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Summary record of the 865th meeting

Topic:
Law of Treaties

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article 52 would be without prejudice to the fate of article 53 (*bis*), paragraph 1.

91. The CHAIRMAN, speaking as a member of the Commission, said that it was on the strength of the Special Rapporteur's assurance with regard to article 53 (*bis*) that several members of the Commission had accepted article 52, to which otherwise there would have been many objections.

92. Mr. TSURUOKA said that paragraph 3 contained a reference to corruption. As the Commission had not yet taken any decision on that matter, he presumed that the vote on article 52 would be without prejudice to whatever position it might take with regard to corruption.

93. Mr. BRIGGS, Chairman of the Drafting Committee, said that the vote on article 52 should be deferred until the Commission had before it the Drafting Committee's text of article 53 (*bis*): they must be examined together.

94. Mr. TUNKIN said he agreed with the Chairman of the Drafting Committee. Article 52 stated a general rule and article 53 (*bis*) would provide particular rules concerning invalidity as a consequence of a conflict with *jus cogens*.

95. The CHAIRMAN suggested that the decision on article 52 be deferred until the Commission had examined article 53 (*bis*).

It was so agreed.[12]

ARTICLE 53 (Consequences of the termination of a treaty) [66][13]

96. The CHAIRMAN invited the Commission to resume consideration of article 53, for which the Drafting Committee had proposed a new title and text reading:

" *Consequences of the termination of a treaty* "

" 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(*a*) releases the parties from any obligation further to perform the treaty;

(*b*) does not affect any rights or obligations of the parties or any legal situation created through the execution of the treaty prior to its termination.

" 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect. "

97. Mr. BRIGGS, Chairman of the Drafting Committee, said that paragraph 2 of the 1963 text was to be transferred to article 53 (*bis*), while paragraph 4 of the 1963 text was now incorporated in article 30 (*bis*) (A/CN.4/L.115), leaving only paragraphs 1 and 3, the substance of which the Drafting Committee had sought to cover in the revised text. The principles it set out had been approved by the Commission at its fifteenth session.

98. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion at the present session had been focussed on paragraph 1 of the 1963 text. The Drafting Committee had tried to devise a formula that would safeguard the legitimate interests of the parties under the treaty, leaving aside the difficult issues raised by the doctrine of vested rights.

99. Mr. BRIGGS said that he had already recorded his objection to the proviso " unless the treaty otherwise provides or the parties otherwise agree ", which was inappropriate from a drafting point of view.

100. Mr. BARTOŠ said he would abstain in the vote on article 53 because it was directly connected with article 29 (*bis*). He was not satisfied with the system provided for in article 29 (*bis*), which was still being considered by the Drafting Committee.

101. The CHAIRMAN put article 53 as revised by the Drafting Committee to the vote.

Article 53 was adopted by 10 votes to none, with 5 abstentions.[14]

102. Mr. PAREDES, explaining his vote, said that his objections applied only to paragraph 1 (*b*). He considered it impossible to maintain, as the Commission did in that provision, that the rights and obligations created while the treaty was in force could subsist, while at the same time affirming in article 52, paragraph 2 (*a*), a sort of right to restitution *in integrum* for those who had suffered from the consequences of the invalidity of a treaty. There was a duality if not an actual opposition, contrary to all legal thinking, between the two points of view: on the one hand full restitution, and on the other hand the thesis that the rights and obligations had been created in a valid manner and produced legal effects.

The meeting rose at 5.45 p.m.

[12] For decision on article 52, and the discussion of article 53 (*bis*), see 865th meeting, paras. 64, 65 and 71-85.

[13] For earlier discussion, see 846th meeting, paras. 59-78, 847th meeting, paras. 2-89, and 848th meeting, paras. 1-18.

[14] The Drafting Committee subsequently made some changes in the French text of article 53, which was therefore put to the vote a second time (see 865th meeting, paras. 66-69). For a further amendment to the text of the article, see 891st meeting, para. 88.

865th MEETING

Wednesday, 8 June 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN
later, Mr. Herbert W. BRIGGS

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107, L.115)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

NEW ARTICLE

ARTICLE 34 (bis) (Corruption of a representative of the State) [47]

1. The CHAIRMAN invited the Commission to consider the text of the Drafting Committee's new article on corruption.

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee had considered the form that the provision concerning the corruption of a representative should take, a question which had been referred back to it by the Commission. In the Drafting Committee's text for article 35 which had been considered at the 862nd and 863rd meetings, the provision had appeared in paragraph 2.[1] After further consideration the Drafting Committee now proposed that the provision be incorporated in a separate article, the wording of which should be modelled on the articles concerning fraud and error. The new text proposed read:

Article 34 (bis)

" *Corruption of a representative of the State* "

" If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another contracting State, the State may invoke such corruption as invalidating its consent to be bound by the treaty. "

3. The Drafting Committee had also considered what bearing article 46 on separability and article 47 dealing with estoppel would have on the new provision and had concluded that those two articles would need to be modified so that the corruption of a representative would have the same legal effect as consent procured by fraud.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had been at pains to express the idea that the corruption must ultimately be imputable to the other contracting State, and the phrase " through the corruption of its representative directly or indirectly by another contracting State " was intended to cover all the possible circumstances in which a State could invoke corruption as a ground of invalidity.

