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Summary record of the 883rd meeting

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apply to visits by Heads of State: it was impossible to stipulate that the same honours should be given and the same facilities granted to all. The Commission should bear that point in mind when it reverted to the article on non-discrimination.

The meeting rose at 12.50 p.m.

883rd MEETING

Monday, 4 July 1966, at 3 p.m.

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

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

Special Missions

(A/CN.4/188 and Add. 1 and 2, A/CN.4/189 and Add. 1 and 2)

(continued)

[Item 2 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on his draft provisions concerning so-called high-level special missions (A/CN.4/189/Add.1).

2. Mr. BARTOŠ, Special Rapporteur, said that most questions relating to high-level special missions were already governed by the rules of courtesy and, usually, by an *ad hoc* agreement between the sending State and the receiving State. Nevertheless, there could be cases in which a mission led by a Head of State or other eminent person was governed neither by the rules of protocol for official visits, nor by the rules on special missions, nor by an *ad hoc* agreement between the sending State and the receiving State. It would therefore be useful to lay down rules on the subject. But governments were not agreed on the minimum level of such missions: should the term "high-level" cover only missions led by a Head of State or Head of Government or should it also include missions led by a Minister or even, for instance, a Chief of Staff?

3. There could be no doubt that for missions led by a Head of State rules of general international law already existed, so that there was no need to lay down any special rules. Nevertheless, the comment by the Government of Upper Volta (A/CN.4/188) was quite pertinent: through a desire to enjoy full freedom of movement, a Head of State visiting a foreign country sometimes caused grave anxiety to the services responsible for his safety. But private visits by Heads of State, which were obviously outside the scope of the topic being studied by the Commission, should not be confused with official visits by Heads of State, which were covered by general rules of international law, often confirmed by bilateral

agreements between the States concerned, or with special missions led by Heads of State. Official visits were often combined with special missions; the head and members of such missions had a dual legal status, and in addition to the rules of protocol applicable to such visits, all the guarantees relating to special missions should be applied to them.

4. He thought the best method to adopt would be that suggested by Mr. Castrén,¹ namely, to add special provisions on so-called high-level missions to individual articles of the draft where it appeared necessary. For example, a paragraph could be added to article 17 stipulating that Heads of State or Heads of Government leading a special mission should also enjoy the guarantees, privileges and immunities established by custom and by general public international law or provided for by bilateral agreement between the States concerned.

5. He therefore proposed that the Commission instruct him to add provisions on high-level missions to the draft articles where necessary.

6. The CHAIRMAN said that, if there were no objections, he would assume that the Commission agreed to adopt the Special Rapporteur's proposal.

It was so decided.

7. Mr. BARTOŠ, Special Rapporteur, drew attention to the question of an introductory article which he had dealt with in chapter IV of his report (A/CN.4/189/Add.1). From the theoretical point of view, he was rather against including definitions in the texts of conventions, because they were apt to be dangerous; but he recognized that the English and American system, already adopted for many conventions and followed by the Commission in most of its drafts, limited the danger by laying down a practical definition for the purposes of the convention, and consequently did not commit the drafters from the theoretical viewpoint.

8. Many delegations to the General Assembly had advocated the inclusion of an introductory article containing definitions. Some had expressed the view that the terminology of the two Vienna Conventions should be followed as closely as possible, whereas the representative of Jordan had said that only the Vienna Convention on Diplomatic Relations should be taken as a guide.

9. He did not quite understand the purport of the comment of the Afghan representative, who had proposed that "a standard terminology of international law" should be adopted in formulating the rules.

10. The Government of Israel had raised two questions in its comments: the inclusion of definitions and the possibility of making cross-references to the Vienna Convention on Diplomatic Relations.

11. He had prepared a draft introductory article which kept as closely as possible to the phraseology used in the Vienna Convention on Diplomatic Relations. The initial proviso "For the purposes of the present articles" kept the scope of the proposed definitions within narrow limits. In paragraphs (a) to (r), he had defined the terms most frequently used in the draft which it had seemed to him useful to define.

¹ Previous meeting, para. 50.

12. The CHAIRMAN, speaking as a member of the Commission, expressed the view—which he thought was shared by all the members of the Commission—that it was necessary to insert an article on definitions at the beginning of the draft. The practice of providing definitions was a valuable contribution of the English and American system; it could be helpful both to those who had to interpret treaties and to those who had to apply them. But that principle having been accepted, detailed discussion of the definitions to be included in the draft on special missions, of their desirability and of their accuracy, should be deferred until the draft had been completed.

