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Summary record of the 870th meeting

Topic:
Law of Treaties

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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.

reference had been made to the case of a State which had entered into a treaty relating to the territorial sea on the understanding that its width was limited to three miles. Obviously, that State would not have signed the treaty had it known that, in the light of subsequent developments in international law, the term " territorial sea " might subsequently be interpreted as covering a wider zone.

11. Other illustrations of the application of the inter-temporal law in the interpretation of treaties were provided by the judgment of the Permanent Court of International Justice in the case of the interpretation of paragraph 4 of the annex following article 179 of the Treaty of Neuilly[5] and the advisory opinion of the International Court of Justice in the *Conditions of Admission of a State to Membership in the United Nations* case, particularly the magnificent joint dissenting opinion of Judges Basdevant, Winiarski, McNair and Read.[6]

12. His views on the question of the inter-temporal law were close to those expressed by the Netherlands Government (A/CN.4/186/Add.6, p. 4) but he would be prepared to accept sub-paragraph 1 (*b*) of the Special Rapporteur's new text, subject to the inclusion in the commentary of a passage which would safeguard the intention of the parties.

13. Mr. VERDROSS said that, in his view, the new version was a distinct improvement on the text adopted at the first reading, more particularly because of its paragraph 1 (*c*).

14. Some provisions had, however, been better expressed in the earlier text. Paragraph 1 (*a*) of the new text especially gave the impression that the objects and purposes of the treaty might be sought elsewhere than in the text. But the objects and purposes of the treaty must be sought first in the text itself, and only if examination of the text did not enable an adequate solution to be reached should recourse be had to the subsidiary means. The former wording, " In the context of the treaty and in the light of its objects and purposes ", was therefore preferable. Paragraph 1 (*b*) also was more satisfactory in the earlier text.

15. Mr. ROSENNE said the Special Rapporteur's analysis of government comments on articles 69 to 71 was notably thorough.

16. In general, and subject to certain drafting changes, he welcomed the new formulation of article 69 as far as it went. He also welcomed the emphasis placed in paragraph 4 of the Special Rapporteur's observations on the unity of the process of interpretation; that valuable idea should be incorporated in the text of the articles or at least given prominence in the commentary.

17. With reference to paragraph 1 of the Special Rapporteur's observations, he believed that the Commission's purpose in including rules of interpretation in the draft articles was to facilitate the transaction of international business and to prevent transient difficulties from developing into disputes; he felt strongly that it was not the Commission's purpose in Section III to lay down final rules for the settlement of disputes after they had arisen. For that reason alone he questioned the relevance of international case-law on the subject of interpretation, for it was inevitably strongly influenced by the manner in which each State party to the dispute had pleaded its case. There was a great difference between pleading a case and handling diplomatic negotiations. In diplomatic negotiations, government advisers were not trying to convince a judge with a view to obtaining a favourable decision, but rather to persuade the other party with a view to reaching an acceptable compromise. His own experience had shown that, when a treaty was interpreted for the purpose of its application, its provisions were never clear. As Mr. Ago had pointed out during the 1964 discussions, there were " cases where two States both found a treaty perfectly clear but interpreted it in two different ways ".[7]

18. He had no objection to the suggestion by the Czechoslovak Government that article 69 should specifically refer to the text of the treaty as the starting point of interpretation and he had not been convinced by the arguments put forward by the Special Rapporteur in paragraph 2 of his observations.

19. He accepted paragraph 4 of the Special Rapporteur's observations, particularly his statement that the Commission had not intended to establish any positive hierarchy for the application of the various means of interpretation. The reference to all the various elements being " thrown into the crucible " to give the legally relevant interpretation was very apt and should be included in the commentary. It would be remembered that, in 1964, the Commission had agreed on the generally permissive character of the rules on interpretation.

20. He agreed with the Special Rapporteur on the place given to the ordinary meaning of the terms used in a treaty. Even though the ordinary meaning might sometimes be ambiguous, it should constitute the starting point of the whole process of interpretation.

