supported the Drafting Committee's text, subject to the replacement of the words " the present articles " by the words " articles 58 to 61 ".

111. Mr. REUTER suggested that the words " upon a third State " be replaced by the words " upon a State not a party ", an expression which would be more precise and would eliminate any doubt as to whether the reference was to third States in relation to the treaty or to third States in relation to custom.

112. Sir Humphrey WALDOCK, Special Rapporteur, said that, according to the definition of a third State which was to be inserted in article 1, that expression meant, precisely, a State not a party to the treaty.

113. The CHAIRMAN, speaking as a member of the Commission, said that he certainly understood the third State referred to in article 62 to be a third State in relation to the treaty.

114. As Chairman, he put to the vote the article 62 submitted by the Drafting Committee, as amended by the replacement of the words " the present articles " by the words " articles 58 to 61 ".

Article 62, as thus amended, was adopted by 13 votes to none, with 3 abstentions.

115. Mr. BARTOŠ said that, although he approved of the idea expressed in the article, he had abstained from voting because, in his opinion, in the case in question, a treaty rule which had become a customary rule also had effects for States parties to the treaty as a customary rule, and they had thus become doubly bound—by treaty and by custom.

The meeting rose at 6.5 p.m.

869th MEETING

Tuesday, 14 June 1966, at 11 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. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, 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: Case of an aggressor State [70][1]

1. The CHAIRMAN invited the Commission to consider the text of a new article proposed by the Drafting Committee on the case of an aggressor State.

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that as he was not in favour of the inclusion of such a provision in the draft articles, he would prefer that the Special Rapporteur should introduce the text.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee wished to put forward for discussion a draft article to cover in a general way the case of an aggressor State. It read:

> " Nothing in the present articles may be invoked by an aggressor State as precluding it from being bound by a treaty or any provision in a treaty which in conformity with the Charter of the United Nations it has been required to accept in consequence of its aggression. "

4. The Governments of the Soviet Union, the United States and others had indicated in their observations on article 59 that the reservation in paragraph (3) of the 1964 commentary regarding the imposition of an obligation upon an aggressor State[2] was not enough. They considered that the matter should be covered in the text of the draft articles.

5. During the discussion of the problem at the present session, there had been a division of opinion. Some members had considered that the reference in article 36, on coercion of a State by the threat or use of force, to the principles of the United Nations Charter excluded by implication the case of an obligation imposed on an aggressor State. Others had considered that the matter should be dealt with explicitly in article 36 or in article 59, while yet others had been in favour of a separate article.

6. After some discussion, the Drafting Committee had finally decided to put forward a text in the form of a separate article which, if accepted, would need to be placed towards the end of the draft articles as a general exception to the provisions of articles 36, 59 and other articles such as article 44, on fundamental change of circumstances, dealing with the grounds most commonly invoked by an aggressor State for releasing itself from an obligation. The whole question raised problems of principle which the Drafting Committee had only begun to discuss and its members had reserved their position pending the general debate in the Commission itself.

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

7. Mr. VERDROSS said that he approved the article in principle, but since it referred to the United Nations Charter, it should be made clear that, under Article 39 of the Charter, the Security Council alone was competent to determine the existence of an act of aggression and that its determination was binding on all Members under Article 25 of the Charter.

8. The situation was therefore a special one, since the organ empowered to determine whether or not an act of aggression existed had already been decided. Consequently, instead of saying merely " by an aggressor

[1] For earlier discussion, see 853rd meeting, paras. 3-88, 854th meeting, paras. 1-23 and 867th meeting, paras. 26-27.

[2] *Yearbook of the International Law Commission 1964*, vol. II, p. 181.

State ", the article might read " by a State declared to be an aggressor in accordance with Article 39 of the United Nations Charter "; without that addition, the opening passage of the article was inconsistent with the remainder.

9. He wondered what was intended by the word " any " in the phrase " any provision in a treaty ". Surely it would be enough to speak of " a provision in a treaty ".

10. Mr. CASTRÉN said he was still of the opinion that the question had not yet been studied with sufficient thoroughness. It seemed to him that the Drafting Committee's text went too far when it stated that an aggressor State was bound, apparently for an indefinite period of time, by a treaty or any provision whatever in a treaty; it would thus be bound even where the treaty was impossible to apply or where it had been substantially violated by the other contracting party, and so on.

