

Document:-
A/CN.4/SR.886

Summary record of the 886th meeting

Topic:
<multiple topics>

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was intended as soon as it had been received by the depositary. He had already expressed his opposition to that idea at the 862nd meeting⁴ when the article had been previously discussed. Although the new version was better, sub-paragraph (b) could still give rise to doubts and thereby jeopardize the results which all the members of the Commission were hoping to achieve.

39. If the concluding words "or, as the case may be, upon its receipt by the depositary" were deleted, the result would be to reduce the role of the depositary, an important and valuable institution.

40. An alternative solution would be to lay down the rule that a notification made to a depositary took effect vis-à-vis the State for which it was intended upon the expiry of a specified period after the receipt of the communication by the depositary. Such a time-limit would introduce a legal fiction but would, to some extent, reflect what actually happened.

41. He urged that the Commission, instead of deleting sub-paragraph (b), should make an effort to amend it, since it was important to retain a provision specifying that a notification was considered as having been made not when it was sent but when it was received.

42. Mr. AMADO said that he too was anxious that a solution should be found. Perhaps some of the difficulties which had arisen could be overcome by rewording sub-paragraph (b) to read "Shall be considered as having been made by the State in question *only* upon its receipt . . .".

43. Mr. ROSENNE said that no real objection had been raised to the rule set forth in sub-paragraph (b). Concern had merely been expressed at the possibility of its contents being interpreted in a certain way. In the circumstances, he strongly supported the suggestion by the Chairman and by Mr. Amado that an effort should be made to retain that sub-paragraph in some form.

44. Mr. TSURUOKA suggested that a reservation reflecting the explanation given by Mr. Ago should be expressly included in the text of the article, perhaps by inserting at the beginning of sub-paragraph (b) a proviso on the following lines: "Without prejudice to the legal effects of the notification or the communication for the State for which it is intended". The text would then be much clearer, although rather cumbersome.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that any attempt to produce a new draft of sub-paragraph (b) would require great care.

46. Under the provisions of article 15 which the Commission had adopted at the previous meeting and which dealt with the exchange or deposit of instruments of ratification, accession, acceptance or approval, the deposit with the depositary of an instrument of ratification, accession, acceptance or approval established the consent of a State to be bound by the treaty. That solution having been adopted in respect of consent to be bound, it would be difficult to lay down a slightly different rule in article 29 (*bis*) with regard to other matters, such as a notice of termination.

47. It seemed to him that the choice before the Commission was either to drop sub-paragraph (b) or to

entrust the Drafting Committee with the task of rewording that sub-paragraph in such a way as to meet the difficulty to which Mr. Tsuruoka had drawn attention. He himself had at one time considered the possibility of adding a proviso to the effect that its provisions were without prejudice to any question that might arise if it were established that the communication had not been transmitted to the State concerned.

48. Mr. AGO said that, if such was the Commission's wish, the Drafting Committee could not but make a further effort to modify sub-paragraph (b) so as to take account of the comments made. If the Drafting Committee was unsuccessful, sub-paragraph (b) would have to be dropped, leaving a gap in the provisions of article 29 (*bis*). He proposed that sub-paragraph (b) should be referred back to the Drafting Committee.

49. The CHAIRMAN, speaking as a member of the Commission, supported that proposal.

50. Mr. BARTOŠ also supported that proposal and asked the Drafting Committee to consider, among other possible solutions, the advisability of replacing the concluding words "by the depositary" by "through the depositary".

51. Mr. TSURUOKA said that he hoped that the Drafting Committee would also consider the advisability of deleting from the opening sentence the words "of the treaty or" preceding the words "of the present articles".

52. Sir Humphrey WALDOCK, Special Rapporteur, said it was essential to retain the reference to the terms of the treaty.

53. With regard to the question of referring article 29 (*bis*) back to the Drafting Committee, he thought that it would be sufficient to note that, in the course of the discussion, there had been no serious criticism of any part of the article other than sub-paragraph (b).

54. Mr. TUNKIN proposed that article 29 (*bis*) should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

*It was so decided.*⁵

The meeting rose at 1 p.m.

⁵ For resumption of discussion, see 887th meeting, paras. 9-43.

886th MEETING

Friday, 8 July 1966, at 10 a.m.

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

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

⁴ Para. 29.

Organization of future work

[Item 3 of the agenda]

1. The CHAIRMAN said that, at its sixteenth session the Commission had decided to complete its study of the law of treaties and of special missions before the end of 1966.¹

2. As far as the other topics in the programme were concerned, the Commission did not have before it any reports either on State responsibility or on succession of States and Governments. Its work at the nineteenth session would therefore consist largely of the continuation of its work on special missions—which could not be completed at the present session—and the consideration of a report which was expected from Mr. El-Erian, the Special Rapporteur for the topic of “Relations between States and inter-governmental organizations”.

3. Mr. EL-ERIAN said that the topic for which he was Special Rapporteur had not appeared on the Commission's agenda for the present session because of the Commission's decision to devote the whole of its time in 1966 to the topics of the law of treaties and special missions. Since the Commission was now considering the organization of its future work, it was desirable that he should report to it on the progress of his work on the topic of relations between States and inter-governmental organizations.