21. He was prepared to accept the views expressed in paragraphs 7 and 13 of the Special Rapporteur's observations and to leave the questions of inter-temporal law and inter-temporal linguistics to be implied. The 1964 debate on the text of article 56[8] in the Special Rapporteur's third report had shown that the Commission was obviously unwilling to embark on a full treatment of the inter-temporal law. It should, however, be made clear in the commentary that the Commission had not wished to prejudice that question.

22. He could agree to the retention of the definition of " context " in article 69, but would have some difficulty in voting for the new paragraph 3 because of the elimination of the reference to the preamble and the annexes. He did not believe it was self-evident that the preamble and the annexes formed part of a treaty. At the San Francisco Conference, it had been found necessary to take a formal decision on the status of the Preamble of the Charter, to the effect that there were no grounds for supposing that the Preamble had less legal validity than the succeeding chapters.[9]

[5] *P.C.I.J. Series A, No. 3.*

[6] *I.C.J. Reports, 1948*, p. 82.

[7] *Yearbook of the International Law Commission, 1964*, vol. I, p. 280, para. 79.

[8] *Ibid.*, vol. I, 728th and 729th meetings.

[9] Report of Committee I/1, *Documents of the United Nations Conference on International Organization*, vol. 6, p. 448.

23. With reference to paragraph 15 of the Special Rapporteur's observations, his own impression was that the Israel Government's comment on the question of the context was not intended to suggest that the definition of " treaty " should be expanded, but rather that an independent definition of " context " should be included in article 1, which he thought would facilitate the application of the articles on interpretation to the articles on the law of treaties themselves. In that connexion, it would be recalled that, in 1965, the Commission had changed the title of article 1 from " Definitions " to " Use of terms " to emphasize that its provisions did not purport to be a general or absolute catalogue of definitions.

24. He agreed with the part of paragraph 16 of the Special Rapporteur's observations which dealt with the concept of the context, but not with the part which dealt with the preamble and annexes of a treaty.

25. There was one point on which he found the 1964 text preferable to the new formulation and that was the reference in the former paragraph 3 (*b*) to the understanding of " all " the parties regarding the interpretation of the treaty. Since the Commission's adoption of article 3 (*bis*), a formulation of that type would not necessarily apply to the constituent instruments of international organizations. That was a point to which he had already drawn attention at the sixteenth session.[10]

26. He might wish to speak later on the question of the comparison of the different authentic versions of a plurilingual treaty and on that of the preparatory work.

27. With regard to the wording of the new formulation, it would be better if the ambiguous word " term " were replaced by a clearer expression.

28. He suggested that the new text of article 69 might form the basis of a comprehensive rule to serve as a general directive to advisers of governments and others on methods of avoiding disputes. He would also have a suggestion to make later on the possibility of combining articles 69 and 70.

29. Mr. BRIGGS said the Special Rapporteur was to be commended on his admirably presented observations on the articles on interpretation.

30. He fully accepted the statement in paragraph (9) of the Commission's 1964 commentary " that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties ".[11] It was therefore to the text that the interpreter should first look rather than to the intention of the parties, which was a subjective element distinct from the text itself.

31. The Special Rapporteur's new formulation of paragraph 1 of article 69 was an improvement on the 1964 text. The removal of the former paragraph 2, on the subject of the context, to paragraph 3 and the incorporation of the former paragraph 3 in the present paragraph 1 as a new sub-paragraph (*d*) were also an advantage.

32. He commended the Special Rapporteur for the new drafting of paragraph 1 (*d*), formerly paragraph 3 (*b*); the latter was unduly rigid in its reference to the understanding of " all " the parties. Article 69 did not deal with consent to the assumption of treaty obligations but rather with a common understanding on the interpretation of the treaty; for that reason, the more flexible formulation of the new paragraph 1 (*d*) was superior.

33. The meaning of the new paragraph 1 (*b*) was not altogether clear. If the words " rules of international law " were intended to refer to the rules of treaty interpretation, the provision was unnecessary. If, however, they were intended to refer to the rules of inter-temporal law, the provision should give a complete statement of that law and be reworded on the following lines:

> " The rules of international law in force at the time of its conclusion as well as those rules in force at the time of its interpretation ".