11. Instead of just a mention of one article—article 59—in the commentary, it was now proposed that there should be a general reservation which was excessive and unreasonable, even where an aggressor State was concerned. The new article provided specifically that nothing in the draft articles could be invoked by such a State. Several members who had taken part in the discussion before the article had been sent to the Drafting Committee had wanted the Commission to confine itself to dealing with the problem in connexion with article 36 or articles 59 to 61. In any case, the question of aggression was not, strictly speaking, a matter for the law of treaties.

12. For those reasons, he would be unable to vote for the proposed article as it was now worded.

13. Mr. JIMÉNEZ de ARÉCHAGA said that, in criticizing the Drafting Committee's text, he did not wish to be accused of defending aggression or obsolete rules of international law on the subject. He was in favour of any stringent measures that might be taken against aggressor States in conformity with existing international law. His primary concern was that the Commission's draft articles on the law of treaties should form a consistent and coherent whole.

14. A broad exception of the kind now being proposed seemed neither reasonable nor requisite for contemporary needs. There was no necessity to incorporate in a separate article the substance of paragraph (3) of the commentary on the 1964 text of article 59[3] merely because of the existence of new rules of international law, particularly the United Nations Charter. Nothing in the Commission's draft articles could add to or detract from the force of the Charter. It would suffice to explain in the commentary why a separate article on the subject should not be included.

15. The Drafting Committee's text was even less acceptable to those members who had been against the inclusion of a provision on the point in article 59. It was far too sweeping and would mean that States, including those former enemy States which were parties to the Second World War peace treaties, would be unable to invoke any of the provisions of the Commission's draft with respect to provisions of those treaties. Thus, such a State would be unable to avail itself of the rights laid down in article 40 if a provision of one of the peace treaties were abrogated by a subsequent agreement of all the parties. It would also be prevented from invoking the provisions of article 41, and, worse still, the provisions of article 42, which, in cases of breach, would result in inequality if the other party to the treaty in question had violated its terms. The same would be true of article 43. It was altogether too harsh to outlaw those States permanently and to deny them any of the protection that had always been applied under customary law in respect of peace treaties.

16. The only specific exception that perhaps need be taken into account was in regard to treaties secured by the coercion of a State. Some exception might also be admissible in regard to entry into force and ratification, but such matters were usually covered in the provisions of the treaty itself and those provisions must take precedence according to the way in which the Commission had framed residual rules in its draft.

Mr. Yasseen resumed the Chair

17. Mr. de LUNA said that he supported the principle laid down in the article, which was not a novel one in contemporary international law, since there was a similar provision in Article 107 of the Charter.

18. He thought, however, that the article in its present form was rather too sweeping. The Commission had been led to discuss the problem in connexion with the effects of treaties on third States; in examining the extent to which obligations could be imposed on third States, it had considered the possibility, in the context of article 59, of making an exception to the conditions it had laid down in the case of an aggressor State. He would therefore be in favour of starting the article, not with a very general expression such as " Nothing in the present articles " but with the words " Nothing in articles 58, 59, 60 and 61 . . . ". He was aware that the *rebus sic stantibus* clause could not operate in the case of an aggressor State at a given point of time, but international practice showed that rules of treaty law intended to be permanent sooner or later ceased to be so.

19. Mr. ROSENNE said that the Commission had first to decide whether an article on the case of an aggressor State was to be inserted at all and, if so, what should be its scope. The text suggested by the Drafting Committee might be inadequate, because it dealt only with the problem of an aggressor State being bound by a treaty or by a provision in a treaty. No light was shed on the meaning of the words " being bound " or on the duration of the obligation. The question arose whether an aggressor State could invoke the various grounds for invalidation or termination other than that specified in article 36 and, if so, at what point in time. During the period between the First and Second World Wars, there had been instances of abuse of the law of treaties in order to escape from the provisions of the Treaty of Versailles and other peace treaties. In an effort to prevent such abuses in the future, the Commission had sought to fill some of the gaps in the law of treaties, particularly by means of its article on fundamental

[3] *Yearbook of the International Law Commission, 1964*, vol. II, p. 181.

change of circumstances. But contemporary international law within the framework of the Charter perhaps called for an examination of the bearing on the law of treaties of a properly established finding of the existence of an act of aggression, and of the effect of such a finding on the treaty relations of an aggressor State. Quite apart from any questions of *jus cogens*, the problem had arisen in practice of an aggressor being obliged to terminate or withdraw from certain treaties. The Drafting Committee's text did not cover that point. The whole matter was exceedingly complex and needed much more thorough examination than the Commission had been able to give it.