4. The Commission had considered his first report² at its sixteenth session, in 1964, together with a list of questions submitted by him as Special Rapporteur. The conclusion reached by the Commission on the scope of the topic was recorded in its report on its sixteenth session in the following terms:

“The majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and inter-governmental organizations should receive priority.”³

5. During the Commission's discussion at its sixteenth session, he had said that:

“With regard to the help of the Secretariat, he had already begun some consultations with the legal advisers of some organizations and would be grateful for the communication of instruments and legal opinions on the legal problems that had arisen. The Secretariat would, as usual, provide all the material available to it. In view of the special character of the topic, which was directly related to international organizations, help from the Secretariat was of great significance, particularly with regard to the application and interpretation of the general Conventions on privileges and immunities.”⁴

6. He was glad to be able to inform the Commission that his consultations both with the Office of Legal Affairs of the United Nations and with the legal advisers

¹ *Yearbook of the International Law Commission, 1964*, vol. II, p. 226, para. 36.

² *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/161 and Add.1.

³ *Yearbook of the International Law Commission, 1964*, vol. II, p. 227, para. 42.

⁴ *Op. cit.*, vol. I, 757th meeting, para. 20.

of the Specialized Agencies and of the International Atomic Energy Agency (IAEA) had proceeded very smoothly. Two questionnaires had been prepared and circulated by the Legal Counsel of the United Nations. The first dealt with the status, privileges and immunities of representatives of member States to specialized agencies and the IAEA, and replies had been received from all the organizations concerned; those replies contained valuable information on the appointment and composition of permanent missions to international organizations and their immunities and privileges. Replies had also been received from most of the recipients of the second questionnaire, which dealt with the status, privileges and immunities of the specialized agencies and the IAEA themselves.

7. At its nineteenth session, the Commission would have before it his second report on the topic of relations between States and inter-governmental organizations; that report would contain a basic study of diplomatic law in its application to relations between States and inter-governmental organizations and a set of draft articles with commentaries relating to the status, privileges and immunities of representatives of States to international organizations. That aspect of the topic was ripe for codification in the form of a draft convention.

8. With regard to the status, privileges and immunities of the organizations themselves, he was taking into careful consideration the apprehensions expressed by the legal advisers of international organizations and by some members of the Commission when the topic had been discussed in 1963 and 1964; those apprehensions related to the position of the general Conventions on the privileges and immunities of the United Nations and the specialized agencies. A thorough study of that question in all its ramifications would therefore be necessary before deciding on the appropriate course of action on that second aspect.

9. He had therefore deemed it proper to give priority to the first aspect of the topic, namely the status, immunities and privileges of representatives of States to international organizations.

10. Mr. BARTOŠ, Special Rapporteur for the topic of Special Missions, said that, in case he should be re-elected to the Commission, he had been giving some thought to the preparation of his fourth report, which he hoped would be the final one; it would consolidate his three earlier reports and incorporate the alterations suggested by the Commission. For the time being, he proposed, with the assistance of the Secretariat, to draw up a brief report giving the history of the topic and recording that at the current session he had submitted a report; that the Commission had taken note of it, that it had examined certain questions of a general nature on which it had taken certain decisions, and that it had instructed the Special Rapporteur to pursue his work on the subject. In view of the small number which had so far commented on the draft, governments might be given until 1 April 1967 to send in their comments.

11. He agreed that one of the subjects to be dealt with by the new Commission—which would no doubt dispose of it at its first session—should be special missions. The other should be relations between States and inter-

governmental organizations, which would be dealt with by Mr. El-Erian and would probably require two sessions.

12. In that connexion there was one question which remained to be settled between the two Special Rapporteurs, namely, the position of delegations to international conferences. Perhaps the Commission should instruct the two Special Rapporteurs to reach agreement on the general questions arising out of that matter and to submit a report on the subject in which they would take as a basis the Convention on the Privileges and Immunities of the United Nations, the Convention on Diplomatic Relations, the constitutions of certain international organizations, the practice of the United Nations and the draft articles on special missions. The two Special Rapporteurs could meet at the beginning of the next session, or earlier, in order to complete the report, which would be distributed in the course of that session.

13. Mr. ROSENNE, referring to Mr. Bartoš' remark regarding the forthcoming elections, said the Commission had decided at its fifth session that "a special rapporteur who had been re-elected should continue his work unless and until the Commission as newly constituted decides otherwise".⁵ He suggested that that decision be mentioned in the report on the present session.

14. With regard to Mr. Bartoš' suggested time-limit of 1 April 1967, perhaps 1 March 1967 would be more suitable, as it would allow time for the reproduction by the Secretariat of the replies received and for their consideration by the Special Rapporteur.

15. Mr. BARTOŠ said that, at the first session of its five-year term the new Commission should place on its agenda the topics on which a start had already been made.

16. In the case of State responsibility, the report by Mr. Ago, the Special Rapporteur, should be placed on the agenda for the first session. With regard to State succession, the codification of which had been requested on several occasions by the General Assembly, it would be necessary for the Commission to appoint another Special Rapporteur to replace Mr. Lachs.