That would leave it to the interpreter to weigh the implications of the inter-temporal law. There was also a possible third meaning, namely, that paragraph 1 (*b*) was intended to refer to rules other than those of interpretation and of inter-temporal law, but if that were the case, what were those rules? He would prefer to see the provision dropped unless it could be made clear that it referred to the rules of inter-temporal law.

34. It was necessary to clarify the relationship between the agreement mentioned in the new paragraph 1 (*c*) and that mentioned in the new paragraph 3.

35. With regard to the relationship between article 70 and article 69, the distinction made between the primary means of interpretation in article 69 and the further or subsidiary means in article 70 seemed to him neither logical nor sound. The assumption appeared to be that the reference in article 70 to the preparatory work and to the circumstances of the conclusion of the treaty was not to the text of the treaty and that they were therefore of a subsidiary character. Since, however, sub-paragraphs (*b*), (*c*) and (*d*) of the new paragraph 1 of article 69 were not confined to the text of the treaty, the distinction between primary and subsidiary means of interpretation should be abandoned and the preparatory work and the circumstances of the conclusion of the treaty should be added to paragraph 1 of article 69. Those changes would have the advantage of eliminating the distinction drawn in the existing article 70 between use of the preparatory work and the circumstances of the treaty's conclusion to " verify and confirm " the meaning and their use to " determine " the meaning. He accordingly suggested that paragraph 1 of article 69 be reworded somewhat on the following lines:

> " A treaty shall be interpreted in good faith in order to determine the meaning to be given to its terms in the light of all relevant factors, including in particular:
>
> (*a*) the context of the treaty;
>
> (*b*) its objects and purposes;
>
> (*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

[10] *Yearbook of the International Law Commission, 1964*, vol. I, p. 278, para. 41.

[11] *Ibid.*, vol. II, p. 201.

of the meaning of the terms as between the parties generally;

(*e*) the preparatory work of the treaty;

(*f*) the circumstances of its conclusion ".

36. Such an approach would also have the advantage of deleting all reference to the " ordinary " meaning, a term which he found just as objectionable as the former reference to the " natural " meaning. Words had no ordinary or natural meaning in isolation from their context and the other elements of interpretation. It would have the further advantage of eliminating paragraph 2 of the Special Rapporteur's text, formerly article 71, which dealt with the special meaning of terms.

37. If his suggestion were adopted, the text would retain its basic importance as the authentic expression of the intentions of the parties, but nothing that might throw light on the meaning of its terms would be excluded and the present distinction between primary and subsidiary means, a distinction which he regarded as undesirable and not in accordance with the practice of States or of international tribunals, would be avoided.

38. Mr. REUTER said that a reluctance to insert provisions on the interpretation of treaties in the draft was understandable because interpretation was an art, not a science. However that might be, he congratulated the Special Rapporteur on his splendid success in producing a clear, simple and progressive text. What his text really proposed was a method, as the title " General rule of interpretation " clearly showed; and that was an excellent thing. The general rule was to rely on the text of the treaty; any departure from the text must be gradual and systematic. The formula contained in the new wording was excellent in that it brought everything back to the text of the treaty. In so doing, it eliminated the alleged problem of the search for the intention of the parties; of course the intention of the parties must be sought but it could only be found in the text.

39. It should be noted that, in the new version of paragraph 1, the term " context " meant the text of the treaty as a whole in its relation to a provision in particular. In the existing version the term might be understood to mean the general climate, political, economic and social in which the treaty had been concluded, and that would make the paragraph incomprehensible. He therefore proposed that the article begin with the words " A provision of a treaty shall be interpreted . . . ".

40. The enumeration in sub-paragraphs (*a*), (*b*) (*c*) and (*d*) indicated a priority of method rather than of value: it was necessary to proceed from the simple to the complex, from the immediate to the remote.

41. In sub-paragraph (*a*), the word " and " before " its objects and purposes " should be followed by the words " in the light of " or " in particular ". Also, the words " its economy " should be inserted before the words " its objects and purposes "; the term " economy " was in common use in international jurisprudence and meant the general structure of the instrument.

42. Sub-paragraph (*a*) should certainly be followed by sub-paragraph (*c*), which indicated the element closest to the treaty itself, and then by subparagraph (*d*), the present sub-paragraph (*b*) being moved to the end.