5. Mr. BARTOŠ said he was glad that the Drafting Committee had devoted a separate article to corruption, for he believed that that cause of invalidity of consent should be distinguished from the others.

6. He was also glad to note that the article provided that " the State may invoke such corruption ", which meant that only the State directly concerned was entitled to invoke it as a reason for invalidity and that other States could not invoke it before the international community; indeed, national honour sometimes required that a case of corruption should not be made public.

7. On the other hand, the Commission should be careful to avoid saying that corruption had the same effect as fraud. In his opinion, it would be wrong to assimilate corruption either to coercion or to fraud.

8. Mr. TSURUOKA said the text was a great improvement on the previous proposal: according to the new text, the corruption referred to must have been carried out, directly or indirectly, by another contracting State; the State would only be entitled to invoke it, and the effect it would have on the validity of the treaty was less drastic.

9. He was not convinced, however, of the need to include an article on corruption in the draft. In the first place, there was a difference between fraud and corruption. In the case of fraud, there was an evil intention to impair the understanding of the representative of the other contracting party, whereas corruption depended on some weakness of the representative and did not affect the freedom of expression of the State's consent. In the case of corruption, the result depended on the personality of the representative, who might or might not be able to resist temptation, rather than on the act itself. From the point of view of freedom to express consent, that was a very important difference, so that assimilation of the effects of the two cases was not entirely justified.

10. Secondly, as the article was drafted, it would be sufficient for the other contracting State to say that it had no intention of corrupting, but had merely wished to maintain good relations with the State and its representative by offering him decorations and all kinds of facilities to visit the country, for example. It was so difficult to prove corruption that it was hard to see when the rule could be applied.

11. Mr. AGO said he did not think that cases of consent obtained by corruption were either so rare or so difficult to prove. Indeed, it was easier to corrupt than to apply personal coercion. He would not wish the Commission to leave the case of corruption out of account, but he was quite willing that it should allay anxiety by providing a clear explanation in the commentary to the effect that the article was intended to deal with serious acts of corruption in the true sense of the term.

12. It must be proved that consent had been invalidated, because if it were found that consent would have been given without corruption, there was no case.

13. The French text would probably be clearer if the word " *opérée* " were inserted before the word " *directement* ".

14. Mr. TSURUOKA said it would be very difficult to prove that consent would not have been given without corruption. By definition, all negotiations consisted in obtaining mutual concessions, and a country seldom adhered to its original position. The fact that there had been concessions and retreats from original proposals did not necessarily mean that consent had been invalidated. It was a question of nuances which it was very difficult to decide in practice.

15. Mr. AMADO said he would be sorry to believe that States were so careless of their own interests as to

[1] See 862nd meeting, para. 81.

entrust them to venal individuals liable to be corrupted. In the law of contract, which had come down from the Romans, there was the age-old classification of error, fraud and coercion: why should the Commission add to it?

16. He would vote against the article, because he considered he would not be true to his principles if he voted in favour of it.

17. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was legislating for human beings, who had their failings, and it must try to protect the interests of the community, so although he hoped that the article need never be applied, he considered that its inclusion in the draft was essential.

18. Mr. BRIGGS said that he could not agree with the Chairman. For the persuasive reasons given by Mr. Amado, and for the reasons he himself had given at the 863rd meeting,[2] he would be unable to vote in favour of article 34 (*bis*), which added nothing to the Commission's draft articles and was unnecessary.

19. Mr. de LUNA said that although an ambassador acting as a messenger had some of the characteristics of an angel, he was nevertheless a fallible human being and cases of corruption were by no means purely hypothetical.

20. If it were now accepted that once consent had been invalidated no fiction could revive it, and if it were recognized that fraud and error invalidated consent, why should the same consequence not ensue when consent no longer existed because it had been bought?

21. He had no wish wantonly to impair the security of international relations, but feared that, in the future, corruption would be a much greater danger than coercion. Having condemned coercion, the Commission could not omit to condemn corruption. It must do so in strict and serious terms which would require corruption to be proved; but once it had been proved and the consent of the State did not exist, the Commission must not recognize the monstrous fiction that a consent which had been bought was true consent.

