Document:-
A/CN.4/SR.873

Summary record of the 873rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1966, vol. I(2)

48. Furthermore, there were means of interpretation other than examination of the preparatory work and the circumstances of the conclusion of a treaty, so that the article was perhaps a little too reticent. At the previous meeting he had mentioned, by way of example, the possibility that a provision of a treaty interpreted in accordance with article 69 might lead to the conclusion that the parties had violated international law.[11] Would such an interpretation be " unreasonable " and accordingly fall under article 70, sub-paragraph (*b*)? In other words did the Commission consider that a treaty should be understood as not engaging the international responsibility of the parties?

49. Mr. AGO said that, on the whole, he was very much in favour of article 70 and hoped it would be kept as a separate article.

50. The word " means " had the merit of being in fairly common use where interpretation was concerned and the word " including " made it clear that recourse could be had to means other than the preparatory work or the circumstances of the conclusion of a treaty, though it probably would be wiser not to mention them expressly. As had already been pointed out, interpretation was an art and it was obvious that a variety of means might be found useful in a specific case. In its draft articles, however, the Commission had sought to single out the means most often used, and he knew of no others that could be be placed on the same footing as the preparatory work and the circumstances of the conclusion of a treaty. As it was, the preparatory work did not appear among the primary means in the draft, and if additional means were listed, that might detract from its importance, which would be undesirable.

51. He supported Mr. de Luna's proposal that the words " in the light of the objects and purposes of the treaty " should be deleted from sub-paragraph (*b*), as the point was already covered in article 69. Moreover, the result obtained might be " absurd or unreasonable " in itself, quite apart from the teleological aspect of the matter.

52. Mr. BARTOŠ said that he was far from being a fanatical partisan of preparatory work as a means of interpretation and had doubts about its legal value, but he recognized that it must be taken into account and sometimes even given a primary role. There were cases, particularly of bilateral treaties, in which the preparatory work brought to light what was sought by interpretation, for it provided an objective expression of the subjective element of the parties' intention. Hence, he might perhaps be among those who were averse to separating the means of interpretation set out in article 70 from article 69. In any case, the preparatory work must be taken into account, but without giving it too much importance.

53. Other elements more directly linked with the context, the meaning and even the purpose of the treaty should also be taken into account for interpretation: there were non-legal and political factors that explained and clarified a treaty. As François Gény had shown, words should not be construed solely in the light of legal, logical and linguistic data, but also by reference to psychological data. Certain dangers, threats and aspirations might compel the use or avoidance of certain words. For example, treaties concluded during the Second World War between the coalition of States fighting the Nazis contained many optimistic and idealistic terms, because at the time the ideas could not have been expressed differently. At a conference held in London in March-April 1946, some of those texts had been taken as a basis for arrangements for the repatriation of displaced persons, and although their validity had not been disputed, it had been necessary to interpret the obligations laid down in them in a more realistic manner. In seeking the meaning of terms, the time at which the text had been drawn up and the atmosphere in which the treaty had been concluded must always be taken into account.

54. A tendency to modify or to depart from the original meaning was inherent in any process of interpretation, unless, on the contrary, it was an effort to preserve that meaning and resist departures from it.

55. The Commission could not achieve perfection, but must lay down rules which took account of what was possible. The content of article 70 was necessary and should be retained, but it could not be entirely divorced from article 69. The art of interpretation consisted sometimes in combining the two means of interpretation referred to in those articles and sometimes in separating them.

The meeting rose at 12.45 p.m.

873rd MEETING

Monday, 20 June 1966, at 3 p.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. Rosenne, Mr. Tabibi, 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]

ARTICLE 70 (Further means of interpretation) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of article 70 (A/CN.4/L.107) which could, of course, be discussed in conjunction with article 69, referred to the Drafting Committee at the previous meeting.

2. Mr. BRIGGS said that although the majority of the Commission appeared to be in favour of keeping article 70

[11] Para. 22.