43. In sub-paragraph (*b*) of the new version the attempt at simplification had perhaps been pushed rather far: it was not stated what rules of international law were referred to. It was certainly preferable not to refer to the inter-temporal law, because everything that the Commission had enunciated on that subject was extremely superficial; but it was not possible to do better in the present state of the vocabulary in the various languages. And the rules of international law referred to could not be the rules of international law relating to the interpretation of treaties; that would be absurd. Was the reference to other rules of international law binding on the parties, or to other rules of international law relating to the subject-matter of the treaty? That should be made clear.

44. Paragraph 2 should, of course, remain where it was.

45. In paragraph 3, the Commission defined the context of the treaty, that was to say, what constituted the text of the treaty as a whole. It was necessary to be very precise on that point. The words " in addition to the treaty " might be replaced by the words " in addition to the whole of the text proper, including the preamble and the annexes ", as had already been suggested. The paragraph might then go on: " any agreement or instrument which has been made either by the parties or by some of them and which, with the assent of the other parties, has been deemed to be an instrument incorporated in or annexed to the treaty ". In point of fact, the term " treaty " was ambiguous: there were groups of instruments which formed a single whole.

46. In dealing with article 69, the Commission would be well-advised to keep very close to the Special Rapporteur's basic idea, which had been to give an explanation of what was the text of a treaty. Article 70 referred to more remote and clearly different elements, and for that reason the division into two articles was justified. Article 69 was a good article; it was methodical and judicious and emphasized the fact that the words were the only thing that counted for the purpose of the interpretation of treaties.

47. Mr. CASTRÉN said he considered that, in general, the new version of article 69 was an improvement on the text—itself quite good—which the Commission had adopted in 1964. More particularly, the transfer of the content of article 71 to article 69 was a sound move.

48. He accepted the amalgamation of paragraphs 1 and 3 of article 69, but was inclined—like other speakers, particularly Mr. Verdross—to think that sub-paragraph (*a*) had been better drafted in the earlier text.

49. The Special Rapporteur had been right to delete the word " general " in the phrase " rules of international law " in paragraph 1 (*b*); it had probably been included by mistake in the 1964 text. Regional and local international law must also be taken into consideration for the purpose of interpreting treaties between small groups of States.

50. The second change which the Special Rapporteur had made in that sub-paragraph, namely, the deletion of the phrase " in force at the time of its conclusion ", was also acceptable, because the phrase in question expressed only a part of the principle of the inter-

temporal law and might therefore in some cases lead to results not intended by the parties to the treaty. The problem of the temporal element in regard to the interpretation of treaties was too complex to be dealt with satisfactorily in the last stages of the Commission's work. Mr. Briggs's proposal was interesting, but seemed rather too general to facilitate the interpretation of treaties to any marked extent. Moreover, if the Commission adopted the Special Rapporteur's new version, the question arose whether it would not be desirable to make some reference to a similar problem in article 68, sub-paragraph (*c*), a provision which most members seemed to wish to delete but whose fate had not yet been decided.

51. He could accept the changes to the former paragraph 3 (*b*) reflected in the new paragraph 1 (*d*), with one exception. Instead of referring to a practice which established " the common understanding " of " the parties generally ", it would be less tautologous and more precise if the words " the parties generally " were replaced by the words " the parties in question ", which would designate the parties in dispute over the interpretation of a bilateral or multilateral treaty.

52. The new wording of paragraph 2 was an improvement on the earlier article 71, and he accepted it. In the English text, the word " may " had been replaced by the word " shall " and a corresponding change should be made in the French text. He also welcomed the deletion of the word " conclusively ", which was too categorical and was ill-suited to a legal text.

53. One of the ways in which paragraph 3 of the new text differed from paragraph 2 of the former text was that the reference to the preamble and annexes of the treaty had been omitted. Although the preamble and annexes were clearly a part of the treaty, they could not, as a general rule, be placed on the same footing as the main text, the articles of the treaty itself. But precisely for that reason, it seemed desirable to stress their importance for the purpose of interpreting the treaty, as was done, especially in the case of the preamble, by the great majority of authors.