22. Mr. AGO said he did not wish to question the morals of a profession which he regarded with the greatest respect. The reason why he thought that the danger of corruption might increase was that the twentieth century was not like the period of the Treaty of Westphalia, when the number of treaties concluded had been very small. Today, there was a continuous network of treaties and agreements covering the most diverse subjects, and they were not always negotiated by foreign ministers or ambassadors, but by technicians and representatives of government departments. That was why he had drawn attention to the need for safeguards.

23. Sir Humphrey WALDOCK, Special Rapporteur, said he hoped the Commission would not expect him to draft a passage for inclusion in the commentary on article 34 (*bis*) which would reflect moral considerations of that kind. At the fifteenth session some members had even been reluctant to include a separate article concerning fraud.

[2] Paras. 40-43.

24. Mr. CASTRÉN said that the Special Rapporteur's proposal met all the points on which he had expressed concern, so that he was now in a position to vote in favour of the article.

25. Mr. REUTER, referring to Mr. Ago's comment regarding the wording of the French text, suggested that the word "*réalisée*" be inserted before the word "*directement*".

26. Sir Humphrey WALDOCK, Special Rapporteur, said that no corresponding change was needed in the English text.

27. The CHAIRMAN put article 34 (*bis*), with the amendment to the French text, to the vote.

Article 34 (bis) *was adopted by 9 votes to 3, with 2 abstentions.*[3]

ARTICLE 51 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) [62][4]

28. The CHAIRMAN invited the Commission to consider the revised text proposed by the Drafting Committee for article 51, which read:

"1. A party which claims that a treaty is invalid or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the present articles must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

"2. If, after the expiry of a period which shall not be less than three months except in cases of special urgency, no party has raised any objection, the party making the notification may carry out the measure which it has proposed in the manner provided in article 50.

"3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

"4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

"5. Without prejudice to article 47, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation."

29. Mr. BRIGGS, Chairman of the Drafting Committee, said that in the light of the points raised at the previous meeting, the Drafting Committee had examined the relationship between articles 50, 51, 52, 53, 53 (*bis*) and 54. In the case of article 51, it had not re-examined the substance of the article, but only the suggestions made by members. It now proposed, in paragraph 1, the substitution of the words "under the provisions of

[3] For later amendments to the text of article 34 (*bis*), see 887th meeting, para. 77; and 893rd meeting, para. 74 (French text only).

[4] For earlier discussion, see 864th meeting, paras. 1-50.

the present articles " for the words " otherwise than under its provisions "; in paragraph 2 the substitution of the words " in the manner provided in article 50 " for the sentence " In that event, article 50 shall apply " and in paragraph 3 the deletion of the words " of the question " after the word " solution ".

30. Sir Humphrey WALDOCK, Special Rapporteur, said that he ought to explain that it was the clear opinion of the Drafting Committee that the order of articles 50 and 51 should be reversed. He would go so far as to say that the agreement reached on the texts of the articles themselves had been conditional on the Commission's agreeing to that recommendation.

31. Mr. TSURUOKA asked the Chairman of the Drafting Committee to explain the choice of the term " under " used in the English text of paragraph 1, and the term " *sur la base de* " used in the French.

32. Mr. BRIGGS, Chairman of the Drafting Committee, said that, as he understood it, the words " under the provisions of the present articles " meant that a party invoking a ground of invalidity or claiming a right to terminate, withdraw from or suspend a treaty in pursuance of any of the substantive articles in the Commission's draft must notify the other parties of its claim.

33. Mr. JIMÉNEZ de ARÉCHAGA said that he interpreted the phrase as covering every ground of invalidity that a State could invoke under the Commission's draft articles.

34. Sir Humphrey WALDOCK, Special Rapporteur, said that that had been the Drafting Committee's intention.

35. Mr. AGO said he thought that the words " *conformément à l'article 50* " in the French text of paragraph 2 were better placed than the corresponding expression in the English text, " in the manner provided in article 50 ".

36. Sir Humphrey WALDOCK, Special Rapporteur, said that the words " in the manner provided in article 50 " could be transposed to follow the words " the party making the notification may carry out ".

37. Mr. BARTOŠ said he wished to make two technical comments on paragraph 2. First, who was authorized to fix the period of three months ? Was it the party which made the notification ? Also it was rather paradoxical to talk of a period of " not less then three months ", when the legal conception of a period was always something specific. Secondly, who was to decide when a case was " of special urgency " ?

38. Sir Humphrey WALDOCK, Special Rapporteur, answering Mr. Bartoš's first point, said that the Drafting Committee's concern had been to ensure that the time-limit fixed by the State making the notification should not be unreasonable, and in order to escape the kind of objections to which such wording as " within a reasonable time " gave rise, it had decided on the present formula, " a period which shall not be less than three months except in cases of special urgency ".