[1] For text see 869th meeting, preceding para. 52.

separate, he had not been convinced by the arguments put forward in support of that view. His own conviction that the contents of article 70 should not be separated from those of article 69 did not proceed mainly from substantive considerations; it was largely a question of method of expression and of emphasis.

3. He did not accept Sir Hersch Lauterpacht's view that the preparatory work should come into the process of interpretation at an early stage because the interpreter was seeking the intention of the parties as a subjective element distinct from the text. As he had stated at the 870th meeting, he fully accepted the text as the basic and authentic expression of the intention of the parties. His criticism related to the rigid hierarchical distinction between the primary and subsidiary means of determining the meaning of the text. He had also pointed out that if the distinction between articles 69 and 70 was supposed to be based on the degree to which the means of interpretation were linked with the text, it was neither logical nor sound, since the elements listed in paragraph 1 (*b*), (*c*) and (*d*) of article 69 were not confined to the text any more than was the preparatory work or the circumstances surrounding the conclusion of the treaty.[2]

4. Mr. Tunkin had expressed the view that article 69 was confined to evidence of agreement between the parties, and article 70 to other elements throwing light on the meaning of the treaty.[3] It was certainly wise to look first at the evidence of what had been agreed between the parties, but the entire process of interpretation involved doing precisely that, in other words searching for evidence that would throw light on the meaning.

5. He had been impressed by Mr. Rosenne's remarks on preparatory work at the previous meeting.[4] In the case of certain treaties, it was almost essential to resort to the preparatory work at some stage, in order to elucidate, not the subjective intention of the parties, but the meaning of the text.

6. By the use of the word "further" in the English text and of somewhat different terms in the French and Spanish texts, article 70 definitely precluded the interpreter from using the preparatory work and the circumstances surrounding the conclusion of a treaty until after he had attempted to ascertain the meaning by the criteria laid down in article 69.

7. Even if it were admitted that the normal method of interpretation was to start by applying the methods or criteria listed in article 69, he saw no advantage in thus tying the interpreter's hands. Reference might be made in that connexion to Article 38. paragraph 1.*d*, of the Statute of the International Court of Justice, which specified that judicial decisions were "subsidiary" sources of international law. In practice, the Court had not thought it necessary to restrict the application of that sub-paragraph to cases in which no evidence of the law had been found by applying the preceding sub-paragraphs. If an attempt were made to impose a restriction with regard to interpretation it would be similarly disregarded, because it could not always be rigidly applied.

8. If the other members of the Commission were prepared to accept a less rigid hierarchical distinction between the contents of articles 69 and 70, he submitted that it would be less artificial and restrictive to convert article 70 into a separate paragraph 4 of article 69, drafted on the following lines:

> "4. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion in order to verify, confirm, or, where needed, to determine the meaning of the text".

Such a formulation would eliminate the unduly rigid provisions of sub-paragraphs (*a*) and (*b*) of the present article 70.

9. The CHAIRMAN, speaking as a member of the Commission, said it was both logical and reasonable to separate the two aspects of interpretation. In interpreting a written rule, the normal procedure was to refer first to the text and then, if its exact meaning could not be ascertained, to refer to extrinsic elements such as preparatory work and the circumstances in which the rule had been formulated.

10. Where recourse to preparatory work was concerned, members of the Commission were familiar with the controversy between the different schools of law and legal systems. English and American lawyers had always rather distrusted that method. In England, a law had to be sufficient in itself and a judge could not take the preparatory work into account; that was a mark of respect for the will of Parliament as expressed in the law. On the Continent the attitude to preparatory work was much more liberal. It was a striking fact that both views had been defended by eminent jurists, some of whom criticized recourse to preparatory work and tried to prove that it was ineffective in practice, while others regarded it as essential. There was much to be said on both sides.

11. The text of article 70 adopted at the first reading was a reasonable compromise between the two conflicting views. The Commission had given a certain primacy to the text of the treaty, without excluding the possibility of recourse to further means of interpretation such as the circumstances of the conclusion of the treaty and the preparatory work.