54. The new wording for the concluding part of paragraph 3 did not seem satisfactory, and he proposed that it be recast to read: " . . . any agreement or instrument related to the treaty which had been made by the parties or by some of them and assented to by the parties in question ". It was not sufficient that an agreement or instrument should have been made; the important point was that the parties to the treaty which disagreed over its interpretation should recognize that the agreement or instrument in question formed part of the treaty in the broad sense.

55. Mr. AGO said that, of the two texts under consideration, he greatly preferred the one which the Commission had adopted in 1964. It was clear from their observations that governments had, by and large, found the rules satisfactory and their comments, sometimes contradictory, were far from demonstrating the desirability of changing a text which had been prepared with great care.

56. The expression " ordinary meaning " had been criticized. He agreed that no term had an inherent meaning, and that the meaning always depended on usage. That was why it was essential to use terms as far as possible in the sense in which they were customarily used, which was what was understood by their " ordinary meaning ".

57. As Mr. de Luna had pointed out, a term in isolation had no meaning; terms had no meaning except in a sentence or in a set of sentences and articles, in other words, in their context. In that respect, even the text adopted in 1964 called for improvement: the words relating to the context should be transferred from paragraph 1 (*a*) to the introductory sentence. It was essential that there should be two clearly-defined stages, and to take into consideration first, the terms in their context, and then the objects and purposes of the treaty—a factor which might throw some light on the matter.

58. The Commission should not allow itself to be confused by the question of inter-temporal law. Interpretation consisted in the attempt to determine what the parties had intended. While the rules of international law might shed light on that point, it was obvious that to ascertain their intention, reference must be made to those rules of international law which the parties had had in mind at the time the treaty was concluded. But to introduce the idea of the evolution of the rules of international law was to give the impression that the meaning of the treaty might change with time. While such changes might occur, they should not be mentioned in a provision concerning the attempt to determine the intention of the parties at the time of the treaty's conclusion. In that respect, therefore, the 1964 text was preferable.

59. The order in which the ideas were expressed was also more satisfactory in the 1964 text. The starting point was the ordinary meaning of the terms in their context and in the light of the objects and purposes of the treaty and of the rules of international law which the parties had had in mind at the time. A subsequent agreement concerning the interpretation of the treaty, or a tacit agreement revealed by the practice of the parties in the application of the treaty, should not be placed on the same footing as the context. Those agreements could be considered at the same time as the context, but they should not be deemed to form part of the context.

60. He hoped, consequently, that the Commission would adopt the 1964 text with only one amendment, namely, the transfer of the reference to the context from sub-paragraph (*a*) of paragraph 1 to the introductory sentence of that paragraph.

61. Mr. TUNKIN said that, after carefully studying the comments of governments on articles 69-71, he had come to the conclusion that, in some respects, the Special Rapporteur's new text for article 69 was an improvement on the 1964 version, but that certain elements in the latter ought to be retained. The purpose of interpretation was to establish the content of an agreement resulting from a process of co-ordinating the wills of the States taking part in the elaboration of a treaty and embodied in the final text. It had to be assumed that the final text reflected that agreement as accurately as possible.

62. If the Commission were to leave aside certain doctrinal defects in the 1964 texts of articles 69 to 71 and base itself on certain practical considerations, it must distinguish between primary and secondary sources of interpretation, as had rightly been done by the Special Rapporteur in his new draft. Primary sources included the original text of the treaty and any agreement between the parties concerning its interpretation which might be reached at the time the treaty was concluded or at a later date. The legal force of those two primary sources was more or less equal because it derived from an instrument reflecting the will of the parties. Secondary sources which might have to be taken into account, such as preparatory work, did not have the same legal force.

63. Where the actual wording of article 69 was concerned, he had some sympathy for Mr. Ago's point of view. Perhaps the 1964 formula was preferable for the introductory sentence and sub-paragraph (*a*) of paragraph 1; it would be useful to know the Special Rapporteur's opinion. Generally speaking, it seemed undesirable to separate the context of the treaty from its objects and purposes.