39. Mr. Bartoš's second point was difficult to answer because there was no compulsory international jurisdiction. There could be cases of special urgency, particularly in situations involving breach, which as Special Rapporteur he had always considered should not be overlooked. The only answer he could give was that all the draft articles had to be interpreted and applied in good faith. At the present stage in the development of international law the Commission could not go further, and problems of the kind that Mr. Bartoš had in mind could only be resolved by reference to an objective criterion of good faith.

40. The CHAIRMAN, speaking as a member of the Commission, said with regard to Mr. Bartoš's first point that the text adopted in 1963[5] clearly showed that it was the State making the notification that fixed the period within which the reply must be made. The Commission did not appear to have changed its views on that point, but paragraph 2 of the new text was less clear because it was too impersonal.

41. Mr. REUTER said that, at the 845th meeting,[6] he had made an objection to article 51, on the ground that the State making the notification would be putting itself in the disagreeable position of plaintiff and that it would be inadvisable from the diplomatic point of view to oblige it to set the time-limit for the reply, since its action would inevitably look like an ultimatum. To that objection it could be replied that, if the rule were stated in a general text, the behaviour of the notifying State would not be interpreted as unfriendly. But he still maintained his objection, because it was clear from the Special Rapporteur's explanations that the new text only appeared to meet that objection and that the Commission had in no way changed its attitude. It would be better if the text were unambiguous on the point.

42. Mr. TSURUOKA said that he understood that, under the terms of article 51, the State to which the notification was addressed could object at any time. Even if the State which had taken the initiative claimed that the matter was urgent, the other State was not obliged to formulate its objection immediately; some time could elapse between the notification and the objection.

43. Moreover, he did not think that, according to the text, every measure taken became lawful automatically at the end of three months; the questions could always be discussed between the contracting parties concerned.

44. Mr. de LUNA said that in specifying a period of not less than three months except in cases of special urgency the Commission had arrived at a text which meant much the same thing as the previous text, but said it far less clearly: it had reverted to the idea of a " reasonable period ". The purpose of choosing a period of three months had been to avoid the vagueness of the idea of a " reasonable period ", but once an exception was made for cases of " special urgency ", the idea of the reasonable period was automatically reintroduced.

Mr. Briggs, First Vice-Chairman, took the Chair.

45. Mr. JIMÉNEZ de ARÉCHAGA said that the change introduced in paragraph 2 by the Drafting Committee was designed to take into account the well-founded comment by Mr. Reuter at the previous meeting.[7] The Drafting Committee's earlier text had

[5] *Yearbook of the International Law Commission, 1963*, vol. II, p. 214.

[6] Para. 25.

[7] Para. 30.

placed the State making the claim in the invidious position of having to fix the time-limit within which the other party or parties had to raise any objection. The new text was to be interpreted as meaning that the State making the claim was not obliged to fix any time-limit, for which provision was already made in the draft articles themselves, but would only have to do so in cases of special urgency, when it could propose a time-limit of less than three months. The text being proposed by the Drafting Committee was certainly an improvement on the 1963 version.

46. The CHAIRMAN,* speaking as a member of the Commission, said that he would like to vote against article 51, which he regarded as quite inadequate for reasons he had already given, particularly at the 845th meeting,[8] but out of respect for the views of other members, he would merely abstain. He regarded many provisions in the draft as going beyond existing law and containing subjective notions which really required more adequate procedures for their determination or settlement than those set forth in article 51.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that as far as the English text was concerned, the phrase " in the manner provided in article 50 " was preferable to some such wording as " in conformity with article 50 ", so as to make it quite clear that the procedure laid down in that article had to be followed.

48. Mr. AGO proposed that, in the French text of paragraph 2, the words " *conformément à l'article 50* " be replaced by the words " *dans les formes prévues à l'article 50* ".

49. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's amendment would be acceptable so far as its concordance with the English text was concerned.

50. Mr. CASTRÉN asked for a separate vote on paragraph 5, which he found unacceptable.

51. The CHAIRMAN put paragraph 5 of the Drafting Committee's text to the vote.

Paragraph 5 was adopted by 12 votes to 1, with 1 abstention.

Article 51 as a whole, as amended, was adopted by 11 votes to none, with 3 abstentions.[9]

52. Mr. REUTER said that he had voted for article 51, subject to the following explanations concerning paragraph 2. First, he understood that paragraph in the sense indicated by Mr. Jiménez de Aréchaga. Secondly, he considered that the word " measure " had been used, for want of a more precise term, to designate the measure by which the State clearly defined its legal position; the rule stated in paragraph 2 did not prevent a State from ceasing to apply the treaty before the expiry of the period fixed, in particular in the case contemplated in article 43, namely, that of supervening impossibility of performance.