13. Mr. BARTOŠ, Special Rapporteur, said that the Commission could choose between the empirical method, which consisted in completing the draft and then seeing whether the concepts used should be defined and how that should be done, and the dogmatic method, which consisted in first stating the definitions and then applying them.

14. He would be glad to have the Commission's views on the other question raised by the Government of Israel: that of cross-references to the Vienna Convention on Diplomatic Relations. He had already implied his opposition to such cross-references, which would needlessly complicate a text that should be cast in the form of a separate instrument.

15. Mr. EL-ERIAN said he agreed with the Chairman that an article containing definitions would be useful. The texts of the definitions were usually considered when the whole draft had been completed; the definitions article of the draft on the law of treaties was a case in point.

16. He had serious doubts about the suggested system of cross-references. Such a system might be suitable for a protocol which formed an integral part of a main treaty, or for an exchange of letters attached to a principal instrument; but he agreed with the Special Rapporteur that the draft on special missions should constitute an independent convention, not merely an annex to the 1961 Vienna Convention on Diplomatic Relations. A system of cross-references would therefore not be appropriate.

17. The CHAIRMAN, speaking as a member of the Commission, said he endorsed Mr. El-Erian's remarks concerning definitions.

18. Mr. ROSENNE said he agreed with the Chairman about the article containing definitions.

19. It would be premature for the Commission to discuss the question of a system of cross-references at that stage; much would depend on the final shape of the draft articles on special missions.

20. Mr. BRIGGS said he agreed with the Chairman and with Mr. El-Erian on the desirability of postponing discussion of the definitions.

21. Mr. BARTOŠ, Special Rapporteur, proposed that the Commission decide, in principle, to draft an introductory article containing definitions, but defer detailed examination of it.

22. He asked members of the Commission who had any comments or suggestions to make concerning the content of the article to communicate them to him in writing.

23. The CHAIRMAN said that, if there were no objections, he would assume that the Commission agreed to adopt the Special Rapporteur's proposal.

It was so decided.

Law of Treaties

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

(resumed from the 880th meeting)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 66 (Amendment of multilateral treaties) [36]²

24. The CHAIRMAN invited the Commission to consider article 66 as redrafted by the Drafting Committee.

25. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 66:

"1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

"2. Any proposal to amend a multilateral treaty as between all the parties must be notified to every party each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

"3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

"4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; and article 63, paragraph 4 (b) applies in relation to such State.

"5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended;

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

26. The new paragraph 1 had been introduced by the Drafting Committee for the purpose of making all the paragraphs of article 66, instead of only three as previously, subject to the proviso "Unless the treaty otherwise provides". Consequent on the introduction of that new paragraph 1, the four substantive paragraphs had been renumbered 2, 3, 4, and 5.

27. In paragraph 5, formerly paragraph 4, the additional proviso "failing an expression of a different intention by that State" had been introduced.

² For earlier discussion, see 875th meeting, paras. 42-78.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that the purpose of the introduction of those words was to eliminate an inconsistency with paragraph 4 (b) of article 63 to which attention had been drawn during the discussion at the 875th meeting.³ They served to protect the State which became a party to the treaty, by safeguarding its right to determine its own position.

29. Mr. TSURUOKA said he doubted whether the presumption in paragraph 5 (b) was really valid. It might be better to reverse that presumption and to state that, failing an expression of a different intention, any State which became a party to the treaty after the entry into force of the amending agreement should be considered as a party only to the treaty as amended. With the exception of some well-defined cases relating to certain international institutions, the presumption in most ordinary cases was that any State which became a party to the treaty after it had been amended had no intention of being bound by the unamended treaty, even vis-à-vis States which were parties only to that treaty. He therefore suggested that paragraph 5 (b) be deleted.

30. The CHAIRMAN, speaking as a member of the Commission, asked Mr. Tsuruoka what, in his opinion, were the relations between a State which became a party to the treaty after it had been amended and States which were parties only to the unamended treaty.

31. Mr. TSURUOKA said that, in his opinion, a State which became a party to a treaty after the entry into force of the amending agreement did not *ipso facto* enter into contractual relations with States which were parties only to the unamended treaty, but could enter into such relations if it so wished.