12. He would, however, be opposed to giving greater prominence to the preparatory work. Even if it was desired to ascertain the exact meaning of a legal rule by reference to the intention of the parties, it would be a serious mistake to attempt to make that intention override the text. Written law was an intention expressed in a certain formal manner and it was to that characteristic that it owed one of its advantages, namely, its stability; to disregard the formal expression would deprive it of that advantage.

13. The rule laid down for recourse to preparatory work was a reasonable one: reference was to be made to it in order to verify or confirm the apparent meaning of the text, so as to make sure that that meaning was in fact what the parties had intended. In sub-paragraph (*b*), the Commission had even gone a little further—a course of which he approved—by providing that if textual interpretation led to a result which was absurd or unreasonable it was justifiable to assume that the

[2] See 870th meeting, paras. 29-37.

[3] 872nd meeting, paras. 43-44.

[4] Paras. 30-36.

wording was defective and to rely on the statements of those who had formulated the text. Such a case was very similar to that of material error, and no one denied that an error could be corrected. There was no reason to believe that an examination of the preparatory work and of the circumstances in which the text had been drawn up would not make it possible to arrive at a reasonable meaning.

14. With regard to the structure of the draft, it would be better to keep the further means of interpretation separate; for although very important, they were not quite so important as the text itself. The value of the text as a formal expression of the will of the parties must not be diminished; in principle, it was the text which should be law between the parties. Consequently, like Mr. El-Erian, he fully approved of the title "*Moyens complémentaires d'interprétation*", and he hoped that similar expressions would be used in the English and Spanish texts.

15. In short, he was in favour of keeping articles 69 and 70 separate, and of allowing recourse to preparatory work to the extent and under the conditions laid down in article 70.

16. Mr. EL-ERIAN said he would first deal with the general question of the place of subsidiary means—especially the preparatory work—in the process of interpretation, a question which some writers considered to be one of the admissibility of certain evidence rather than of substantive law.

17. He congratulated the Special Rapporteur on not showing the bias of most English lawyers against preparatory work. As Lord McNair had said, an English lawyer approached the question "with a bias against resort to preparatory work, as that is, in general, contrary to his legal tradition and instinct in dealing with legislation and contracts".[5] In 1964, the Commission had wisely adopted a balanced formulation with regard to the place of subsidiary means in the process of interpretation. That remark applied in particular to preparatory work.

18. He still had some doubts about the relationship of article 70 to article 69 and those doubts had been strengthened by Mr. Briggs' remarks. The Commission was in general agreement that there were certain principal or original means of interpretation and certain subsidiary means. The whole interpretative process was, however, very intricate; it was accumulative, not consecutive. In the circumstances, and having regard to the somewhat divergent suggestions made by governments, he believed that the Commission's general approach had been sound and was not unduly restrictive. At the same time, the Drafting Committee should give careful consideration to Mr. Briggs' suggestion that articles 69 and 70 should be combined. A useful parallel was provided by Article 38, paragraph 1, of the Statute of the International Court of Justice.

19. In the commentary which the Commission had included in its 1964 report,[6] a number of judicial and arbitral decisions were cited in support of the proposition that there was no occasion to resort to the preparatory work if the text was sufficiently clear. All the members of the Commission agreed that the preparatory work was not an original means of determining the text of a treaty, but merely a means of confirming or elucidating its meaning. The essential principle was the primacy of the text as the authentic expression of the intention of the parties.

20. The contextual approach, however, did not dispose of the problem of preparatory work, as the Special Rapporteur had pointed out. The context of the treaty included such materials as the preamble and the annexes, but did not include previous drafts or other preparatory work. The term preparatory work was somewhat ambiguous; as Lord McNair had pointed out, it was "an omnibus expression which is used rather loosely to indicate all the documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation".[7] In some cases, the preparatory work would include a declaration made prior to the commencement of the negotiations; sometimes "heads of agreement" were subscribed to in advance and could serve to shed light on ambiguities in the treaty.