17. The Commission could either concentrate on one or two items, as it had done in the case of the law of treaties, which did not lend itself to subdivision, or deal with several topics. Consequently it would be a good idea to hold a short session in January 1967 at which the topics to be codified would be entrusted to Special Rapporteurs and the work programme of those Special Rapporteurs would be examined, so that the real work of the new Commission could begin in May. If it did not tackle that problem soon enough, the Commission might reach the end of its term of office without having submitted anything. Although the term of the present Commission was about to expire, the Commission had a moral responsibility with respect to the policy to be followed in codification matters. It should accordingly give thought to those matters and make the necessary recommendations to the General Assembly.

18. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt Mr. Rosenne's suggestion to mention in

the report the Commission's decision at a previous session concerning special rapporteurs and their re-election.

It was so agreed

19. Mr. AGO said that the replacement of a Commission by a new one raised problems of transition, which meant that the first year of a new Commission was always a little difficult.

20. He had no anxiety in that respect where 1967 was concerned, for in his view the reports on special missions and on the relations between States and inter-governmental organizations would provide ample material for the session.

21. The question which he had in mind was that of the two immense subjects confronting the Commission, namely, State responsibility and State succession. By the time it had reached the end of its term, the new Commission would have to be in a position to submit a definitive draft on one or the other of those subjects. In 1965 the Commission had considered the possibility of giving some priority to State succession, a topic which it had thought to be of particular interest to certain groups of States. It would now be difficult to maintain that priority, since the Special Rapporteur for the topic would most probably no longer be a member of the Commission, having been appointed to a higher post. Clearly the Commission would have to designate a new Special Rapporteur for State succession, but it would be absolutely impossible for it to do so until it knew who its members were to be.

22. In the case of State responsibility, the Sub-Committee on State Responsibility had approved his preliminary report⁶ and that report had subsequently been approved by the Commission; but it was possible that the new Commission might have different views on the question.

23. He would not be in a position to submit a detailed report with draft articles in time for the 1967 session; but it might be advisable that the new Commission should examine what had already been done and, so to speak, confirm the instructions given to the Special Rapporteur.

24. In the circumstances he would propose that he prepare a short report summarizing the conclusions reached by the Commission on the first occasion and indicating the main lines to be followed in dealing with the topic of State responsibility. The new Commission might then devote a few days to the consideration of that report, so that he could be sure that its general outline still met with the Commission's approval.

25. Mr. TUNKIN said he supported Mr. Ago's useful suggestion. The problem of State responsibility was a very complex one and would undoubtedly require a preliminary study by the Commission. A step-by-step approach would be necessary.

26. The CHAIRMAN asked whether Mr. Ago's proposal required any action by the Commission.

27. Sir Humphrey WALDOCK proposed that a passage be included on the subject in the Commission's report.

⁵ *Yearbook of the International Law Commission, 1953*, vol. II, p. 231, para. 172.

⁶ See *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/152.

28. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to that proposal.

It was so agreed.

29. Mr. TUNKIN proposed that the subject of State responsibility be included in the provisional agenda for the nineteenth session.

Mr. Tunkin's proposal was adopted.

30. Mr. RUDA proposed that the topic of succession of States and Governments be also included in the provisional agenda for the nineteenth session.

31. Mr. TUNKIN said that that would be premature if the Commission did not have any report on the topic before it. But the Commission's work on the topic could be covered by the item "Organization of future work".

32. Mr. WATTLES (Deputy Secretary to the Commission) said he understood that a report on the topic of State succession was expected from Mr. Lachs.

33. The CHAIRMAN, speaking as a member of the Commission, said that the General Assembly, by its resolution 1686 (XVI), had requested the Commission to continue its work on State responsibility and to include on its priority list the topic of succession of States and Governments. It was only because the Commission had been occupied for five years with the law of treaties that it had not had an opportunity to deal with those two topics.

34. Mr. TUNKIN said that if the Commission had before it a report on the succession of States and Governments, it would be appropriate to include that topic in its provisional agenda.

35. Mr. AGO said he thought that the Commission could place the topic on its agenda if it was to have a report before it. Even so, the Commission should not deceive itself; it was doubtful whether it would be able to discuss a report without a Special Rapporteur. The most that it would be able to do would be to glance at it and then choose a new Special Rapporteur.

36. The new Commission should consider the problem of the two major topics which the Commission had already begun to tackle. It would hardly be feasible to have two subjects of such major importance on the agenda simultaneously. The Commission had achieved remarkable results in the case of the law of treaties because it had concentrated its attention on that subject only. He was not suggesting any order of priority, but he greatly feared that if the Commission tried to deal with both topics at the same time, it would not succeed in codifying either.

37. Mr. TUNKIN said that, even though Mr. Lachs might be absent, the Commission could engage in a preliminary discussion of his report: that discussion would be helpful to the new Special Rapporteur to be appointed.

38. Mr. BARTOŠ said that it would indeed be difficult to make progress if both topics were to be discussed. In the case of State responsibility, the position would be easier, since Mr. Ago would be present. In the case of State succession the Commission would have before it a report by Mr. Lachs, which was almost ready, and its first task would be to appoint a Special Rapporteur.