32. Sir Humphrey WALDOCK, Special Rapporteur, said that it was not infrequent in United Nations practice for a State which ratified, or acceded to, a treaty not to specify clearly its intention to ratify, or accede to, the treaty as amended. The rule in paragraph 5 reflected the existing practice of the Secretary-General, as depositary of a large number of multilateral treaties, of regarding the States concerned as having ratified, or acceded to, the treaty as amended. That rule was the one likely to produce the best results in the history of the treaty; it was a progressive rule, which made for orderly development. The position of the State concerned was in any case adequately protected by the saving clause "failing an expression of a different intention by that State" which the Drafting Committee had introduced into paragraph 5.

33. Mr. BARTOŠ said that although he was grateful to the Drafting Committee for having taken account of the objections he had raised at the 875th meeting, he was not sure that the text now proposed was fully satisfactory. As a general rule, the amendment of a treaty meant that some progress had been made by eliminating the difficulties which had prevented certain States from acceding to the treaty in its original form. The rights of the parties which continued to adhere to the original text must, of course, be respected, but if the treaty had been amended to allow for new accessions, it was hard to agree that States which had become parties to a treaty because it had been amended were compelled to accept the obligations laid down in the unamended treaty vis-à-vis States

which adhered to their original position and did not wish to accept the amended version. Such a commitment by newly-acceding States would accord neither with their own wishes nor with the wishes of the parties which had amended the treaty.

34. Paragraph 5 (b) went beyond what he had asked for; he had merely wished to safeguard the position of States which had not accepted the amendment, but only as between themselves, not vis-à-vis States which had acceded to the treaty only because it had been amended.

35. He would not, however, vote against article 66 in the revised form submitted by the Drafting Committee.

36. Mr. JIMÉNEZ de ARÉCHAGA said he supported the new text proposed by the Drafting Committee, which favoured the development of treaty relations. The proviso in paragraph 1 and the additional saving clause in paragraph 5 fully protected the State concerned, by leaving it entirely free to make its own choice in the matter. If it had any objection to any of the provisions of the original treaty, it could always express its intention not to be bound by the unamended treaty.

37. Mr. AGO said he understood Mr. Tsuruoka's doubts over paragraph 5 (b). The Committee had to choose between two presumptions, both of which were somewhat arbitrary. Under the Drafting Committee's presumption, a State which became a party to a treaty after the entry into force of the amending agreement was understood, failing an expression of a different intention, to wish to be bound at the same time by the unamended treaty vis-à-vis States which were parties only to that treaty. Under the other presumption, the State in question was not bound by the original treaty unless it expressed the wish to be so bound. The first of those presumptions was perhaps preferable.

38. In any case, the decisive factor was the manifestation of its intention by the State which became a party to the amended treaty; in such a situation, it was hard to imagine that it would fail to specify the relations it intended to enter into vis-à-vis States which were parties only to the original treaty.

39. Mr. TUNKIN said that if paragraph 5 (b) were deleted, the change in substance would not be very great. A State which became a party to the treaty had always a choice in the matter; the only difference would be to make the rule less clear.

40. He was in favour of retaining paragraph 5 (b), because its provisions tallied with those of paragraph 4 and placed a new party to the treaty in the same position as the original parties.

41. Mr. BRIGGS said that he had accepted paragraph 5 (b) in the Drafting Committee but now had doubts regarding its relationship with other parts of the article. He did not see how the proviso "failing an expression of a different intention by that State" could apply to sub-paragraph (b).

42. The CHAIRMAN, speaking as a member of the Commission, said that the question raised by Mr. Tsuruoka related to the interpretation to be put on the silence of a State which, on becoming a party to an amended treaty, failed to express any intention concerning its relations with States which were parties only to the unamended treaty.

³ Paras. 58-63.

43. On the whole, he was inclined to favour the presumption suggested by Mr. Tsuruoka, because the general trend in international relations was to regard the purpose of amending a treaty as being to adapt it to the changed conditions of contemporary life. The presumption suggested by Mr. Tsuruoka would be prejudicial to no one, since a State which became a party to an amended treaty could expressly regulate its relations both with States parties to the unamended treaty and with States parties to the amended treaty. The question was not very important from a practical point of view and he would willingly accept the majority opinion; he would not vote against the article.