20. Mr. TSURUOKA said he had already made it quite clear that he could not agree to the incorporation in the draft articles of an article of the type proposed. He did not intend to recapitulate the reasons which had led him to take that negative attitude, but, after reading the Drafting Committee's text, he still had the impression that the provision might lend countenance to the idea that, in the modern world, victorious States could impose their will on defeated or weak States. That was perhaps a psychological point which had nothing to do with the law, but it was not without importance.

21. He could endorse all the arguments put forward by previous speakers against the article. In addition, since the articles of the draft would not have retroactive effect, they would apply only to situations arising after the entry into force of a treaty of the kind considered. So before such an article could be included, it would be necessary to study a wider range of possible situations, to consider every eventuality, and to decide what rule would be appropriate and what its consequences would be in the world of the future. That would be an arduous task, and would take more time than the Commission could spare.

22. Indeed, the idea was not directly relevant to the law of treaties. It might perhaps be indirectly connected with the work of international organizations, particularly the United Nations, the primary purpose of which was to prevent aggression, but the Commission was merely studying questions relating to the law of treaties. The Commission had not made a study of United Nations practice and did not know what the future fate would be of the articles of the Charter dealing with the maintenance of peace and the sanctions imposed on an aggressor. In his view, the least that could be said was that to adopt such an article would be premature.

23. Mr. TUNKIN said that the observations of the previous speaker were reminiscent of certain discussions on the definition of aggression that had taken place in the Disarmament Conference in 1932 and 1933. There was, however, no need to go into the stand taken at that time by certain States, the reasons for which were well known.

24. Most members of the Commission believed it was necessary to include some safeguard in the draft, particularly in respect of articles 59 and 62. The Drafting Committee's text was perhaps a little too broad in scope, but Mr. de Luna's suggestion offered a starting point for the formulation of a new text that would confine the application of the article to specific provisions in a treaty. The task of devising an acceptable text would again have to be entrusted to the Drafting Committee.

25. With regard to the argument that the case of an aggressor State did not fall within the law of treaties he wished to point out that the Drafting Committee's text did not attempt to deal with the substantive issue. The problem as a whole would need to be dealt with in a code of the rules of State responsibility, but there was no blinking the fact that a safeguard had to be inserted in the Commission's draft to prevent an aggressor State from claiming that it was not bound by certain international agreements. The obligations must be binding on an aggressor State, even in cases where the treaty had been concluded without its participation. That was all that needed to be said in order to fill the gap in treaty law.

26. Mr. BRIGGS said that the problem of the aggressor State had arisen at the sixteenth session during the discussion of the Special Rapporteur's article 62, on treaties providing for obligations or rights of third States, and some members had questioned the need for the express consent of an aggressor State to an obligation arising out of a treaty; some indeed had thought that the problem did not belong to the law of treaties at all.[4] Paragraph (3) of the 1964 commentary on article 59 indicated what the trend of the discussion had been and the last sentence in that paragraph set out the Commission's conclusion that a treaty provision imposed upon an aggressor State not a party to the treaty would not infringe article 36.

27. The matter was now being treated in an entirely different context and the Drafting Committee's text had been put forward in the form of an additional article for possible insertion at the end of the draft. He would draw particular attention to the use of the word " accept " in the new text. According to article 12, paragraph 2 (A/CN.4/L.115), the consent of a State to be bound by a treaty was expressed by acceptance or approval under conditions similar to those applicable to ratification, and in article 1(*f*) (*bis*) a party was defined as a State which had consented to be bound. It was not clear to him whether the Drafting Committee's new text was intended to refer to treaties to which an aggressor State was regarded as being a party by reason of its acceptance of the treaty, or whether the text was intended to cover the situation in which an aggressor was not a party but a third State, whose failure to express consent could not in itself be invoked as a ground for non-compliance with the obligations of the treaty. He shared the doubts expressed by other members about the need for such an article, even if its application were confined to obligations arising out of a treaty for third States. The whole matter seemed to have no relevance to draft articles on the law of treaties.