Both subjects were extremely complex; if the Commission succeeded in disposing of one of them it would already have achieved a great deal. But some progress must be made with the other topic also; the Commission could not drop either of them.

39. In suggesting that there should be a brief session in January-February, 1967, he had had in mind the detailed instructions which the Commission would have to give to the Special Rapporteurs. Admittedly, it was for the new Commission to decide whether to hold a winter session; but, to avoid financial difficulties for the new Commission, it was important that the present Commission should make arrangements forthwith for requesting the necessary funds. If it were thought sufficient that the additional session should be held in 1968, the necessary credits could be provided in the next budget.

40. Sir Humphrey WALDOCK, referring to the suggestion for a special session, said that, apart from budgetary considerations, it was very undesirable that the first meeting of a newly elected Commission should take place at an irregular time when it was likely that the attendance would fall far short of the full membership. In a similar situation in 1961, the Commission had been unwilling to bind the hands of the new Commission to any greater extent than was required to ensure the continuity of its work.

41. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to include in the provisional agenda for its next session the topics of Special Missions, Relations between States and inter-governmental Organizations, State Responsibility, and Succession of States and Governments.

It was so agreed.

Date and place of the nineteenth session

[Item 4 of the agenda]

42. The CHAIRMAN invited the Commission to consider item 4 of the agenda, the date and place of the next session. With regard to the date, at the Commission's fourteenth session it had been decided that the first Monday in May was the most convenient opening date for the session.⁷ Since Monday 1 May 1967 would be unsuitable for some members, perhaps the session could begin on Thursday, 4 May, or Monday, 8 May, 1967.

43. Mr. RUDA pointed out that Thursday, 4 May 1967 was Ascension Day which was a public holiday at Geneva.

44. Mr. ROSENNE proposed that, in the circumstances, out of consideration for those members for whom 1 May was a public holiday, the Commission decide to begin its nineteenth session on Monday, 8 May 1967.

45. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed that its nineteenth session should be held at Geneva and begin on Monday, 8 May 1967.

It was so agreed.

⁷ Yearbook of the International Law Commission, 1962, vol. II, p. 193, para. 83.

Law of Treaties

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

(*resumed from the previous meeting*)

[Item 1 of the agenda]

REARRANGEMENT OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

46. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the following rearrangement of the order of the draft articles on the law of treaties:⁸

Part I. Introductory provisions

- Article 0. The scope of the present articles
- Article 1. Use of terms
- Article 2. Treaties and other international agreements not within the scope of the present articles
- Article 3 (*bis*). Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations

Part II. Conclusion and entry into force of treaties

Section I—Conclusion of treaties by States

- Article 3. Capacity of States to conclude treaties
- Article 4. Full powers to represent the State in the conclusion of treaties
- Article 4 (*bis*). Subsequent confirmation of an act performed without authority
- Article 6. Adoption of the text
- Article 7. Authentication of the text
- Article 11. Consent to be bound expressed by signature
- Article 12. Consent to be bound expressed by ratification, acceptance or approval
- Article 13. Consent to be bound expressed by accession
- Article 15. Exchange or deposit of instruments of ratification, accession, acceptance or approval
- Article 16. Consent relating to a part of a treaty and choice of differing provisions
- Article 17. Obligation of a State not to frustrate the object of a treaty prior to its entry into force

Section 2—Reservations to multilateral treaties

- Article 18. Formulation of reservations
- Article 19. Acceptance of and objection to reservations
- Article 20. Procedure regarding reservations
- Article 21. Legal effects of reservations
- Article 22. Withdrawal of reservations

Section 3—Entry into force

- Article 23. Entry into force of a treaty
- Article 24. Entry into force of a treaty provisionally

⁸ Some of the titles were later amended at the time of the adoption of the final text of the articles.

Part III. Observance, application and interpretation of treaties

Section 1—Observance of treaties

- Article 55. *Pacta sunt servanda*

Section 2—Application of treaties

- Article 56. Non-retroactivity of treaties
- Article 57. Application of treaties to territory
- Article 63. Application of successive treaties relating to the same subject-matter

Section 3—Interpretation of treaties

- Article 69. General rule of interpretation
- Article 70. Supplementary means of interpretation
- Article 72. Interpretation of treaties expressed in two or more languages

Section 4—Treaties and third States

- Article 58. General rule regarding third States
- Article 59. Treaties providing for obligations for third States
- Article 60. Treaties providing for rights for third States
- Article 61. Revocation or modification of obligations or rights of third States
- Article 62. Rules in a treaty becoming binding through international custom

Part IV. Modification of treaties

- Article 65. General rule regarding the amendment of treaties
- Article 66. Amendment of multilateral treaties
- Article 67. Agreements to modify multilateral treaties between certain of the parties only
- Article 68. Modification of treaties by subsequent practice

Part V. Invalidity, termination and suspension of the operation of treaties

Section 1—General provisions

- Article 30. Validity and continuance in force
- Article 30 (*bis*). Obligations under other rules of international law
- Article 46. Separability of treaty provisions
- Article 47. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