64. With regard to sub-paragraph (*b*), there were arguments for and against qualifying the rules of international law as " general ". Mr. Castrén had rightly pointed out the need to take into account rules of a regional character that were binding on the parties. If the rules of international law were to be mentioned at all, they must be the rules in force at the time when the treaty had to be interpreted. On balance, the sub-paragraph could probably be dropped: the point was covered in paragraph 2 of the Special Rapporteur's new text.

65. Sub-paragraph (*c*) of the Special Rapporteur's new text was acceptable, as was sub-paragraph (*d*), provided the latter was worded in similar terms to those which the Drafting Committee had proposed in its new text for article 68, namely, something on the lines of " any subsequent practice in the application of the treaty by the parties which establishes their understanding of the meaning of the terms of the treaty ". The Special Rapporteur's wording: " the common understanding of the meaning of the terms as between the parties generally " was too loose and open to misinterpretation.

66. He supported Mr. Rosenne's suggestion that the preamble of the treaty should be mentioned in paragraph 3 of the Special Rapporteur's new text.

67. Mr. JIMÉNEZ de ARÉCHAGA said he congratulated the Special Rapporteur on his analysis of the comments of governments and of the problems arising out of the articles dealing with interpretation, and fully endorsed the substance of his proposals concerning those articles.

68. As he had not been able to take part in the discussions on the section concerning interpretation at the sixteenth session, he wished to express his support for the approach adopted by the Commission at that time, which seemed to have been accepted by governments, namely, that fundamental rules of interpretation should be set out in the form of legal rules, taking as a point of departure the text of the treaty itself rather than the intentions of those responsible for drafting the original text. He accepted the Special Rapporteur's suggestion that the presumption regarding the intention of the parties should not be introduced into the articles. His general rearrangement of the 1964 text was a great improvement and should be followed. It made for greater flexibility, particularly by combining paragraphs 1 and 3 of the 1964 text.

69. He favoured the Special Rapporteur's suggestion that the context of the treaty should not be divorced from its objects and purposes. If the two were divorced, contextual interpretation might become too rigid and possibly even mechanical. He had in mind the consideration put forward by Judge Jessup in his separate opinion in the preliminary objections stage of the *South West Africa Cases*.[12] Judge Jessup had suggested that the contextual method of interpretation might result in a word being given the same meaning throughout a treaty in a way that might not be appropriate in the case of an instrument, parts of which had been drafted in separate or independent committees of a conference when co-ordination might have been insufficient.

70. Sub-paragraph 1 (*b*) in the Special Rapporteur's new text should be maintained, because it set out the important principle that a treaty constituted a new legal element which was additional to the other legal relationships between the parties and should be interpreted within the framework of other rules of international law in force between them. But it should not be qualified by the insertion of the word " general ", which would exclude specific or regional rules of international law binding on the parties. That was a particularly important matter where one treaty had to be interpreted in the light of other treaties binding on the parties. Sub-paragraph 1 (*b*) should be transferred to the end of paragraph 1.

71. The Special Rapporteur had been right to drop the words " in force at the time of its conclusion ", which had appeared in paragraph 1 (*b*) of the 1964 text. As he (Mr. Jiménez de Aréchaga) had said in 1964,[13] there were two possibilities: either the parties had intended to incorporate in the treaty certain legal concepts that should remain unchanged, or they had had no such intention, in which case the legal concepts might be subject to change and would have to be interpreted not only in the context of the law in force at the time when the instrument had been concluded, but also in the framework of the entire legal order binding between the parties at the time of the interpretation.

72. The words incorporated in that paragraph in 1964 prevented the free operation of the will of the parties by crystallizing every concept as it had existed at the time when the treaty was concluded. He therefore welcomed the elimination of the first branch of the so-called inter-temporal law from the articles on interpretation. The temporal element should be regarded as implicitly covered by the concept of good faith.

73. Sub-paragraph 1 (*c*) of the Special Rapporteur's new text was acceptable, as was his paragraph 2. Para-

[12] *South West Africa Cases, Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962*, p. 407.

[13] *Yearbook of the International Law Commission, 1964*, vol. I, p. 34, para. 10.

graph 3 would be acceptable with the deletion of the words " as an instrument related to the treaty ", since the assent required was assent to the content of the instrument and not to its relationship with the treaty. Those words were open to misconstruction. He also agreed with other members that an express reference should be made in paragraph 3 to the preamble and annexes of a treaty, which would be of assistance in interpreting its object and purpose.