44. Mr. TSURUOKA said that, although the result would be practically the same whichever wording were chosen, he doubted whether it would be logical to choose the presumption submitted by the Drafting Committee. When a treaty had been amended, was there one treaty or two?

45. Normally a State which accepted a treaty was bound by that treaty alone. In the case in point, however, the text allowed a State the possibility of becoming a party to both treaties and presumed that it accepted both simultaneously, because it had stated that it would become a party to the amended treaty.

46. Surely both normal reasoning and the arguments advanced by Mr. Bartoš and Mr. Yasseen would support his own proposal, rather than the Drafting Committee's. He would not vote against the Drafting Committee's text, but would be obliged to abstain.

47. Mr. AMADO said that he was perplexed by paragraph 5. How could a State become a party to a treaty and not be considered as a party to that treaty? It had waited for the original treaty to be amended and had become a party to the treaty which amended the original treaty. But it was impossible to say that, having become a party, it should be "considered as a party": it genuinely was a party to the treaty. The wording "considered as a party to the treaty" was really a piece of verbal juggling inserted in order to justify paragraph 5 (b) and safeguard the original treaty so that States which accepted the amended treaty might maintain treaty relations with the other States, but that did not make it any less redundant.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that some of the remarks made during the discussion suggested an unduly optimistic view of the process of treaty amendment in international law. In the case of multilateral treaties with a large number of parties, it was quite common for an amendment to be ratified by only a few of them. On its entry into force, the amending agreement not infrequently bound only a few of the States parties to the original agreement.

49. The problem then arose of a State which became a party to the treaty after the entry into force of the amending agreement; under paragraph 5 (a), that State was assumed to have wished to subscribe to the treaty as amended. However, since the parties to the amending agreement might in fact be only a small fraction of the total number of parties to the original treaty, it was necessary to introduce the flexible formula embodied in sub-paragraph (b). That formula enabled the new party

not to be cut off from treaty relations with those States which were not bound by the amending agreement but remained bound by the unamended treaty.

50. The rule in paragraph 5 (b) was, he was convinced, in the best interests of treaty relations.

51. Mr. BARTOŠ said that it was not the first time that the question had been asked whether, when a treaty had been amended, there was one treaty or two. The United Nations already had a fairly well established practice in the matter. On several occasions, when treaties concluded under the auspices of the League of Nations and the United Nations had been amended and consolidated in a single instrument, it had been made quite clear that in future there would be only one treaty, but that parties which had undertaken obligations under the original instruments would continue to be bound, within the limits of the obligations they had contracted under those instruments. The purpose of that was to ensure that States were not liberated from obligations of a progressive humanitarian character which they had undertaken by acceding to conventions such as those for the suppression of the traffic in opium, of prostitution and of the white slave traffic.

52. The Commission's draft contained an innovation, in that it reversed the position by stating that newly-acceding States had obligations vis-à-vis those States which were already bound by contractual obligations, within the limits and terms of their obligations, instead of stating that States which previously had contractual obligations remained bound by those obligations. There was no real difference, because the States parties to the earlier instruments were not freed from their obligations, while the States parties to the new treaties had a reciprocal obligation.

53. In his opinion, there were not two treaties, but two sets of obligations under the same treaty. Far from being an innovation, that idea had already been applied several times by the United Nations at conferences convened to amend multilateral treaties. There was only one treaty, but the obligations it imposed were not uniform.

54. The only question he had asked himself was how to treat States which had not accepted the original treaty, since they had compelled the parties to amend it so that they themselves could accede to it. But that was a secondary question and could be left aside so that the Drafting Committee's proposal could be adopted. Although he had some hesitation on theoretical grounds, in practice he intended to vote for the Drafting Committee's new text.

55. Mr. REUTER said he agreed that there might be some doubt about paragraph 5 (b) from the point of view of logic. The Commission had not always made it absolutely clear what it regarded as an "amendment" as opposed to a "modification", and it seemed that the point would have to remain somewhat esoteric.

56. He nevertheless considered that paragraph 5 (b) did not impair the homogeneity of the draft, especially if it were compared with the solutions adopted with regard to reservations. There the situation was reversed but it fitted in quite well with the one that the Commission was now considering. Paragraph 5 (b) had been drafted in

terms which safeguarded the maximum development of treaty relations, and for that reason he would vote for it.