28. Mr. BARTOŠ said he would vote for the article now that the text had been amended to include the words " in conformity with the Charter of the United Nations ". If an obligation was in conformity with the Charter, it was one with which all States were bound to comply; since an aggressor State had to respect such

[4] *Yearbook of the International Law Commission, 1964*, vol. I, 734th and 735th meetings.

an obligation, there could be no objection to a treaty being binding on that State also.

29. From the theoretical point of view, however, he was still not sure whether it was a question of a treaty concluded with the aggressor State, or of an obligation imposed upon it by a treaty concluded between third States. However that might be, the article was, in his opinion, necessary as a derogation from the rule laid down by the Commission that treaties were not binding on third States. In the proposed new article, the Commission was making an exception; the aggressor State was required to accept, not the treaty as such, but the obligation arising out of it, because it was a measure taken by virtue of and in conformity with the Charter.

30. The new draft seemed to him to be an improvement on the old; he could accept it as a compromise, although he still had doubts regarding the theoretical aspect of the matter.

31. Mr. REUTER said he agreed that the article should refer not to the draft articles as a whole but to certain specific articles. All he wished to add to what had already been said was that the wording proposed by the Drafting Committee contradicted the provisions of the draft articles dealing with the emergence of new rules of *jus cogens;* it would raise a difficulty which could not be solved without recourse to the idea of a higher order of *jus cogens*, which would be absurd.

32. Like Mr. Bartoš, he was not sure that the expression " it has been required to accept " was sufficient; it might perhaps be better to add the words " or to comply with, " for some treaties had been imposed on aggressor States without their having even been asked to accept them.

33. A further more delicate question arose out of the article: was it sufficient to refer to the United Nations Charter? In the past, at all events, it seemed clear that certain measures had been taken which had gone beyond the Charter. So far as the future was concerned, it was no doubt difficult to refer to anything other than the Charter, since the Commission had rejected all ideas, such as the theory of a *de facto* international government, which would justify derogations from articles 59 to 62 in the case of aggressor States. He would accept the reference to the Charter, although he had some doubt whether it would be effective.

34. Mr. AGO said that, although the text submitted by the Drafting Committee did not fill him with enthusiasm, it seemed to him to be acceptable. On the other hand, he could not accept the suggestion that the article should contain a specific reference to article 59. Peace treaties imposed on an aggressor State had in most cases been signed and ratified by that State, which had thus become a party to them. The mere suggestion that such a State might remain a third State would run counter to the Commission's purpose. The aggressor State had become a party to the treaty even if it had not participated in drawing it up; in the wholly exceptional cases in which a treaty provided for obligations on an aggressor State which had not accepted it, the obligation for the aggressor State would not arise as the effect of a treaty on a third State but, in reality, from a source other than the treaty.

35. If the Commission decided to revert to a formulation incorporating a reference to article 59, he would be unable to accept the article.

36. Mr. EL-ERIAN said that his views on the issue were known. He shared the doubts of other members about framing the provision in general terms. The Drafting Committee should be asked to narrow the scope of the provision by inserting specific references to the articles to which it related. In the interests of precision, the reference to the United Nations Charter must be retained, as had been done in article 36.

37. The CHAIRMAN, speaking as a member of the Commission, said that he was in favour of including such a provision in the draft, but as a proviso, not as an exception. The article did not state an exception to the principle governing the question of the applicability of treaties to persons; it expressed a proviso, the purpose of which was to emphasize that that principle did not preclude the imposition of certain obligations on an aggressor State.

38. There was no doubt about the source of the obligation: it was to be found, not in the treaty but in a rule of international law, perhaps in a decision taken by an organ of the international community under that organ's rules.

39. Taken in that sense, the inclusion of such a proviso in the draft might further strengthen the measures taken against aggressor States.

40. Sir Humphrey WALDOCK, Special Rapporteur, said that his own position was very similar to that of Mr. Ago; the choice for him lay between the inclusion of a fairly general reservation and the omission of the subject from the draft articles altogether. He would be strongly opposed to reverting to a provision the application of which would be limited to article 59, or to articles 59 and 61. In the past, a defeated aggressor State wishing to evade its obligations under a peace treaty had usually alleged that the treaty had been imposed upon it. Many other pretexts could, however, be invoked. The allegation had not infrequently been made, for example, that the persons who had signed the treaty had not had the necessary authority to represent the people or the State.