53. Mr. BARTOŠ said he had abstained from voting because of the lack of precision in paragraph 2 about the time-limit, to which he had drawn attention during the general discussion.[10]

Mr. Yasseen resumed the Chair.

ARTICLE 50 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) [63][11]

54. Mr. BRIGGS, Chairman of the Drafting Committee, said that, after re-examining articles 51 and 50, the Drafting Committee had decided to propose two changes in paragraph 1 of the text put forward at the previous meeting. The first change was to substitute the words " paragraphs 2 or 3 of article 51 " for the words " the present articles " and the second change was to delete the concluding words, " in accordance with article 29 (*bis*) ". The text now read:

" *Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty* "

" 1. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 51 shall be carried out through an instrument communicated to the other parties.

" 2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. "

55. The act referred to in paragraph 1 was not the notification provided for in article 51, paragraph 1. At the previous meeting[12] he had drawn attention to the fact that, in the substantive articles on invalidity, the word " grounds " had been used and that the word " act " appeared for the first time in article 50. It was intended to designate the action taken by a party under the provisions of the treaty in question or of the procedure laid down in article 51, paragraphs 2 or 3.

56. The Drafting Committee proposed no change in paragraph 2.

57. Mr. TSURUOKA asked whether there was not some conflict between the rule contained in paragraph 2 and the provisions on the conclusion of treaties in section II of the draft, under which the ambassador of one State accredited to another State enjoyed rather wide powers for the conclusion of a treaty between those two States. In the case covered by paragraph 2, it would be surprising if a State receiving an instrument signed by the ambassador accredited to it were to ask him to produce his full powers.

58. The CHAIRMAN, speaking as a member of the Commission, proposed that in the French text the second line of the title be amended to read: " . . . *prononçant le retrait du traité ou en suspendant l'application* " and that the same change be made in paragraph 1.

It was so agreed.

59. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Tsuruoka, said that at an earlier stage

* Mr. Briggs.

[8] Paras. 10-21.

[9] For later amendments to the text of article 51, see 893rd meeting, para. 105; also paras. 97 and 106 (French text only).

[10] Para. 37.

[11] For earlier discussion, see 864th meeting, paras. 51-73.

[12] Para. 60.

he had favoured a closer parallel between the provision concerning full powers in the present context and the provisions of article 4 on the conclusion of treaties, but the Commission had rejected that view. But despite the apparent discrepancy between the two articles, the consequences as far as diplomatic practice was concerned would not be grave. The presumption in article 50 was that full powers would not be required. For the conclusion of a treaty they must be produced, or at least evidence of intention to dispense with them, unless the person concerned was a head of State, head of government, or minister for foreign affairs. The Drafting Committee's new text was better adapted to instruments concerning termination or invalidity than his own original proposals.

60. Mr. ROSENNE said that, if article 50 were adopted in the form proposed by the Drafting Committee, the definition of full powers in article 1 (A/CN.4/L.115) might have to be reconsidered.

61. Mr. TSURUOKA thanked the Special Rapporteur for having clarified the meaning of the article by tracing the stages of its drafting. He agreed that the text would not create any serious obstacles in international practice.

62. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Rosenne that the definition of full powers might require a slight adjustment.

63. The CHAIRMAN put to the vote article 50 in the new text proposed by the Drafting Committee.

Article 50 was adopted by 14 votes to none.

ARTICLE 52 (Consequences of the invalidity of a treaty) [65][13]

64. Mr. BRIGGS, Chairman of the Drafting Committee, reminded the Commission that the vote on article 52 had been deferred at the previous meeting so as to give the Drafting Committee time to correlate that article with articles 53 (*bis*) and others. No changes to the text of article 52 were proposed by the Drafting Committee.

65. Sir Humphrey WALDOCK, Special Rapporteur, said that as article 34 (*bis*) had now been approved, a reference to it would have to be inserted among the articles listed in paragraph 3 of article 52.

Article 52, as amended, was adopted by 14 votes to none.[14]

ARTICLE 53 (Consequences of the termination of a treaty) [66]

66. Mr. BRIGGS, Chairman of the Drafting Committee, recalled that, at its previous meeting, the Commission had adopted for article 53 a text which read:

" 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(*a*) releases the parties from any obligation further to perform the treaty:

(*b*) does not affect any rights or obligations of the parties or any legal situation created through the execution of the treaty prior to its termination.

" 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect. "

67. The Drafting Committee had subsequently examined the article in the light of other articles adopted by the Commission and had made three minor drafting changes, which applied only to the French text. First, in the opening sentence of paragraph 1, the word " *autrement* " had been deleted after the word " *dispose* ". Secondly, in the same sentence, the words " *en vertu de* " before the words " *ces dispositions* " had been replaced by the words " *sur la base de* ". Thirdly, in paragraph 1 (*a*) the words " *toute obligation* " had been replaced by " *l'obligation* ".