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

57. Mr. WATTLES (Deputy Secretary to the Commission) said that paragraph 5 (a) did not go as far as the General Assembly had frequently done in dealing with amending agreements. In United Nations practice it was usually assumed that any ratifications or accessions to a treaty after the entry into force of an amending agreement should be regarded as relating to the treaty as amended. Ostensibly therefore the General Assembly did not allow an option to States which had merely ratified an amending agreement. The question had arisen in practice when the Secretary-General had received instruments in which no allusion was made to the treaty as amended. In practice, all the States concerned had accepted the Secretary-General's understanding that their ratification or accession related to the treaty as amended rather than to the original treaty.

58. The case dealt with in paragraph 5 (b) had not occurred in United Nations practice, but it had occurred in connexion with the treaties of international institutions like the Berne Union, which usually provided that any State becoming a party to the latest version of an agreement should be considered a party to earlier versions in respect of States which were parties only to those earlier versions.

59. Mr. TSURUOKA said that his proposal to reverse the Drafting Committee's presumption had been made in the interests of logic both in the article and in the general structure of the draft.

60. In the article, it was assumed that there were two different treaties, which might be cumulative, and that for a time there would be two sets of treaty relations. Paragraph 5 enabled a State to accept only the second treaty, and that accorded with existing practice, as had been confirmed by the Deputy-Secretary to the Commission.

61. But there still seemed to be some confusion over paragraph 5 (b), particularly since some members took the view that its purpose was to promote the development of treaty relations at the cost of sacrificing the difference in degree between such relations, whereas other members took the view that the purpose was to unify treaty relations. Those ideas were diametrically opposed, and the Commission should choose one or the other.

62. It was all very well to say that there was only one treaty. The draft article enabled the State concerned to enter into relations with the parties to the original treaty, but that was only possible precisely because there was a treaty which still existed, at least for a time.

63. The CHAIRMAN, speaking as a member of the Commission, suggested that the text might be clearer if the word "and" were inserted between paragraphs 5 (a) and (b).

64. Mr. AGO said that, in deciding the question, it must not be forgotten that the case was manifestly one of a residuary rule. And in establishing a residuary rule, certain criteria had to be taken as a basis and a choice made between different possibilities. Normally, States would express their views and indicate their preference. The Commission's task was therefore simply to state

what was to be presumed in the exceptional case where they did not express their views.

65. The situation was that there was an original treaty and an amended treaty. The former remained in force as between certain parties, while the second had entered into force as between the other parties. The third State, which after all was not usually blind, would be aware of the circumstances and would indicate its preference. It was not inconceivable that it might decide to accede to the original treaty. But if it did not express its intention, must it be presumed that it wished to accede to the unamended treaty rather than to the amended treaty? Obviously not. The treaty had been amended and the presumption in paragraph 5 (a) must be inferred.

66. There was however another problem. The third State had acceded to an amended treaty and would therefore be bound by that amended treaty vis-à-vis the States which had accepted the amendment. But what would be its relations with the other States? It might not wish to have contractual relations with them; it might wish to have relations only with those States which had amended the treaty, in which case it would normally say so. Must it really be presumed that, unless a State declared that it did not wish to be bound by contractual relations with those States which had not accepted the amended treaty, it did not intend to have any relations with them? He did not believe that that was so. In such a case at least, the presumption should be in favour of maximum treaty relations, that the State which acceded to the amended treaty intended to be bound by that treaty vis-à-vis those States which had accepted the amendment and by the unamended treaty vis-à-vis those States which had not accepted the amendment.

67. The presumption certainly contained an arbitrary element, but that was inherent in any presumption. If the contrary presumption were adopted, the arbitrary element would be even more marked, and the consequences would be prejudicial to the development of treaty relations. That was why he thought that the Special Rapporteur's view should be accepted.

68. Sir Humphrey WALDOCK, Special Rapporteur, said that the insertion of the word "and" would be quite acceptable to him; it had certainly been the intention of the Drafting Committee that the rules should be cumulative.

69. It had to be remembered that in many cases the State concerned would be one which had signed the original treaty and had not ratified it, often because the process of ratification took a considerable time. If that State finally announced that it was to become a party to the treaty and gave no specific indication that it did not wish to be a party vis-à-vis the States parties only to the original treaty, it was surely not very arbitrary on the part of the Commission to say that, in the absence of any indication of intention, that State should be considered a party to the unamended treaty, which after all it had originally signed.