21. From his own experience, he could cite the example of the Anglo-Egyptian Agreement of 1954.[8] During the negotiations, it had been agreed by both parties that there would be no agreed minutes; that type of preparatory work was accordingly ruled out. However, the two parties had exchanged no less than nineteen letters, some of them dealing with the meaning of terms used in the text; those exchanges of letters formed an integral part of the Agreement. One of the problems thus dealt with was the fate of the Anglo-Egyptian Treaty of 1936. The British draft of article 2 had stated that the 1954 Agreement superseded the 1936 Treaty in case of conflict; but that provision had not been acceptable to Egypt, which had abrogated the 1936 Treaty in 1951. The Egyptian draft of article 2 had stated that the United Kingdom Government recognized the abrogation of the 1936 Treaty in 1951; but that provision had not been acceptable to the United Kingdom, which had not recognized the abrogation. As a compromise, a text had been adopted stating that the 1936 Treaty "is terminated", thus leaving the Egyptian Government free to maintain that it had terminated in 1951 and the United Kingdom Government free to maintain that it had terminated on 19 October 1954, the date of signature of the 1954 Agreement. The practical problem of the legal situation between 1951 and 1954 had been settled by an exchange of letters. The two Governments had waived all financial claims against each other and had established a mixed commission to deal with claims by private persons arising out of the situation during that period.

22. To sum up, he considered that the rule on preparatory work should be flexible and that the 1964 text of article 70 (A/CN.4/L.107) fulfilled that condition. He therefore supported the decision taken by the Special Rapporteur, after a thorough examination of government comments, not to propose any change in the text of the article.

[5] McNair, *The Law of Treaties* (1961), p. 411.

[6] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 204-205.

[7] McNair, *The Law of Treaties* (1961), p. 411.

[8] United Nations, *Treaty Series*, vol. 210, p. 24.

23. Mr. AGO said that, after listening to Mr. Briggs' statement, he thought it necessary to explain that his reasons for advocating the separation of articles 69 and 70 were based on logic: for the two articles dealt with two distinct and logically successive phases in the operation of interpretation. During the first phase, an attempt was made to ascertain the will of the parties from what they had said, first in the text and then in the ancillary elements of that text, namely, the context, the documents accompanying the treaty, agreements on the meaning of the text, and subsequent practice showing agreement on the meaning given to the text. If, after that, some doubt still remained, a different system was adopted: recourse was had to the history of the formulation of the text, in other words, the inquiry no longer centred on what the text said, but on how it had been arrived at. To that end, an examination was made of the preparatory work in the widest sense and of the circumstances of the treaty's conclusion. The separation of articles 69 and 70 made it clear that those two phases of interpretation succeeded each other; it did not in any way imply that the Commission was taking a position in favour of one theory rather than another. In particular, it did not mean that the Commission disapproved of recourse to the history of the conclusion of a treaty, which was often indispensable.

24. He was in some doubt about article 69, paragraph 2, in the Special Rapporteur's new text (A/CN.4/186/Add.6). How could it be established that the parties intended a term to have a special meaning, unless recourse was had to the further means of interpretation? That provision had perhaps been given a more suitable place in the 1964 text, where it followed article 70 as article 71. That was a point of detail which could be settled by the Drafting Committee.

25. The CHAIRMAN, speaking as a member of the Commission, said he wished to state his opinion on an important question raised at the previous meeting, namely, whether the work of the International Law Commission should be regarded as part of the preparatory work for the international conventions evolved from the drafts it prepared. When reference was made to preparatory work it was to find evidence of the intention of the parties. Obviously, the members of the Commission were not the parties to a convention concluded by the plenipotentiary representatives of States. But the very nature of a convention as an act of will made it essential to take into account all the work which had led to the formation of that will—all the material which the parties had had before them when drafting the final text. The text of a convention of the kind in question was adopted by a conference of plenipotentiaries which took the Commission's draft as a basis for discussion. The articles and the accompanying commentaries were discussed at some length and it quite often happened that one of the Commission's articles was adopted as it stood; in such cases, the plenipotentiaries had the Commission's commentary before them and adopted the article with the meaning given to it by the Commission. That was the usual attitude. He was therefore unable to agree with those who held that the Commission's work did not form part of the preparatory work for conventions concluded on the basis of its drafts.