41. If the article on the aggressor State were drafted in such a way as to confine the reservation to particular draft articles, it would encourage a search for other methods of evasion. For example, if an aggressor State in due course became a Member of the United Nations, it might try to invoke that development as a fundamental change of circumstances justifying the termination of the treaty under article 44. Another problem was presented by the fact that article 36 did not make a specific exception in the case of a treaty imposed upon an aggressor State. In that article, the Commission had been content to refer to the use of force " in violation of the principles of the Charter of the United Nations ", leaving it to be implied from those words that the article did not cover the case of an aggressor State. That implication would suffice if the special article on an aggressor State embodied a safeguard in purely general terms; if, however, reference was made to specific articles, it would be essential to mention at least article 36, in addition to articles 59 and 61.

42. He had noted Mr. Rosenne's remarks with interest but believed that his suggestion went too far and raised questions outside the scope of the law of treaties, such as the possibility of an aggressor State being called upon to terminate a treaty as part of the sanctions against aggression.

43. Finally, it was essential that the Drafting Committee should be given some guidance if the article was to be referred back to it.

44. Mr. TUNKIN said that, in supporting Mr. de Luna's suggestion, it had not been his intention to oppose the Drafting Committee's text, which he was quite prepared to accept; he had merely been trying to explore the possibility of meeting some of the points raised by other members. After listening to the Special Rapporteur, he was inclined to favour a provision couched in general terms.

45. Mr. de LUNA said he had made his suggestion in order to help to meet the objections raised by other members. He nevertheless believed it was necessary to indicate the articles to which the reservation applied.

46. Mr. AGO said that he could agree to the article being referred back to the Drafting Committee so that it could try to find a text which aroused fewer misgivings. But for the reasons which the Special Rapporteur had just given, he was altogether opposed to the article taking the form of a reservation to certain specific articles.

47. Mr. EL-ERIAN suggested that the Drafting Committee be instructed to make the formulation of the article more precise. The possibility of making specific reference to a number of articles should not, however, be ruled out if the Committee concluded that such reference could be made without danger.

48. Mr. TSURUOKA said that, while he was quite willing that the article should be reconsidered by the Drafting Committee, he was still opposed to its inclusion in the draft. If the Commission wished to formulate a provision concerning the case of an aggressor State, it would have to make sure, in order to exclude the possibility of abuse, that the designation of aggressor was applied in accordance with the Charter and the procedure of the United Nations. A mere reference to the principles of the United Nations was too vague; those principles were numerous and had no established order of precedence, so that varying interpretations were possible. It would therefore be necessary to specify what organ was competent to declare a State an aggressor in accordance with current United Nations practice. Otherwise an article of the kind contemplated would be a source of difficulty in treaty relations between States, instead of a contribution to their stability and progress.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had mentioned the Charter of the United Nations deliberately, instead of the principles of the Charter, as in article 36, in order to indicate that the reference was to the Charter in its entirety and not to its underlying principles.

50. Mr. TSURUOKA, after thanking the Special Rapporteur for his explanation, said he still thought that the Charter itself was interpreted in different ways. It would be necessary to be sure that one organ only was competent to determine the existence of an act of aggression and to impose sanctions in accordance with the established procedure. He greatly doubted whether those points were fully conveyed by the words " in conformity with the Charter ".

51. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer the new article back to the Drafting Committee.[5]

It was so agreed.

ARTICLES 69-71 (Interpretation of treaties)

[27]

Article 69

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term:

(*a*) In the context of the treaty and in the light of its objects and purposes; and

(*b*) In the light of the rules of general international law in force at the time of its conclusion.

2. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty, including its preamble and annexes, any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion.