70. Accession raised rather different problems, but it was impossible to go into too much detail in laying down a general presumption of that kind. Frequently, the amending agreement dealt with quite minor matters which did not affect the main substance of the treaty.

If there were no rule, the Commission might be preventing the development of desirable treaty relations, and it was that development which the Drafting Committee's text was intended to achieve.

71. The CHAIRMAN put to the vote the Drafting Committee's text for article 66, with the addition of the word "and" between sub-paragraphs (a) and (b) of paragraph 5.

Article 66 was adopted by 13 votes to none, with 2 abstentions.

ARTICLE 68 (Modification of treaties by subsequent practice) [38]⁴

72. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee had proposed a new title and text for article 68 reading:

"Modification of treaties by subsequent practice"

"A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions."

73. Mr. RUDA said that, although he accepted the Drafting Committee's text, he was anxious to know whether a definition of "modification" would be given in the commentary. Paragraph (9) of the commentary to articles 65 and 66 in its 1964 report gave a definition of what the Commission meant by "*modificación*" in that particular context.⁵ Was the meaning of the word "modification" in the new article 68 to be understood in accordance with that definition?

74. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee, in the belief that it was following the point of view expressed by the Commission in 1964, had thought it best not to use the word "amendment" in article 68 and to reserve the word amendment to describe a formal attempt, in accordance with article 66, to amend the terms of a treaty as between all the parties. The word "modification" applied to a process other than such a formal attempt.

75. The final commentary should indicate precisely in what sense the words "amendment" and "modification" were used.

76. Mr. BARTOŠ said he interpreted the text to mean that the agreement of the parties was in fact the agreement of *all* the parties to the treaty. If that was indeed the meaning of the text, he would vote for it. Since the Commission had not explicitly accepted the possibility of modification as between some parties, it should not contradict itself.

77. Mr. JIMÉNEZ de ARÉCHAGA said that it was not his impression that the Commission had tried to differentiate between the terms "amendment" and "modification" by suggesting that "amendment" meant an operation which involved all the parties while "modification" only involved some of them. The word

"amendment" referred not so much to the number of parties as to the fact that it was a formal procedure expressly designed for the purpose of altering a treaty; "modification" described a result which might occur by different means, but did not imply a restriction to only a few of the parties.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that it was necessary to remove any ambiguity. His view had always been that it was difficult to deny that a modification to a multilateral treaty could take effect bilaterally; it was possible to conceive of a case where two parties applied a treaty in a particular way between themselves and where one of those parties applied it in a somewhat different way in relation to another party.

79. If the Commission had any qualms about the text as it stood, it would be better to say "the agreement of *all* the parties".

80. Mr. ROSENNE said that he had already made his position clear in previous discussions of the article. The text had been considerably improved by the Drafting Committee, but he would have to abstain in the vote precisely because of the lack of clarity on the point mentioned by the Special Rapporteur. As the article stood, it was open to the interpretation that it was possible to have an *inter se* modification by subsequent practice of some of the parties; but it would then be necessary to make it quite clear that such an *inter se* modification by subsequent practice could not be invoked against any party which had manifested its opposition to that subsequent practice.

81. Mr. AGO said he was definitely in favour of the text submitted by the Drafting Committee. The term "the practice of the parties" normally meant "the practice of all the parties"; it could not relate to some of the parties only. If it tried to be over-precise and added the word "all", the Commission would be running counter to practice and introducing an unreasonable rule into the draft. It might be that a treaty was given concrete application between a large number of States, and that only a few did not participate in that application. It would then be absurd to maintain that, because one or two States omitted to adopt that practice, the existence of an agreement to modify the treaty could not be recognized. He would therefore be unable to vote for the text if the word "all" were added.

82. Mr. JIMÉNEZ de ARÉCHAGA said that he entirely agreed with Mr. Ago.

83. Mr. TSURUOKA said that, although he too agreed with Mr. Ago, he was not sure that it would be really useful to include the article in the draft at all. He would therefore abstain in the vote.