Section 2—Invalidity of treaties

- Article 31. Provisions of internal law regarding competence to conclude a treaty
- Article 32. Specific restrictions on authority to express the consent of the State
- Article 34. Error
- Article 33. Fraud
- Article 34 (*bis*). Corruption of a representative of the State
- Article 35. Coercion of a representative of the State

Article 36. Coercion of a State by the threat or use of force

Article 37. Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

Section 3—Termination and suspension of the operation of treaties

Article 38. Termination of or withdrawal from a treaty by consent of the parties

Article 39 (*bis*). Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Article 39. Denunciation of a treaty containing no provision regarding termination

Article 40. Suspension of the operation of a treaty by consent of the parties

Article 40 (*bis*). Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only

Article 41. Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty

Article 42. Termination or suspension of the operation of a treaty as a consequence of its breach

Article 43. Supervening impossibility of performance

Article 44. Fundamental change of circumstances

Article 64. Severance of diplomatic relations

Article 45. Emergence of a new peremptory norm of general international law

Section 4—Procedure

Article 51. Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty

Article 50. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

Article 50 (*bis*). Revocation of notifications and instruments provided for in articles 51 and 50

Section 5—Consequences of the invalidity, termination or suspension of the operation of a treaty

Article 52. Consequences of the invalidity of a treaty

Article 53. Consequences of the termination of a treaty

Article 53 (*bis*). Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law

Article 54. Consequences of the suspension of the operation of a treaty

Part VI. Miscellaneous provision

Article Z. Case of an aggressor State

Part VII. Depositaries, notifications and registration

Article 28. Depositaries of treaties

Article 29. Functions of depositaries

Article 29 (*bis*). Notifications and communications

Article 26. Correction of errors in texts or in certified copies of treaties

Article 25. Registration and publication of a treaty

47. Sir Humphrey WALDOCK, Special Rapporteur, said that he was himself in entire agreement with the scheme now proposed by the Drafting Committee for the rearrangement of the draft articles.

48. Part I, entitled "Introductory Provisions" contained a number of articles on the scope of the draft articles, the instruments excluded from that scope and the use of terms.

49. In part II, entitled "Conclusion and Entry into Force of Treaties", the main change made by the Drafting Committee had been to remove a number of articles dealing with depositaries, notifications, correction of errors and registration and publication of treaties, articles which had now been grouped together as a new part VII. The purpose of that rearrangement had been to bring article 55 (*Pacta sunt servanda*)—the first article of part III—to a position immediately after the articles on entry into force, which were the concluding articles of part II.

50. In part III, entitled "Observance, application and interpretation of treaties", the main change made by the Drafting Committee had been to introduce the articles on interpretation as a new section 3, following immediately after the sections entitled "Observance of Treaties" and "Application of Treaties". It had been considered undesirable that the articles on interpretation should be placed at the end of the whole draft.

51. The Drafting Committee had decided to place the articles dealing with invalidity, termination and suspension of the operation of treaties, which now formed part V, immediately after part IV (Modification of Treaties). Part V began with a section entitled "General Provisions", which included article 46 (Separability of treaty provisions) and article 47 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty). The Drafting Committee had considered whether article 47 should not logically be placed immediately after the articles dealing with the substantive grounds of invalidity, termination and suspension. It had, however, arrived at the conclusion that the article was in a sense a provision on its own and that the best place for it would be in section I (General Provisions).

52. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Committee had devoted a great deal of time and effort to the consideration of a number of alternatives. He commended its proposal to the Commission.

53. Speaking as Chairman, he invited the Commission to consider each part of the Drafting Committee's proposal separately.

Part I. Introductory provisions

54. Mr. RUDA said he found the title of part I "Introductory Provisions", unsatisfactory. A more appropriate title would be "General Provisions". The Drafting Committee had probably wished to avoid using that title because there was a section in part V headed "General Provisions". He himself would have

no objection to using the same title both for part I and for one of the sections of part V, but if other members found that unacceptable, another title should be found for part I.

Mr. Yasseen took the Chair.

55. Sir Humphrey WALDOCK, Special Rapporteur, said that, as Mr. Ruda had surmised, the drafting Committee had been averse to using the title "General Provisions" twice and the phrase "Introductory Provisions" had seemed appropriate as a designation for part I.

56. Mr. RUDA said that while he would not press for the alteration of the title of part I, he wished to point out that a great many treaties commenced with a section entitled "General Provisions".

57. Mr. PAREDES said that he was in complete agreement with Mr. Ruda. He suggested that the title of part I be altered to read "Preliminary Provisions".

58. Mr. BARTOŠ said that he would prefer to keep the title "Introductory Provisions", as the four articles in question were not actually rules; their function was rather to keep certain matters separate from the main scheme. It might be possible to say "Preliminary Provisions", but certainly not "General Provisions".

59. Mr. AMADO said that since part I was clearly an introduction, he would propose that it be entitled "Introduction".

60. Mr. AGO said that that proposal was acceptable to him. The four articles in part I were not provisions; they merely made it clear what the draft was about, what it did not cover and what certain terms meant. The rules properly so called came later. In any case, the articles in part I were not general provisions or even preliminary provisions. It would, therefore, be better just to say "Introduction".

61. The CHAIRMAN, speaking as a member of the Commission, said he supported Mr. Amado's proposal that part I be entitled "Introduction": it did not contain any "provisions" but was merely intended to provide certain information necessary to the understanding of the draft as a whole.