26. Mr. TUNKIN said that great caution should be exercised in introducing into international law certain processes familiar to municipal law. The work of a parliament adopting legislation could not be compared with that of an international conference of sovereign States adopting the text of a treaty; in the latter case, the agreement of the sovereign States formed the basis of the treaty.

27. With regard to the work of the International Law Commission itself, although he agreed in principle that it formed part of the preparatory work, he could not go so far as the Chairman; in his view, the documents of the conference itself constituted the first order of preparatory work. It was true that the Commission prepared a commentary on each of its drafts, but that commentary was not always taken into account by diplomatic conferences. A conference might adopt one of the Commission's draft articles without change, but might place a somewhat different construction on it from that which was reflected in the Commission's commentary. It was necessary to adopt a realistic approach and to refer in the first place to the documents of the conference itself; the Commission's documents could serve as further preparatory work where appropriate.

28. Mr. ROSENNE said he agreed with Mr. Tunkin's views on the use of the Commission's proceedings as part of the preparatory work.

29. He was attracted by the suggestion made by Mr. Briggs, and supported by a number of other members, that article 70 should be incorporated in article 69 in a shortened form. That arrangement would do much to solve the problem.

30. The real difficulty in article 70 arose from the provisions of sub-paragraph (*b*). He had reflected on those provisions in the light of the Chairman's remarks at the previous meeting on the opening words of article 69, paragraph 1: " A treaty shall be interpreted in good faith . . . ",[9] and he failed to see how, if a treaty was so interpreted, honestly using all the various methods to elucidate its text set forth in article 69, it was possible to reach a result that was " manifestly absurd or unreasonable ". It was true that that phrase appeared from time to time in international jurisprudence. But if that jurisprudence was examined closely, it would be found that the absurd results in question were not the outcome of an interpretation in good faith; in every case, the interpretation had been extremely narrow and literal and had been arrived at otherwise than by making use of the various elements mentioned in article 69.

31. At the previous meeting, he had raised the question whether many of the Commission's substantive articles could be applied without fairly free recourse to the preparatory work.[10] That concern appeared to be shared by Mr. Jiménez de Aréchaga. It would be very difficult to reconsider the text of the substantive articles at that stage, and he therefore thought it would be more correct for the provision on preparatory work to be drafted taking full account of the substantive rules already adopted by the Commission.

[9] Para. 19.

[10] Paras. 31-33.

32. Lastly, he fully shared the view of the majority of members that the preparatory work and the circumstances of the conclusion of the treaty, as elements to be considered by the interpreter, were of a different order from the elements set forth in article 69, in which the text was the main factor. At the same time, he thought that the sharp differentiation established by articles 69 and 70 was not justified in practice and was not the best way of expressing what was only a difference in degree.

33. Mr. JIMÉNEZ de ARÉCHAGA said he thought the Special Rapporteur and the Drafting Committee should study the interaction of article 70 and the substantive articles. He had not suggested that the substantive articles should be altered; perhaps the simplest course would be to add to article 70 a proviso to the effect that its provisions were without prejudice to the use of preparatory work in the interpretation of certain articles of the draft, such as article 39.

34. Mr. EL-ERIAN said that the position of the work of the International Law Commission as preparatory work for a diplomatic conference could be illustrated by the United Nations Conference on the Law of the Sea, held at Geneva in 1958. When that Conference had voted on the text of the 1958 Convention on the Territorial Sea and the Contiguous Zone, it had had before it the Commission's draft articles on the regime of the territorial sea, which had included an article 25 on the right of passage of warships through the territorial sea.[11] That article, adopted as article 24 by the First Committee of the Conference, had provided for the right of coastal States to make such passage " subject to previous authorization or notification ". A separate vote had been requested on the crucial words " authorization or ", which had been rejected; the article, thus amended, had failed to obtain the required majority, so that it had not been adopted.[12] The omission from the Convention of an article on the right of passage of warships had been interpreted by some writers as meaning that there were no restrictions on such passage. He himself considered that that interpretation was not consistent with the preparatory work, in view of the fact that the Conference had had the Commission's draft article 25 before it.

35. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion on article 70, said that the main point to be decided was whether or not the Commission wished to maintain the structure of articles 69 and 70 suggested in his sixth report (A/CN.4/186/Add.6). He had understood the trend of opinion at the sixteenth session to be in favour of incorporating in article 69 those elements of interpretation that were binding on the parties and of covering certain other elements in article 70. He agreed with Mr. Tunkin on the nature of the former.

36. The circumstances of the conclusion of a treaty were important and it was not always easy to draw a sharp distinction between them and the context, but those two elements of interpretation were of a different legal character; he personally preferred to discuss the problem, not in terms of a hierarchy, but in the light of legal and logical considerations. He could not subscribe to Mr. Ago's theory of successive phases of interpretation if that meant succession in time: the process of interpretation was essentially a simultaneous one, though logic might dictate a certain order of thought.

37. He doubted whether the majority of the Commission was in favour of transferring the contents of article 70 to article 69 to form a new paragraph 4. The point could be considered by the Drafting Committee, but he could see no compelling reason for such a change. Moreover, if the Commission wished to maintain the principle it had adopted at the sixteenth session that the starting point of interpretation was the text of the treaty itself, that principle would be undermined if more prominence were given to the preparatory work by incorporating article 70 in article 69. While he had never underestimated the importance of recourse to the preparatory work for the purpose of verification and confirmation, it was essential to discourage attempts by a party to resort to that means of interpretation in order to dispute the result of an interpretation by the means set out in article 69.

38. The criticism that sub-paragraph (*a*) of article 70 was too stringent seemed to him to be without foundation; surely that sub-paragraph reflected the existing rule that interpretation by reference to the preparatory work and the circumstances of a treaty's conclusion could be decisive only when the processes set out in article 69 failed to eliminate ambiguity or obscurity.

39. Too much had been made of the difficulties that sub-paragraph (*b*) might cause. In practice, cases in which interpretation in the light of the objects and purposes of the treaty led to a manifestly absurd or unreasonable result were rare, but they could occur and should be covered. He had in mind, for instance, a drafting error which might give, as a matter of language, a perfectly possible interpretation, but one which was " absurd " in the light of the object of the particular treaty. The phrase " in the light of the objects and purposes of the treaty " had been inserted as an objective criterion in order to discourage disingenuous recourse to the notion of an " absurd " interpretation.

40. Mr. Ago had had second thoughts about the desirability of transferring article 71 of the 1964 text to article 69 to form a new paragraph 2, because a meaning other than the ordinary meaning of a term could often be discovered only in the preparatory work or from the circumstances of the conclusion of a treaty. That was another matter that the Drafting Committee could consider but, in defence of the change he had suggested, he would point out that articles 69 and 71 of the 1964 text could be construed as excluding article 71 from the application of the provisions of article 70.

41. The Drafting Committee should discuss the points of drafting brought up in the Commission, such as the comparative merits of the phrases " elements of interpretation " and " means of interpretation ". The word " further " had been used in article 70 in order to avoid the word " subsidiary ", which in Article 38, paragraph 1.*d.* of the Statue of the International Court placed an emphasis on the subordinate character of

[11] *Yearbook of the International Law Commission, 1955*, vol. II, p. 41.

[12] United Nations Conference on the Law of the Sea, *Official Records*, vol. II, pp. 66-68.

those means that would not perhaps be appropriate in the draft articles on interpretation.

42. The observations made about the status of the Commission's own documents as part of the preparatory work for the conclusion of an international instrument had been of great interest, but, for lack of time, he would not touch on that subject.

43. He agreed with Mr. Rosenne that it would be necessary to consider whether the phrase " the circumstances of its conclusion " in article 70 necessitated any change in substantive articles.