68. At the previous meeting, he had abstained from voting on article 53, and would abstain once more because, for purely drafting reasons, he objected to the opening proviso " Unless the treaty otherwise provides ", as he had done when the Commission was discussing article 56.[15] While he agreed with the substance, he preferred the formula " Unless otherwise agreed ".

69. The CHAIRMAN put article 53, with the French text thus amended, to the vote.

Article 53 was adopted by 13 votes to none, with 1 abstention.[16]

70. Mr. ROSENNE said that he had voted for article 53 but that, as far as the drafting was concerned, his views were similar to those of Mr. Briggs.

NEW ARTICLE

ARTICLE 53 (*bis*) (Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law) [67]

71. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new article 53 (*bis*) which read:

" *Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law* "

" 1. In the case of a treaty void under article 37, the parties shall:

(*a*) eliminate as far as possible the consequences of any act done in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) establish their mutual relations on a basis which is in conformity with the peremptory norm of general international law.

" 2. In the case of a treaty which becomes void and terminates under article 45, the termination of the treaty:

[13] For the text of article 52 and earlier discussion, see 864th meeting, paras. 83-95.

[14] For a later amendment to the text of article 52, see 893rd meeting, para. 111.

[15] See 850th meeting, paras. 20-22.

[16] For a later amendment to the text of article 53, see 891st meeting, para. 88.

(*a*) releases the parties from any obligation further to perform the treaty;

(*b*) does not affect any rights or obligations of the parties or any legal situation created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law. "

72. The purpose of the new article was to include in a single article certain provisions which had previously been placed elsewhere in the draft. It now incorporated certain provisions formerly in article 53, paragraph 2, which had misled a number of governments with regard to the consequences of a *jus cogens* rule under article 37, as distinct from the consequences of the emergence of a new *jus cogens* rule under article 45. The Drafting Committee had decided that the draft would gain in clarity if the consequences of rules of *jus cogens* under both articles 37 and 45 were juxtaposed in a single article.

73. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 1 of the new article contained certain provisions that had not appeared in the 1963 draft articles; those provisions dealt with cases where both parties in concluding the treaty had transgressed a peremptory rule of international law, which was the situation envisaged in article 37. As he had said in paragraph 4 of his observations on article 52 in his sixth report (A/CN.4/186), in cases of that kind it would not be open to any party to speak of " acts performed in good faith in reliance on the void instrument ", so that those cases would automatically be excluded from the benefit of the relieving provisions contained in the former paragraph 1 (*a*), now paragraph 2 (*b*), of article 52.

74. However, in its formulation of article 53 (*bis*), the Drafting Committee had considered that it was not sufficient to make express provision for that exclusion: for a proper formulation of the rule in the matter, it was necessary to state in a more positive manner the consequences of invalidity under article 37. The Drafting Committee had accordingly included in the new article 53 (*bis*) a paragraph 1 (*b*) requiring the parties to establish their mutual relations on a basis which was in conformity with the rule of *jus cogens* in question.

75. Mr. TSURUOKA said he had some doubts about paragraph 1 (*b*). Since the whole draft related to the law of treaties, it appeared to mean that States were required to enter into treaty relations in conformity with the peremptory norm of general international law. But all that States were required to do was to conform with the norm unless, of course, the norm also ordered them to enter into treaty relations. The paragraph was open to an interpretation which was not in accordance with the Commission's intentions.

76. Mr. BARTOŠ said that the authors of paragraph 1 (*b*) had gone too far; they seemed to have assumed that the existence of the peremptory norm of general international law required the establishment of certain relations in conformity with the norm. But States were required to bring existing relations into conformity with the norm, not to establish new relations. Was it perhaps the intention of the authors that after relations not in conformity with the peremptory norm had been terminated, their existing relations should be made to conform with it? In his view, the provision needed further redrafting.

77. Mr. ROSENNE said that the misunderstanding could perhaps be dispelled by introducing the word " legal " before " relations " in paragraph 1 (*b*). It had clearly not been the intention of the Drafting Committee to refer to relations in fact or to diplomatic relations.

78. Sir Humphrey WALDOCK said that the hypothesis envisaged in paragraph 1 was that the parties had established their relations on a basis that was not in conformity with the rules of *jus cogens*. Consequently, sub-paragraph (*a*) called on the parties to eliminate as far as possible the consequences of any act done in reliance on treaty provisions which conflicted with the rules of *jus cogens*, while sub-paragraph (*b*) called on them to place their relations on a plane of full conformity with international law; it did not of course call on the parties to create any new treaty relations. In fact the provisions of paragraph 1 (*b*) were perhaps self-evident; They had been included *ex abundanti cautela*.