Mr. Amado's proposal was adopted.

Part I, as thus amended, was approved.

Part II. Conclusion and entry into force of treaties

62. Sir Humphrey WALDOCK, Special Rapporteur, said that in part II, section 1, articles 8 and 9 no longer appeared. The new title and text of article 13 had been approved at the 884th meeting. The other main change was the transfer of the section on the functions of depositaries to part VII.

63. Mr. ROSENNE said that it might be more consistent to reverse the order of articles 23 and 24 so that entry into force provisionally was dealt with before entry into force as such.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that he would not favour such a change.

65. Mr. RUDA proposed that the words "by States" in the title of section 1 be deleted.

It was so agreed.

66. Mr. RUDA, supported by Mr. PAREDES, proposed that the words "*manifestación del*" before the word "*consentimiento*" in the Spanish titles of articles 11, 12 and 13 be deleted.

It was so agreed.

Part II, as thus amended, was approved.

Part III. Observance, application and interpretation of treaties

67. Mr. TSURUOKA suggested that section 2 (Application of Treaties) and section 3 (Interpretation of Treaties) be transposed, since the process of interpretation should logically precede the process of application. Admittedly, the need for interpretation would in practice come to the front only after a concrete application of a treaty had led to a dispute. But even so interpretation was required for the purpose of a proper application of the provisions in question; it was a process prerequisite to the process of application, at least from a logical point of view.

68. Mr. TUNKIN said that he was unable to agree with Mr. Tsuruoka. The Commission had started from the premise that the parties would try to express their intention as lucidly as possible so that recourse to the rules on interpretation would only be necessary if there were some doubt as to the meaning of terms. The possibility of States deliberately questioning that meaning before the instrument was put into effect for the purpose of frustrating the object of the treaty should be left aside.

69. The CHAIRMAN, speaking as a member of the Commission, said that on that point he differed entirely from Mr. Tunkin. In his view, a treaty could not be applied unless it had first been understood, in other words unless it had been interpreted. The purpose of interpretation, an operation which might be simple or complicated, was to understand the treaty. When the text was clear, its very clarity was the result of interpretation.

70. If, however, the Commission shared Mr. Tunkin's view of interpretation and regarded it as an exceptional operation intended to solve some difficulty of application, then the proposed order was correct.

71. Mr. AMADO said that the Chairman's proposition was theoretically correct, but States were always apt to adopt a somewhat guarded attitude towards interpretation. The main thing was that the treaty should be applied; interpretation was called for only if there was any doubt about the meaning of the text. He was therefore in favour of the order proposed by the Drafting Committee.

72. Mr. PESSOU said that he agreed with Mr. Tunkin and Mr. Amado. The order proposed by the Drafting Committee was in conformity with the purpose of treaties, which were intended to be applied, not to be interpreted. It was only in cases where the text was deliberately vague that interpretation should precede application.

73. Mr. TSURUOKA said that, when a difficulty arose in applying a treaty and it became necessary to resort to interpretation, the treaty could not really be

applied until it had been interpreted in accordance with the rules in article 69. That clearly showed that application was always the result of interpretation. But since the proposed order would not interfere with the proper application of treaties, he was prepared to accept it.

74. Mr. RUDA said that the order proposed by the Drafting Committee was correct. The provisions concerning application ought to precede those on interpretation, since that was the normal course of events.

75. Mr. AGO said that the Chairman's line of argument was unquestionably logical, but an examination of the articles in section 2, on application, would show that those three articles regulated questions which arose in the course of a preliminary examination of a treaty, before the stage of its practical application in detail had been reached. Perhaps the difficulty was caused by the word "application".

76. The CHAIRMAN, speaking as a member of the Commission, said that, in that case, it was the title of section 2 that should be changed; the three articles in that section were in fact concerned more with the scope of treaties than with their application.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that at an earlier stage he had been of the same view as the Chairman and, at the second part of the seventeenth session, he had proposed to the Drafting Committee that the rules on interpretation be placed immediately after article 55 (*Pacta sunt servanda*) but members of the Committee had argued persuasively against such an arrangement. Purely on logical grounds, perhaps, the articles on interpretation ought to come before article 55, but once article 55 had been placed at the head of part III, the Drafting Committee's proposed order was surely correct. It should be noted that articles 56, 57 and 63 were in fact concerned with problems of interpretation, but for the purpose of the title of section 2, "Application of Treaties" was unobjectionable.

Part III was approved.

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

Part IV. Modification of treaties

78. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee considered that the obvious place for the rules on the modification of treaties was between the provisions of part III, on the observance and application of treaties, and those of part V, on invalidity, termination and suspension.

79. Mr. RUDA suggested that, in view of the distinction drawn between amendment and modification, part IV be entitled "Amendment and Modification of Treaties".

80. Mr. TSURUOKA supported Mr. Ruda's suggestion.

81. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Ruda that the title of part IV should be amended by the insertion of the words "Amendment and" before the words "Modification of treaties". The title would then correspond with the content of that part of the draft.

Part IV, as thus amended, was approved.