3. There shall also be taken into account, together with the context:

(*a*) Any agreement between the parties regarding the interpretation of the treaty;

(*b*) Any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation. (A/CN.4/L.107)

[28]

Article 70

Further means of interpretation

Recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to verify or confirm the meaning resulting from the application of article 69, or to determine the meaning when the interpretation according to article 69:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty. (A/CN.4/L.107)

[27]

Article 71

Terms having a special meaning

Notwithstanding the provisions of paragraph 1 of article 69, a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. (A/CN.4/L.107)

52. The CHAIRMAN invited the Special Rapporteur to give his views on the best method of discussing

[5] For resumption of discussion, see 876th meeting, paras. 65-89.

articles 69 to 71, the first three articles of section III, on the interpretation of treaties.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that government comments on articles 69 to 71 had tended to deal with those articles as a group. The Commission might therefore perhaps find it useful not to engage immediately on a detailed discussion of the various provisions of each article, but to begin by considering the general problems which had been raised in connexion with all three articles.

54. The first general problem raised by governments might be described as that of the hierarchy of the rules of interpretation. Paragraph 1 of article 69 laid down the " ordinary meaning " rule,which was subject to certain conditions specified in sub-paragraphs (*a*) and (*b*); paragraph 2 defined the context of the treaty, and paragraph 3 laid down two other rules relating to elements to be taken into consideration in conjunction with the context. A number of governments had suggested that those two rules should be treated as rules of interpretation on the same footing as those laid down in sub-paragraphs (*a*) and (*b*) of paragraph 1.

55. If that approach were adopted, it would be necessary to rearrange the whole structure of articles 69 to 71. Such a rearrangement would have some implications so far as the concept of " ordinary meaning " was concerned. That concept must, in his view, always be related to the context, to the object and purposes of the treaty and to the general rules of international law. The United States Government wished to relate it also to any agreement between the parties on the interpretation of the treaty.

56. Another problem to be settled was whether article 69 should deal with the question of the inter-temporal law and, if so, in what terms.

57. The Commission should also decide whether it wished to retain the definition of the context of the treaty in article 69, and how the question of preparatory work should be treated.

58. It further had to take a decision on the proposal to incorporate the provisions of article 71 in article 69, and it might also wish to take a decision on the suggestion by the Government of Israel that comparison between two or more authentic versions of a plurilingual treaty should be mentioned in article 69 as an additional principal means of interpretation.

59. In order that the Commission might have before it a text illustrating the broad effect of acceptance of certain of those suggestions by governments, he had prepared the following redraft of article 69, incorporating the former article 71, article 70 remaining unchanged:

" *General rule of interpretation* "

" 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the light of:

(*a*) the context of the treaty and its objects and purposes;

(*b*) the rules of international law;

(*c*) any agreement between the parties regarding the interpretation of the treaty;

(*d*) any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally.

" 2. Nevertheless, a meaning other than its ordinary meaning shall be given to a term if it is established that the parties intended the term to have that special meaning.

" 3. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising, in addition to the treaty, any agreement or instrument related to the treaty which has either been made by the parties or has been made by some of them and assented to by the others as an instrument related to the treaty ". (A/CN.4/186/Add.6).

60. The CHAIRMAN suggested that the Commission consider first the main points raised by governments, since the discussion might otherwise become confused.

61. Mr. CASTRÉN suggested that, instead of attempting to deal with those points *seriatim*, which might waste a lot of time, the Commission should begin by discussing the articles themselves. In the redraft prepared by the Special Rapporteur, article 71 would disappear while article 70 would remain unchanged; the Commission should therefore concentrate on the redraft of article 69.

62. Mr. BRIGGS said that he was reluctant to disagree with the Chairman, but considered that the Commission ought to discuss forthwith the text before it and deal with the topical problems as they arose.

63. Mr. REUTER said that the most important questions were dealt with in paragraph 1 of the redraft of article 69; the other provisions dealt rather with technical points. The Commission might therefore begin by discussing the essential paragraph.

64. Mr. AMADO said that the articles on interpretation had been very thoroughly discussed in 1964, when every point of view had been put and listened to.[6] He himself was among those who at first had been reluctant to see articles on interpretation included in the Commission's draft, because he was very concerned to safeguard the freedom of States and their untrammelled rights in the matter of the interpretation of treaties. But on reading right through the texts of those articles and the commentaries, he had been filled with admiration at the Special Rapporteur's drafting skill, at his ability to clothe ideas in the essential and appropriate words. Those texts and commentaries did honour to the Commission and the less they were interfered with, the better.

65. None of the points made in the comments by governments had any cogency.

66. Mr. TABIBI said that careful consideration should be given to the suggestions made by governments for the re-arrangements of articles 69 to 71.