74. Mr. VERDROSS, replying to the observations of some speakers on paragraph 1 (*b*) of article 69, said that, in his opinion, the word " general " had been omitted so as to make it clear that the provision in question also covered the rules of local and regional customary law. While he could approve that idea, he felt that, to express it more clearly, reference should be made to the rules of " customary " international law, because every treaty contained rules of international law.

75. Mr. AMADO said that all the guidance set down in writing by Vattel for the use of interpreters, all the principles which in his time had been regarded as essential to the art of interpretation, even the rule of the effectiveness of treaties, were, if adapted as appropriate, pertinent in the present instance. Vattel had already had a respect for the written text—the " context " as it was now called—and had urged that words should be interpreted according to the meaning attached to them at the time of the treaty's conclusion. To that principle the Commission was adding the precision required by contemporary multilateral treaties—the agreement of the parties on the meaning of the terms used.

76. He agreed with the views expressed by Mr. de Luna, who had put the problem of the context back into its proper perspective, and he approved the return, suggested by other members, to the expression " in the light of its objects and purposes ".

77. He entirely agreed with Mr. Tunkin and Mr. Reuter that the adjective " general " should be deleted from sub-paragraph 1 (*b*) of article 69 in relation to the rules of international law. The word was one of those which had both a specific and a general meaning. When the Commission spoke of general international law, it knew that it was not referring to international law in general.

78. He had found no cause to differ with the views expressed by the Special Rapporteur, although his partiality for the text adopted in 1964 was not yet altogether overcome. There were, however, a number of matters on which he had reached a firm conclusion.

79. First of all, with regard to Mr. Briggs's suggestion that the question of further means of interpretation should be dealt with in article 69, he fully endorsed the remarks of Mr. Reuter, because article 69 was essentially concerned with the vast topic of the " context ": the other means of interpretation would be treated in separate articles, for, whether the Commission liked it or not, they were further means of securing information.

80. In his opinion, customary law was contained in the rules of international law, and he therefore thought, unlike Mr. Verdross, that it was not necessary to refer to it expressly.

81. He was in favour of restoring the reference to the preamble, which had been included in the 1964 text but had now been deleted. The elements of information which were to be found in the preamble and annexes of a treaty and which might be useful to an interpreter could not be disregarded.

82. In his opinion, the Commission had succeeded in 1964 in correctly defining the juridical realities of the contemporary world. It should not now be led astray by memories of Roman law and other impressive maxims, but should assemble the essential rules in a well-balanced and harmonious text.

83. Mr. BARTOŠ said that, in his sixth report (A/CN.4/186/Add.6), the Special Rapporteur had dealt with a topic which was not only vast, complicated and of great importance, but also highly controversial as to method, if not as to the purpose to be achieved. He particularly congratulated the Special Rapporteur on having produced a text which would ease the Commission's task. With regard to substance, he approved the texts now proposed for articles 69 and 70, and also the proposal to reduce the number of articles on interpretation from three to two.

84. But although the Special Rapporteur had tried to summarize the main ideas on the subject, the discussion was bringing to light a number of other ideas, some of which might at first glance appear to be contradictory. Those new ideas had convinced him of the need for the Drafting Committee and the Special Rapporteur to give the question further consideration with a view to producing a more suitable text.

85. First, with regard to the question of what was to be understood by " ordinary meaning ", while he saw no objection to " words " and " terms " being treated as synonyms, many jurists drew a distinction between them and maintained that " terms " were words peculiar to jurists. He would nevertheless prefer to speak of " words", because terms were words, but words were not, if that distinction was accepted, necessarily and always terms.

86. The ordinary meaning varied according to time and circumstances. A case in point was the Annex to the Brussels Agreement of 1948[14] for the settlement of intercustodial conflicts relating to German enemy assets, which arose out of the Final Act of the 1945 Paris Conference on Reparation. The English and French versions of the Annex were printed side by side and, in the part dealing with property owned by enterprises under German control, the term " German-controlled " was understood by the British as meaning " administered" or " managed ", but the term " *sous contrôle allemand* " was understood by the French as implying supervision, however ineffective, at every stage, but supervision nevertheless. The problem of interpretation had arisen at Brussels when the assets of those enterprises were being transferred to the Inter-Allied Reparation Agency.