44. Mr. AMADO said that the discussion, which had been of an exceptionally high standard, and the Special Rapporteur's reply had confirmed him in his view that, where interpretation was concerned, the Commission's first duty was to safeguard the text of the treaty. Owing to the influence of municipal law, there was always a tendency to look for " the intention of the parties ", and that expression sprang to the lips of speakers almost automatically. But the essential, the fundamental matter was the text of the treaty, the context, the express statement of the will of the parties. The treaty existed and all its provisions had to be carried out in good faith. If the text failed to convey the purpose of the States concerned, if it did not enable States to exercise their authority as States in performing the treaty, then the meaning of the text must be sought by every available scientific means.

45. He had at first been attracted by the argument advanced by Mr. Ago, who had presented recourse to preparatory work as a second phase of interpretation; but then he had been convinced by the Special Rapporteur's reply, which had shown that the various means of interpretation could be employed simultaneously. There was nothing to prevent the interpreter from even considering the preparatory work. He was not enthusiastic about preparatory work; he knew what happened at conferences and how States sometimes avoided expressing their real opinion or arranged for it to be expressed by a friendly State, so that the preparatory work must be used with great caution. Nevertheless, distrust of preparatory work should not be carried to the point of despising it or refusing to take it into consideration.

46. Mr. Briggs's proposal to combine articles 69 and 70 had merit; since there was no hierarchy and no precedence of one means of interpretation over another, and since they could all be useful, why not put them together? But he would like to put the converse question: why should they not be separated?

47. The CHAIRMAN suggested that article 70 should be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[13]

Organization of Work

48. The CHAIRMAN announced that the officers of the Commission had met to consider the progress of the Commission's work. They had proposed that members of the Commission should prepare to examine part of the report on Special Missions (A/CN.4/189), namely the introduction and chapter II, omitting chapter I which dealt with the history of the topic.

49. Mr. BARTOŠ said that he had handed his report to the Secretariat twenty days previously, but the Languages Division had been unable to translate it any sooner.

50. Difficulties had also arisen because certain Governments—those of Austria, Malta, the United Kingdom and the USSR—had not submitted their comments within the prescribed time limit. The comments of the two last-mentioned governments related to the substance; he had prepared summaries of them (A/CN.4/188/Add.1 and Add.2), but the text was not yet available in all three languages and the Commission could not begin its examination of the draft articles until it had the corresponding sections of those documents before it. It could discuss general questions of a preliminary nature. Once the Commission had settled the eight general questions raised in chapter II of his report, it could apply its decisions to the articles affected.

51. Mr. WATTLES, Deputy Secretary to the Commission, said he wished to explain the position in regard to the translation of the third report on special missions (A/CN.4/189 and Add.1). Through force of circumstances, the reports of the special rapporteurs were having to be translated by the Languages Division of the United Nations Office at Geneva during the session, instead of at Headquarters before the session. Consequently, the workload of the Office had been much heavier than usual, perhaps heavier than during any of the Commission's sessions at Geneva. The Languages Division also had to handle a considerable amount of other work. The secretariat of the Legal Division was grateful to the Languages Division for having done everything possible to ensure that the documents needed by the Commission were issued in time. Priority had been given, first, to the Special Rapporteur's reports on the law of treaties and his proposals for the Drafting Committee and, secondly, to the material on special missions. As it had been impossible to recruit additional translators qualified to do the Commission's difficult and complex work, there had been unavoidable delay in the issue of summary records.

52. The CHAIRMAN, referring to the delay in the appearance of the summary records, said he thought the Commission could accept the situation, as it was due to exceptional circumstances. The Secretariat should however, allow members of the Commission reasonable time to send in their corrections, even after the end of the session.

53. Mr. WATTLES, Deputy Secretary to the Commission, said the Secretariat was aware that it would take time for the summary records of the last meetings of the session to reach members after their departure from Geneva, but it must be borne in mind that delay in the submission of corrections would hold up the publication of the 1966 *Yearbook*. As governments would presumably again be asked for their comments on the Commission's final report on the law of treaties, to be submitted to the next session of the General Assembly, and as many of them found the *Yearbook* indispensable for preparing their comments, it was important to avoid any delay.