Part V. Invalidity, termination and suspension of the operation of treaties

82. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had considered placing article 47 nearer the end of part V but for practical reasons had decided that it ought to be in section 1 among the general provisions. The provisions concerning invalidity, termination and suspension, including the rules on special cases of nullity (articles 44 and 45) were followed by the section on procedure. The articles dealing with the consequences of invalidity, termination or suspension had been placed together in section 5.

83. The CHAIRMAN, speaking as a member of the Commission, said he noted that articles 50 and 51 now appeared in section 4. The Special Rapporteur had suggested a different arrangement in the paper submitted to the Drafting Committee during the second part of the seventeenth session.

84. Sir Humphrey WALDOCK, Special Rapporteur, said that as articles 51, 50 and 50 (*bis*) were more or less of a procedural character it had seemed preferable to place them in a separate section following the substantive rules.

85. As the final text of article 64 on the severance of diplomatic relations was in a purely negative form, the Drafting Committee had come to the conclusion that it ought to be placed towards the end of section 3, between articles 44 and 45.

Part V was approved.

Part VI. Miscellaneous provision

86. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had decided that the title of article Z should be amended to read "Case of an aggressor State". The title suggested previously "Reservation regarding the case of an aggressor State" was unsatisfactory because of the technical connotation of the word "reservation".

87. Mr. RUDA said that he found the use of the word "Miscellaneous" in the English version of the title of part VI somewhat surprising. In Spanish, the equivalent adjective was used to describe a variety of matters coming under one heading and for that reason the Spanish version of the title was in the plural; but part VI contained only one article. It would be better to place article Z in that part of the draft which dealt with application; or again, part VI might be given the same title as article Z, namely "Case of an aggressor State".

88. Mr. AMADO, supporting Mr. Ruda, said that the title "Miscellaneous Provision" was indefensible. The subject-matter of article Z was so remarkable and so striking that it would be proper to entitle part VI, "Case of an aggressor State".

89. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said there was a discrepancy between the English and French versions of the title proposed for part VI. The English read "Miscellaneous provision", whereas the French read "*Disposition particulière*".

90. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the phrase "Miscellaneous provision", though common in legal usage, was not particularly satisfactory in the context. The word "special" might be substituted for the word "Miscellaneous".

91. Mr. TSURUOKA said he supported Mr. Ruda's proposal.

92. Mr. CASTRÉN said that it might be going too far to devote one part of the draft wholly to the question of an aggressor State. It might be better to transfer article Z to part III, as Mr. Ruda had suggested. It could be placed in section 2 of part III, either before or after article 63.

93. Mr. AGO suggested that part VI be entitled "Case of an aggressor State" and article Z "Limitation to the application of the present articles".

94. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission must be very careful in modifying the title of part VI because opinion had been divided and it was important to find a non-committal form of words. It would be clumsy to repeat in the title of part VI the title of the article itself.

95. Mr. TUNKIN said that the importance of an article dealing with the case of an aggressor State could not be exaggerated because of the serious implications of the problem as a whole. The title of part VI might read "Case of an aggressor State"; the title of article Z itself could then read "Application of the present articles with regard to an aggressor State".

96. Sir Humphrey WALDOCK, Special Rapporteur, said that that formula was not acceptable because of the importance attached by some members, particularly Mr. Jiménez de Aréchaga, to not placing an aggressor State in the position of a complete outlaw as far as treaty law was concerned.

97. Mr. TUNKIN said that the title of an article was merely indicative of its contents and could not affect its substance.

98. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the title of part VI be changed to read "Case of an aggressor State" and the title of article Z to read "Special provision regarding an aggressor State".

*It was so agreed.*⁹

Part VI, as thus amended, was approved.

Part VII. Depositaries, notifications and registration

99. Mr. BARTOŠ said that, in law and in logic, article 26 ought not to be in part VII. The correction of errors in certified copies was indeed a matter for the depositary, but the correction of errors in texts affected the actual substance of the treaty and the authentication of the text and had nothing to do with depositaries, notifications and registration. Admittedly, his criticism was hardly constructive, since he had asked himself in vain where article 26 should be placed; he hoped that the Special Rapporteur would find the right place.

100. Mr. CASTRÉN said that, in order to meet the point made by Mr. Bartoš, he would reintroduce the proposal he had made in the Drafting Committee to transfer the whole of part VII to its previous position at the end of part II. Article 26 would then be in a more appropriate place.

101. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Castrén's proposal for rearrangement had

been closely examined in the Drafting Committee but had been rejected. Personally, he believed that there was great advantage in the provisions on entry into force preceding article 55 (*Pacta sunt servanda*). To interpose provisions concerning the transmission of notifications and communications, though they were linked with the conclusion of treaties, would interrupt the logical order. There was also a technical reason for not making the change, namely, that the functions of a depositary were not limited to the conclusion stage.

102. Mr. BARTOŠ said he was unfortunately unable to accept Mr. Castrén's suggestion. What he (Mr. Bartoš) wished to do was to remove the provision relating to errors in texts from the rules on depositaries, notifications and registration. He still had no definite views as to where that provision should be placed; perhaps it could be added to the section on the application of treaties or to that on interpretation.