84. Mr. BARTOŠ said that, since the explanations so far offered had not confirmed his own interpretation of the text, he too would be obliged to abstain.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that it should be made quite clear in the commentary that the Commission understood the words "the agreement of the parties" to relate to all the parties; that was not inconsistent with Mr. Ago's view. It was not suggested in the text of the article that the practice had to be one in force between all the parties, but only that the practice

⁴ For earlier discussion, see 876th meeting, paras. 11-64.

⁵ *Yearbook of the International Law Commission, 1964*, vol. II, p. 195.

N.B. The word used in the English version is "amendment", but in the French and Spanish versions it is "*modification*" and "*modificación*".

should be such as to establish the agreement of all the parties.

86. Mr. BARTOŠ said that, in the light of the explanation just given by the Special Rapporteur, he would vote for the Drafting Committee's new text.

87. Mr. REUTER said that, if he might raise a rather delicate question, it was what was the object of the article? Did it mean that the same agreements could be established by practice as by *inter se* agreements, or did it mean that something more or something different could be established by practice than by *inter se* agreements? It was important for the Commission to be clear on that point.

88. Mr. TUNKIN said that the problem raised by Mr. Reuter was not actually implied in the text. If the words "establishing the agreement of the parties" meant in principle all the parties, then it could not refer to *inter se* agreements.

89. The CHAIRMAN put article 68 to the vote.

Article 68 was adopted by 11 votes to none, with 4 abstentions.

ARTICLE 69 (General rule of interpretation) [27]⁶

90. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 69:

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

"2. The context of a treaty for the purpose of its interpretation shall comprise, in addition to the text, including its preamble and annexes:

"(a) any agreement related to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

"(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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

"(a) any subsequent agreement between the parties regarding the interpretation of the treaty;

"(b) any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;

"(c) any relevant rules of international law applicable in the relations between the parties.

"4. A special meaning shall be given to a term if it is established that the parties so intended."

91. The words "in the context of the treaty and in the light of its object and purpose" had been taken from paragraph 1 (a) of the new text proposed by the Special Rapporteur in his report (A/CN.4/186/Add.6).

92. The opening words of paragraph 2, which as in 1964 was placed immediately after paragraph 1, were taken from paragraph 3 of the Special Rapporteur's text but had been made more precise by the inclusion of the words "in addition to the text, including its preamble and annexes"; furthermore the word "all" had been inserted before the words "the parties" in paragraph 2 (a). Paragraph 2 (b) was also taken from paragraph 3 of the Special Rapporteur's proposal.

93. Paragraph 3 (a) reproduced paragraph 1 (c) of the Special Rapporteur's proposal, with the addition of the word "subsequent" before the word "agreement". Paragraph 3 (b) reproduced paragraph 1 (d) of the Special Rapporteur's proposal with the omission of the word "common" before the word "understanding", and the alteration of the concluding words to read "of the parties regarding its interpretation". Paragraph 3 (c) was based on the Special Rapporteur's paragraph 1 (b).

94. Paragraph 4 was a simplified version of paragraph 2 of the Special Rapporteur's text.

95. Sir Humphrey WALDOCK, Special Rapporteur, said that, in effect, the Drafting Committee proposed a return to the scheme of the 1964 text (A/CN.4/L.107).

96. In the course of their comments, a number of Governments had objected to what they conceived to be a "hierarchy" in the application of the rules of the 1964 text. As he had indicated in his report, that criticism seemed a little misdirected in that it disregarded the careful use of the words "together with the context" in paragraph 3 of the 1964 version of article 69. Neither in that text nor in the one now proposed was there any intention of creating an order in which a series of rules should be successively applied; the Commission's idea was rather that of a crucible in which all the elements of interpretation would be mixed: the result of that mixing would be the correct interpretation. It was important that that should be made clear in the commentary, because the Commission was not meeting the views of those governments which had taken exception to the previous text. The rearrangement would be helpful in that connexion, although it was true that it accentuated the importance of the ordinary meaning of terms in the context by dealing with the matter separately in paragraph 1. It might be therefore that the question of the hierarchy of the rules would again be raised, but a careful examination of the article would show that the Commission was not suggesting that the other elements of interpretation were to have any less weight than those stated in paragraph 1.