[13] For resumption of discussion, see 884th meeting, paras. 32-41.

He hoped that members would send in their corrections as early as possible.

54. The CHAIRMAN said that the officers of the Commission had considered a further question: the duration of the current session. On the basis of the information provided by the Secretariat, they had found that the Commission would not be able to conclude its session on 8 July and that it was difficult to say yet whether it would be able to do so on 15 July. The officers therefore proposed that the session should be provisionally extended until 15 July. It could then be decided, in the light of the progress made during the next two or three weeks, whether that date was final or whether any further extension was necessary.

55. After a discussion in which Mr. JIMÉNEZ de ARÉCHAGA, Mr. TUNKIN, Mr. AGO, Mr. BARTOŠ, Sir Humphrey WALDOCK, Mr. AMADO, Mr. VERDROSS and Mr. ROSENNE took part, the CHAIRMAN proposed that, since it was uncertain whether the Commission could in fact complete its work by 15 July, it should decide to conclude its session on 19 July at the latest. He hoped that members of the Commission would try to make their statements shorter.

It was so agreed.

The meeting rose at 6.5 p.m.

874th MEETING

Tuesday, 21 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. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/186 and Add.1-7; A/CN.4/L.107, L.115 and Corr.1)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 72 (Treaties drawn up in two or more languages)

ARTICLE 73 (Interpretation of treaties having two or more texts)

1. The CHAIRMAN invited the Commission to consider articles 72 and 73 (A/CN.4/L.107), for which the Special Rapporteur proposed a new combined text, reading:

Article 72 [29]

Interpretation of treaties drawn up in two or more languages

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, unless the treaty otherwise provides.

2. A version of the treaty drawn up in a language other than one of those in which the text was authenticated shall also be considered as an authentic text and authoritative if the treaty so provides or the parties so agree.

3. Authentic texts are equally authoritative in each language unless the treaty provides that, in the event of divergence, a particular text shall prevail.

4. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 3, when a comparison of the texts discloses a difference in the expression of the treaty and any resulting ambiguity or obscurity is not removed by the application of article 69-70, a meaning which as far as possible reconciles the texts shall be adopted.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, in his sixth report (A/CN.4/186/Add.7), he had suggested that articles 72 and 73 should be combined into a single article of four paragraphs which preserved the substance of the two original articles.

3. There had been few government comments on articles 72 and 73. One of the questions raised had been whether the term " text " or " version " should be used. On that point, he referred the Commission to paragraphs 2-5 of his observations. The United States Government had pointed to the need to stress the unity of the treaty and he had taken that point into account in redrafting articles 72 and 73.

4. The reference in paragraph 2 (*b*) of the former article 72 to " the established rules of an international organization " had been dropped in order to take into account the general provisions on the subject of international organizations adopted by the Commission in article 3 (*bis*) (A/CN.4/L.115).

5. Mr. VERDROSS said he approved of the new wording proposed by the Special Rapporteur. However, it might perhaps be necessary to add at the end of paragraph 4 a provision to the effect that, if it was impossible to find a meaning which reconciled the texts, the language to be considered should be that in which the treaty had been drawn up.

6. Mr. TSURUOKA said he accepted the whole of the article proposed by the Special Rapporteur. The reservation in the second sentence of paragraph 4 regarding the case mentioned in paragraph 3 was important, because that case was fairly common. For example, if Japan and Thailand concluded a treaty, it would normally be drafted in Japanese and in Thai; an English text might also be drawn up, however, and the treaty might stipulate that the three texts were equally authentic, but that in the event of a dispute over interpretation, the English text would prevail.

7. Mr. ROSENNE said he was in general agreement with the Special Rapporteur's proposal combining articles 72 and 73. He was satisfied by the arguments for the use of the word " text " in preference to " version " given in paragraphs 3 and 4 of the Special Rapporteur's observations.