79. The CHAIRMAN, speaking as a member of the Commission, said he also thought that paragraph 1(*b*) raised a problem. The parties must not only eliminate the consequences of their act in accordance with paragraph 1 (*a*), but must also establish certain mutual relations in accordance with paragraph 1 (*b*). Under the proposed wording the latter operation seemed to comprise two stages: first, the establishment of relations on a certain basis, and then steps to ensure that that basis was in conformity with the peremptory norm. But States might not wish to seek such a basis, and might prefer to make their relations directly subject to the norm.

80. Mr. REUTER said that paragraph 1 (*a*) dealt with the immediate consequences of the nullity of a treaty under article 37, whereas paragraph 1(*b*) raised the problem of relations between the parties. The Chairman had just suggested that another possible solution would be to do nothing with regard to those relations. The Commission could state in paragraph 1 (*b*) that the parties were required to " define " their mutual relations in conformity with the peremptory norm.

81. Mr. AMADO suggested that the word " establish " be replaced by the word " adapt ".

82. Mr. TSURUOKA said he agreed that it was probably the word " establish " that created the difficulty. Perhaps paragraph 1 (*b*) was not really necessary. If the Commission wished to retain it, however, it could be amended to read: " bring their mutual relations into conformity with the peremptory norm of general international law ".

83. Sir Humphrey WALDOCK, Special Rapporteur, said that objection had in fact been made both to the term " established " and to the expression " on a basis ". Those objections would be met by rewording paragraph 1 (*b*) to read as suggested by Mr. Tsuruoka: " (*b*) bring their mutual relations into conformity with the peremptory norm of general international law ".

84. The CHAIRMAN, speaking as a member of the Commission, said that he found that new wording very satisfactory.

85. Speaking as Chairman, he put article 53 (*bis*) to the vote, with paragraph 1 (*b*) amended as proposed by the Special Rapporteur.

Article 53 (bis), as thus amended, was adopted by 16 votes to none.[17]

86. Mr. ROSENNE said it was with some concern that he noted that the Commission had now adopted three separate articles on the problem of *jus cogens:* articles 37, 45 and 53 (*bis*). He suggested that the Special Rapporteur and the Drafting Committee, when reconsidering the organization and the order of the draft articles as a whole, should examine the possibility of placing those articles in a separate section of their own.

ARTICLE 54 (Consequences of the suspension of the operation of a treaty) [68][18]

87. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a revised title and text for article 54 which read:

" *Consequences of the suspension of the operation of a treaty* "

" 1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or under the present articles:

(*a*) relieves the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(*b*) does not otherwise affect the legal relations established by the treaty.

" 2. During the period of the suspension the parties shall refrain from acts calculated to render the resumption of the operation of the treaty impossible. "

88. The text differed from the one adopted by the Commission in 1963 (A/CN.4/L.107) only in minor points of drafting. Paragraph 1 (*c*) had, however, been dropped because its contents seemed to be already covered by paragraph 1 (*b*).

89. Mr. BARTOŠ said he doubted whether paragraph 2 was sufficient. It might also be necessary to specify that the parties which had suspended the application of a treaty must equally abstain from any acts calculated to render impossible its performance by the parties which continued to apply it.

90. Mr. ROSENNE said that he had a general difficulty with regard to the whole question of suspension as it emerged from the draft articles adopted by the Commission. Some of those articles stressed the inherently temporary character of suspension, but in article 42, which dealt with breach, the temporary character of suspension did not appear at all.

91. In the Drafting Committee, he had suggested that the temporary character of suspension should be emphasized in article 54 by amending paragraph 2 to read:

" During the period of the suspension the parties shall refrain from acts calculated to render impossible the resumption of the operation of the treaty as soon as the ground [or cause] of suspension has ceased to exist. "

92. Since the Drafting Committee had not accepted that suggestion, he now raised the point in order to have his views in the matter placed on record.

93. Mr. TUNKIN said that the Drafting Committee had rejected Mr. Rosenne's suggestion because the temporary element was already stressed in paragraph 2, both by the opening words " During the period " and by the implications of the term " suspension " itself. Moreover, the additional words suggested by Mr. Rosenne would have introduced into article 54 a totally extraneous element, relating to the grounds of suspension, a matter which was dealt with in other articles in the draft.

94. Mr. JIMÉNEZ de ARÉCHAGA said that there was no need to stress the temporary character of suspension in those articles which made provision for the suspension of the operation of a treaty as a measure which could be taken in cases where termination was also permitted. Clearly, if it was possible to terminate the treaty, it was also possible to suspend its operation, since termination was the stronger of the two measures.

95. His own view was that it was in article 40, not in article 54, that provision should be made for some guarantee that suspension would not become a disguised form of termination.