87. That example illustrated the problem posed at the international level by the " ordinary meaning ". But it was hardly possible to do otherwise than speak of the " ordinary meaning ", " common meaning ", or " general meaning ". The expression " ordinary meaning " was used in all civil codes in connection with the inter-

[14] United Nations, *Treaty Series*, vol. 71, p. 216.

pretation of wills, which had to be interpreted according to the will of the testator in the ordinary meaning of the words used.

88. In international law, the problem of the " ordinary meaning " was complicated by the fact that there were multilateral treaties. There might be an " ordinary meaning " for the authors of the preliminary draft—generally national or international civil servants—for the authors of the subsequent drafts, for the most eloquent members of the drafting committees and for certain States which took part in the drafting, while others took none at all. In his view, the " ordinary meaning " was that which was understood *inter partes*—between the parties which had drafted the treaty.

89. Another factor which had to be taken into account was the evolution of language. The " ordinary meaning " might not always continue to be what it had been at the time of the treaty's conclusion. It had been said that diplomats were particularly conservative in the use of words, but the French Academy had recently pointed out that they were sometimes pioneers, since they had just attached a new meaning to the word " *communauté* ", which had formerly been an expression in the Civil Code, but which had now passed into international law.

90. In his opinion, " the parties " should be understood as meaning the parties which had participated in the authentication of the treaty, not in its conclusion. That was how he understood article 69, paragraph 2, which was an explanatory passage in which the parties had tried to give a special meaning to certain terms.

91. Next, was any significance to be attached to the order of sub-paragraphs (*a*), (*b*), (*c*) and (*d*)? Were they four factors which had the same value? Were they cumulative or graduated? The context, of course, must take first place, but where sub-paragraph (*c*) was concerned, there might be some doubt concerning the value of subsequent treaties of interpretation and the possibility of their having retroactive effect. He was accustomed to drafting protocols of interpretation which came into force on the day of the entry into force of the treaty of interpretation itself.

92. With regard to sub-paragraph (*b*) and the rules of international law, he was of the opinion that the rules of international law referred to were those in force at the time of the treaty's conclusion, not at the time of its interpretation. True, they might change in the interval, but in that case, being rules of *jus cogens*, they also changed the earlier treaty, since a new rule of *jus cogens* had supervened.

93. He had stated that the parties which should participate in the interpretation of the treaty were those which had participated in its authentication, because it was possible that parties might accede to the treaty subsequently. While such parties would certainly have a voice in any amendments to the treaty, had they the right to decide what had been the meaning of the words used at the time of its conclusion?

94. Moreover, it should be borne in mind that amendments to the treaty might lead to *inter se* interpretations of multilateral treaties valid only between certain parties. That was a question which had not been taken into account in the text and had not been considered by governments in their comments.

95. He was not in favour of relying on the preparatory work of multilateral treaties, particularly those of a universal character, but there was a problem where reservations might be made during the negotiations and accepted by the other parties as a compromise: did the compromise also cover the notion of the " ordinary meaning " of the words used? All members could think of international conferences convened by the United Nations at which, when it came to voting, compromise amendments had been submitted for the purpose of achieving a majority in order to save the conference and enable the text to be authenticated. Such amendments sometimes came near to rendering the text meaningless by adding phrases which were inconsistent with the rest.

96. That was why, if the preparatory work was taken into consideration for the purpose of discovering the origin of the ideas underlying a treaty, and if last-minute amendments—sometimes forgotten and not recorded—were disregarded, there was a risk of losing sight of the meaning which the majority had considered as the " ordinary meaning ", and which had enabled the treaty to be adopted.

The meeting rose at 1 p.m.

871st MEETING

Thursday, 16 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, 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 consideration of articles 69 to 71 on interpretation.

2. Mr. de LUNA said he would supplement his remarks of the previous day by some comments prompted by the statements of other members of the Commission.

3. With regard to the question of " context ", he was more convinced than ever of the need to draft paragraph 1

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