103. Like the Special Rapporteur, he thought that the remainder of part VII affected not only the section on the conclusion of treaties but also a number of others, such as those in invalidity, termination, suspension and the consequences of invalidity.

104. Mr. CASTRÉN said that, in view of what the Special Rapporteur and Mr. Bartoš had said, he withdrew his proposal; but he would suggest that article 26 be placed at the end of part IV, the title of which should be altered to read: "Modification of Treaties and Correction of the Text of Treaties".

105. Mr. ROSENNE said that the previous day the Drafting Committee had discussed at length what would be the best place for article 26 and he was satisfied that its conclusion was right. The article could be transferred to part II but that would interrupt the proper sequence: it could certainly not be placed in part IV. The Drafting Committee's proposal should be accepted.

106. Mr. AGO said that, while he had no objection to the Commission attempting to find a more appropriate place for article 26, he doubted whether it could be inserted in part IV, as that would give the erroneous impression that the correction of an error in the text of a treaty was tantamount to modification of the treaty.

107. Mr. BARTOŠ said that it would perhaps be enough if the Commission explained in its commentary to article 26 that although it had placed the correction of errors in texts together with the correction of errors in certified copies, it was aware of the fact that the correction of errors in texts was not a matter for which depositaries were responsible.

108. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had considered transferring article 26 to follow article 7 but that would have interrupted the sequence. That decision should not be understood as implying that part VII was confined to provisions concerning the functions of depositaries.

109. Mr. AMADO said that it was no use trying to achieve perfection. It was surely admissible that the correction of errors in texts should be mentioned together with the functions of depositaries. Before negotiators dispersed, they had a last look at the text of a treaty and then entrusted it to the depositary.

⁹ For later amendments to the title of part VI and of article Z, see 893rd meeting, paras. 118 and 119.

110. Mr. BARTOŠ said that, in practice, errors in texts were usually discovered after the negotiators had dispersed. Cases had arisen where wrong expressions or mistakes in transcription or in translation had been discovered several years after a treaty had been concluded under the auspices of the United Nations.

111. In any case, he accepted the explanation which the Special Rapporteur had just given: since errors in texts were corrected by notification, it was possible to agree that the provision dealing with that matter should appear in that part of the draft articles which dealt *inter alia* with notifications.

112. Sir Humphrey WALDOCK, Special Rapporteur, said that errors were often discovered by a depositary. The point made by Mr. Bartoš would be met to some extent if the word "corrections" was inserted after the word "notifications" in the title of part VII.

The Special Rapporteur's amendment was adopted.

Part VII, as thus amended, was approved.

The rearrangement of the draft articles proposed by the Drafting Committee, as amended, was approved.

113. Mr. AGO suggested that the Commission authorize him to re-examine the French text, with the help of the Secretariat, in order to ensure that the terminology was uniform. For instance, the word "*terminaison*" was used in one part but not in others. He also asked whether the Special Rapporteur would be agreeable to the addition of the words "by a treaty" after the words "Consent to be bound" in the titles of articles 11, 12 and 13; that would ensure a closer correspondence between the English and French texts, for in French it was impossible to say "*consentement à être lié*" without adding the words "*par un traité*".

114. Sir Humphrey WALDOCK, Special Rapporteur, said that he was prepared to accept the insertion of the words "by a treaty" after the words "consent to be bound" in the title of articles 11, 12 and 13, if that were needed for purposes of the French text.

115. Mr. RUDA requested the Commission to give Mr. Paredes and himself the same authority with respect to the Spanish text as Mr. Ago had asked for with respect to the French text.

116. The CHAIRMAN suggested that the authorization sought by Mr. Ago and Mr. Ruda to make drafting changes in the French and Spanish texts in consultation with the Secretariat, which would accord with the Commission's usual practice, should be given.

It was so agreed.

117. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee wished to recommend that the Commission incorporate in its draft report to the General Assembly a statement modelled on that made in paragraph 35 of the report covering the work of its thirteenth session.¹⁰ In its recommendation concerning the convening of an international conference on consular relations, the Commission had stated:

¹⁰ *Yearbook of the International Law Commission, 1961, vol. II, p. 92.*

"The chapters, sections and articles are headed by titles indicating the subjects to which their provisions refer. The Commission regards the chapter and section titles as helpful for an understanding of the structure of this draft. It believes that the titles of articles are of value in finding one's way about the draft and in tracing quickly any provision to which one may wish to refer. The Commission hopes, therefore, that these titles will be retained in any convention which may be concluded in the future, even if only in the form of marginal headings, such as have been inserted in some earlier conventions."

118. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that it would be desirable to include a statement of that kind regarding the draft articles on the law of treaties, but that there was no need to mention marginal headings as full titles were more helpful.

The Drafting Committee's recommendation was approved.

The meeting rose at 1 p.m.

887th MEETING

Monday, 11 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. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldoack.

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 1 (Use of terms) [2]

Paragraph 2

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's proposal for paragraph 2 of article 1.

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that, as originally adopted in 1962, article 1, then entitled "Definitions", had contained a paragraph 2 reading:

"2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State."¹

¹ *Yearbook of the International Law Commission, 1962, vol. II, p. 161.*