96. It was quite common to include in multilateral treaties safeguards emphasizing the temporary character of the suspension of certain treaty provisions. An example was the provisions of article 16, on the suspension of the right of innocent passage, in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.[19]

97. Mr. ROSENNE said that he would welcome the inclusion in article 40 of the safeguard mentioned by Mr. Jiménez de Aréchaga. However, a change in article 40 would still leave unsolved the question of what Lord McNair called " retaliatory suspension " in cases of breach, and he would therefore abstain.

98. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Rosenne, said that if the Commission wished to tighten the provisions on suspension, it must do so elsewhere and not inject into article 54 a point of substance which was outside the scope of the consequences of suspension.

99. The CHAIRMAN put article 54 to the vote.

Article 54 was adopted by 15 votes to none, with 1 abstention.[20]

100. The CHAIRMAN invited the Commission to resume consideration of the draft articles on second reading.

[17] For a later amendment to the text of article 53 (*bis*), see 893rd meeting, para. 113.

[18] For earlier discussion, see 848th meeting, paras. 19-80.

[19] United Nations Conference on the Law of the Sea, *Official Records*, vol. II, p. 134.

[20] For later amendments to the text of article 54, see 891st meeting, para. 101, and 893rd meeting, para. 117.

ARTICLE 68 (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law) [38]

Article 68 [38]

Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law

The operation of a treaty may also be modified:

(*a*) By a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible;

(*b*) By subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions; or

(*c*) By the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.

101. The CHAIRMAN invited the Commission to consider article 68, for which the Special Rapporteur had proposed a new title and text reading:

" *Modification of a treaty by subsequent practice*

" The operation of a treaty may be modified by subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions. In the case of a multilateral treaty, the rules set out in article 67, paragraph 1, apply to an alteration or extension of its provisions as between certain of the parties alone. "

102. Sir Humphrey WALDOCK, Special Rapporteur, said that, in the light of the discussions both in the Commission and in the Drafting Committee, it was very likely that articles 69 to 71 on interpretation would be moved up to an earlier position in the draft, so as to be placed closer to the article on *pacta sunt servanda*. As a result, article 68 would in all probability ultimately be placed after the articles on interpretation, a fact which should be borne in mind when discussing its provisions.

103. Government comments on the 1964 text of article 68 had not been very numerous but those which had been made, and his own reflections, had led him to propose considerable changes in the wording of the article. In the first place, as explained in paragraph 4 of his own observations (A/CN.4/186/Add.5), he had dropped the word " also " from the opening phrase, in response to a valid point raised by the Government of Israel. As indicated in paragraph 6 of his observations, following another comment by the Government of Israel, he had also dropped sub-paragraph (*a*), the provisions of which were not as complete as those of article 63, which contained an adequate formulation of the rules regarding the effect of a subsequent treaty.

104. He had, however, been unable to accept the suggestion by the Government of Israel that sub-paragraph (*b*) should also be dropped on the ground that it was indistinguishable in its practical effects from the provisions of article 69 on the interpretation of a treaty in the light of subsequent practice in its application; he had explained his reasons at length in his fifth report (A/CN.4/186/Add.5 paras. 8, 9 and 10). In bilateral treaties, the dividing line between interpretation and modification was somewhat blurred and the distinction was not very important in practice, but the position was quite different in the case of multilateral treaties. In the case of multilateral treaties which operated bilaterally, it was possible for a number of States to apply the treaty in a certain way in the relations between themselves, but other States which did not carry out the same practice were not bound by that *inter se* interpretation. It was therefore essential to give separate treatment to the two different problems of modification and interpretation.

105. Three governments, including that of the United Kingdom, had proposed the deletion of sub-paragraph (*c*). The first reason given by the United Kingdom Government was the difficulty of determining the exact point of time at which a new rule of customary law could be said to have emerged; but customary law could not be ignored, whatever the difficulties of establishing the exact situation in a particular case.

106. As explained in his own comments, he had been impressed by the United Kingdom Government's second objection, which was based on the need to take into account the will of the parties, and by the Israel Government's comment regarding the connexion between sub-paragraph (*c*) and the provisions of article 69 on interpretation. He therefore proposed that sub-paragraph (*c*) be dropped, on the understanding that the Commission would consider the question of covering its contents in article 69.

107. In the light of those considerations, he had prepared a new draft of article 68 which consisted of the opening phrase and the contents of sub-paragraph (*b*) of the 1963 text, and a new second sentence to take into account the problem of *inter se* modification of multilateral treaties.

The meeting rose at 1 p.m.

866th MEETING

Thursday, 9 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Also present: Mr. Golsong, Observer for the European Committee on Legal Co-operation.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107, L.115)

(continued)

[Item 1 of the agenda]

ARTICLE 68 (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law) *(continued)*[1]

[1] See 865th meeting, para. 100.