67. Sir Humphrey WALDOCK, Special Rapporteur, said that he had not himself made any proposal for the amendment of articles 69 to 71; he had merely prepared a text to illustrate the effect of incorporating in para-

[6] *Yearbook of the International Law Commission, 1964*, vol. I, 765th and 766th meetings.

graph 1 of article 69 the contents of paragraph 3 of the article and of article 71.

68. The comments of governments had not convinced him that the 1964 formulation should be abandoned; he had an open mind on the suggestion that all elements of interpretation should be placed on the same footing.

69. He could accept Mr. Reuter's suggestion that the Commission begin its work on section III by discussing paragraph 1 of article 69, comparing the 1964 text with the one which he had prepared for purposes of illustration.

70. The CHAIRMAN said that the Commission would follow that method when it began its discussion of article 69 at its next meeting.

The meeting rose at 12.50 p.m.

870th MEETING

Wednesday, 15 June, 1966, at 10 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, Mr. Verdross, 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]

ARTICLES 69 TO 71 (Interpretation of treaties)*(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of the articles on interpretation, with particular emphasis on the Special Rapporteur's redraft of paragraph 1 of article 69.[2]

2. Sir Humphrey WALDOCK, Special Rapporteur, said he had made a fairly exhaustive analysis of government comments on articles 69 to 71 (A/CN.4/186/Add.6, pp. 8-25) and hoped that members would state their views on the three major questions to which he had referred at the previous meeting, namely, the question of a hierarchy of the rules of interpretation, the " ordinary meaning " rule, and the possible rearrangement of the structure of the articles.

3. Mr. de LUNA said the Special Rapporteur had analysed the government comments on an extremely difficult subject with remarkable clarity and thoroughness.

4. He would discuss only two of the major questions, because he was in agreement with the Special Rapporteur on the rest.

5. His first point related to paragraphs 1(*a*) and 1(*b*) of the Special Rapporteur's new version of article 69. He personally preferred the 1964 text in both cases. In international as in municipal law, the text constituted the authentic expression of the will of the parties. A treaty came into existence when the parties reached agreement on the text as an expression of their intention. The will of the parties at the time of the conclusion of a treaty was therefore decisive, and the 1964 text made that fact clearer.

6. The Special Rapporteur's new version was less satisfactory because the concept of the " ordinary meaning " of the terms used was divorced from that of the context of the treaty as a result of the insertion of the words " the light of " before the words " the context of the treaty ". The context was thus presented as one of the elements to be investigated if the ordinary meaning of the terms used was not clear, but those terms had an ordinary meaning only in the context in which they were used. The meaning of words was dependent on their context; for instance according to the context in which it was used, the French word " *mineur* " could mean either " miner " or " minor ".

7. Since the parties had chosen to express their will in written form, it was the terms used by them, in their context, which must be presumed to reflect their real intentions. He had himself supported that proposition when, at the session of the Institute of International Law held at Granada in 1956, he had voted in favour of article 1 of the resolution on the interpretation of treaties, the first sentence of which read:

> " The agreement of the parties having been reached on the text of the treaty, the natural and ordinary meaning of the terms of that text should be taken as the basis of interpretation. "[3]

8. The primacy of the text of the treaty as the basis for its interpretation had been repeatedly upheld by the Permanent Court of International Justice and by the International Court of Justice. Thus, in its advisory opinion in the *Polish Postal Service in Danzig* case, the Permanent Court had held that it was " a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd ".[4]

9. For those reasons, he would suggest that the last part of the opening sentence of paragraph 1 be amended to read " . . . the ordinary meaning to be given to its terms in the context of the treaty and in the light of:

(*a*) the objects and purposes of the treaty; "

10. His second point related to the question of the inter-temporal law. He could accept paragraph 1 (*b*) as redrafted, provided it was explained in the commentary that the question whether the parties to a treaty had intended to refer to the rules of international law in force at the time of the conclusion of the treaty, or to legal terms the meaning of which could change with the development of international law, was one of interpretation. For example, during the discussions at the Conference on the Law of the Sea at Geneva in 1958,

[1] See 869th meeting, preceding para. 52.

[2] *Ibid.*, para. 59.

[3] *Annuaire de l'Institut de droit international, 1956*, pp. 364-365.

[4] *P.C.I.J.* (1925), Series B, No. 11, p. 39.