97. Mr. TSURUOKA suggested that, in the interests of clarity, it might be better if paragraph 4 were placed immediately after paragraph 1; that would show the process of interpretation more clearly. Paragraph 4 provided that a special meaning should be given to a term if it was established that the parties so intended. How was that intention to be established? Presumably by the rules of interpretation set out in paragraphs 2 and 3, and in article 70. The purpose of interpretation was to ascertain which of several ordinary meanings was the one intended or whether a special meaning was given to a term. The idea would be better brought out if paragraph 1 were followed by paragraph 4 and then by

⁶ For earlier discussion, see 869th meeting (paras. 52-70), 870th meeting, 871st meeting, and 872nd meeting (paras. 1-24).

the rules according to which the purpose, which was interpretation, was to be achieved.

98. Mr. ROSENNE said that it seemed unfortunate that article 69 was being discussed separately; on previous occasions the Commission had discussed all the articles on interpretation as an entity.

99. There were three points to which he wished to draw attention. First, could the Special Rapporteur confirm that throughout the series of articles on interpretation, the word "party" had the meaning given to it by the Commission in article 1(1)(f) *bis* of its 1965 text (A/CN.4/L.115), namely, "a State which has consented to be bound by a treaty and for which the treaty has come into force"?

100. Secondly, there was a certain ambiguity in paragraphs 3 (a) and (b) which referred to "the parties", whereas paragraph 2 (a), and by implication paragraph 2 (b), referred to "all the parties". In article 69 it was even more important than in article 68 to make it clear that the reference was to all the parties. If paragraph 3 were put to the vote as it stood, he would ask for a separate vote on paragraphs 3 (a) and (b), so that he could abstain.

101. Lastly, the Special Rapporteur had carefully explained that there was no intention of creating a hierarchy of rules of interpretation; but his explanation had been made in reference to article 69, whereas in his report and in previous discussion in the Commission the absence of any such hierarchy had been taken to apply not only to article 69 but to article 70 and to some extent to article 72. He would be glad if the Special Rapporteur would confirm that the division of article 69 and 70 and paragraph 3 of article 72 into three separate articles was essentially a matter of drafting convenience and did not prejudice the main principle of the unity of the process of interpretation.

102. He agreed in other respects with what the Special Rapporteur proposed to include in his commentary on article 69. He hoped, however, that there would be a single commentary on all three articles.

The meeting rose at 6 p.m.

884th MEETING

Tuesday, 5 July 1966, at 11 a.m.

Chairman: Mr. Herbert W. BRIGGS

later, Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 69 (General rule of interpretation)¹ (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 69.

2. Mr. CASTRÉN said that he was in favour of the text submitted by the Drafting Committee, but he supported the proposal made by Mr. Tsuruoka at the previous meeting² to change the position of paragraph 4 and place it immediately after paragraph 1. He would even go further and make the text of paragraph 4, preceded by the word "However", a second sentence in paragraph 1. It was obvious that the two provisions should be taken together and that the idea stated in paragraph 4 formed an exception to what was provided in paragraph 1.

3. Mr. VERDROSS said he also supported Mr. Tsuruoka's proposal regarding paragraph 4.

4. Paragraph 1 gave the impression that the object and purpose of the treaty should be sought elsewhere than in the text. In order to overcome that difficulty, the words "and in the light of" should be replaced by the words "taking into account".

5. Mr. REUTER said that he approved of the proposed text. Without wishing to reopen the substantive discussion he would, however, point out that the word "contexte" was used inelegantly and indeed incorrectly in the French text. It was possible to speak of the context with reference to a provision in a treaty, but not with reference to the treaty as a whole; the expression "contexte du traité" was therefore unfortunate, especially in paragraph 2, where the "context" was opposed to the "text" and where it was stated that the context included instruments other than the treaty. He would not make any formal proposal, but he thought the drafting would be improved if the words "du traité" after the word "contexte" were deleted in paragraphs 1 and 2.

6. Generally speaking, article 69 introduced the basic idea that different instruments which were formally separate could legally constitute a single homogeneous whole; in other words, that a treaty could consist of several treaties. That important and correct idea was well expressed, which made the minor defect due to the use of the word "contexte" all the more regrettable.

7. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Reuter's remark was equally applicable to the English text. His first proposal for the articles on interpretation had referred to the meaning to be given to each term "in its context in the treaty".³ He had since bowed to the views of other members who had

¹ For text see previous meeting, para. 90.

² Para. 97.

³ *Yearbook of the International Law Commission, 1964*, vol. II, p. 52, article 70.