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Summary record of the 889th meeting

Topic:
Other topics

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71. Sir Humphrey WALDOCK, Special Rapporteur, said that such a change was unacceptable as it would imply that certain members did not remain strongly critical of the thesis that constitutional limitations were incorporated in international law, and that was certainly not the case.

72. Mr. ROSENNE said he considered that the insertion would have been harmless because it was clear that paragraph (3) summarized a discussion that had taken place in 1951.

73. Mr. TUNKIN said that the third sentence was perhaps not very satisfactorily drafted.

74. Mr. AGO suggested that the sentence be amended to read "During the discussion at that session it was said that the Commission's decision had been based less on legal principles than on a belief that States would not accept any other rule".

75. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that that was a clearer wording.

Paragraph (3), as thus amended, was approved.

Paragraph (4)

76. Mr. AGO suggested the deletion of the words "or could easily be ascertained by inquiry", at the end of the paragraph.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's amendment was acceptable.

Paragraph (4), as thus amended, was approved.

Paragraph (5)

78. Mr. RUDA said that, since the Commission had to all intents and purposes adopted the theory on which it commented in the paragraph, it might be that, by referring to a "notorious" limitation", it was going rather too far in criticizing the very theory which it had adopted.

79. Sir Humphrey WALDOCK, Special Rapporteur, said that he could not admit that the Commission as a whole had accepted the theory discussed in paragraph (5). The commentary to article 31 must be read as a whole; he had been at great pains to summarize the views expressed at different stages in the elaboration of the article.

80. Mr. RUDA said that, as he had not voted for article 31, he had no preference as between the words "notorious" and "manifest". If it saw fit to do so, the Commission could leave the text as it was; but it seemed to him that the criticism it was making might equally well apply to the article which it had adopted.

81. Mr. AGO said that it would suffice to tone down paragraph (5), which seemed too critical of an opinion which was not the Commission's own.

82. Sir Humphrey WALDOCK, Special Rapporteur, said that in paragraph (5) he had tried to formulate the Commission's comment on the theory of a "notorious" limitation. The Commission had accepted the view that it could not provide a firm basis for the rule in article 31. To take the obvious example of United States constitutional provisions, the practice of executive agreements made it impossible to rely on such provisions. The

Commission had therefore turned to a more delicately balanced solution that took into account manifest violations of constitutional provisions in a particular case.

83. Mr. AGO suggested that it might be preferable to transfer the content of paragraphs (5) and (6) to a later position in the commentary to article 31.

84. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the views of the Special Rapporteur; he saw no contradiction between the content of paragraphs (5) and (6) and the text of the article itself because the article required, rather than notoriety in the violated provision of the national constitution, a different element, namely, that a particular breach of a constitutional provision was a manifest violation. The requirement of notoriety referred to the concrete violation and not to the constitutional provision. Furthermore, the Commission took as an initial hypothesis that of the validity, and not the invalidity, of a treaty approved despite lack of compliance with constitutional provisions.

85. The CHAIRMAN proposed that further consideration of paragraph (5) be adjourned.

It was so agreed.³

The meeting rose at 1 p.m.

³ For resumption of discussion, see 889th meeting, paras. 44-53.

889th MEETING

Wednesday, 13 July 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldoock.

Draft report of the Commission on the work of its eighteenth session

(A/CN.4/L.116 and Addenda)

(continued)

CHAPTER II: LAW OF TREATIES

(continued)

ARTICLE 30 (Validity and continuance in force of treaties) *(resumed from the 862nd meeting)*

"2. A treaty may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty."

1. The CHAIRMAN invited the Commission, in accordance with its decision at the previous meeting, to reconsider paragraph 2 of article 30.¹

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion of the commentary to article 30 had shown the need to reserve the question of the effect on treaties of State succession on the one hand and hostilities on the other.

3. With regard to hostilities, it was agreed that the matter could be disposed of by a suitable passage in the introduction to the draft articles, but with regard to State succession, it had been felt necessary to amend article 30 itself by including a safeguard in paragraph 2. He would suggest that the clause take the form of a proviso to be introduced at the beginning of paragraph 2. He had prepared two alternative texts for the proviso, the first of which read: "Without prejudice to any question that may arise in connexion with a change in the personality of a State", and the second: "Without prejudice to any question that may arise in connexion with State succession".

4. He himself preferred the first of those two formulae because, by seeming to endorse the hypothesis of succession, the use of the expression "State succession" could appear to commit the Commission to a particular view.

5. Mr. BARTOŠ said that he inclined towards the Special Rapporteur's second formula. In the situation covered by article 30, not only did certain subjects of international law disappear but others appeared on the scene.

6. He had already summarized to the Commission in some detail the current practice of States in matters of State succession.² There were at least five different doctrines, all of them applicable, ranging from straight-forward succession to the territories of the former sovereign to the case where a clean sweep was made of the past. The Commission should therefore defer consideration of the question until it came to deal with the topic of State succession.

7. For the time being, it would be enough to say in the commentary that apparently no separate legal ground was involved. In that way the Commission would be mentioning the problem both specifically, by recognizing the existence of situations arising from State succession, and non-specifically, by refraining from expressing an opinion on the doctrines applied in the modern world.

8. Mr. JIMÉNEZ de ARÉCHAGA said he supported the Special Rapporteur's proposal for the introduction of a proviso at the beginning of paragraph 2, and preferred his second formula, which would be more in keeping with the Commission's decision in 1963, following its consideration of the report of the Sub-Committee on the Succession of States and Governments. In its report for that year, the Commission had "approved the Sub-Committee's recommendations concerning the relationship between the topic of State succession and other topics on the Commission's agenda."³ It had thus

endorsed the use of the term "State succession" in the manner in which it was employed in the Special Rapporteur's second formula.

9. The Special Rapporteur's first formula was not broad enough, because it referred only to a "change in the personality of a State", whereas State succession covered also problems arising out of the disappearance of a State, the birth of a new State and territorial changes.

10. Mr. CASTRÉN said that he shared the view that the Commission should not take a position on the problem of State succession; consequently the last two sentences of the commentary at least should be omitted. But in order to make the matter perfectly clear, it would be better to include a saving clause in the article, in which case, of the two formulae proposed by the Special Rapporteur, he would prefer the second.

11. Mr. LACHS said it should be remembered that the consequences of State succession were not confined to problems of invalidity and termination. A reservation in article 30 would therefore not be sufficient. A general reservation should be included, as he had suggested at the previous meeting, either in one of the introductory articles, or in one of the closing articles,⁴ and that was what he accordingly proposed.

12. With regard to the formula to be used, he agreed that a reference to a change in the personality of a State was not sufficient since, as Mr. Jiménez de Aréchaga had pointed out, the question of what was called succession arose from three phenomena, the birth, death and change of a State. He also agreed, however, that use of the term "State succession" might lead to misunderstanding, in view of certain special connotations and other theoretical problems, and he personally would prefer a broader formula.

13. Mr. AGO said that he agreed with the Special Rapporteur on the principle. In order to avoid any possibility of misunderstanding, it would be better to include the reservation in the article itself because, if it were included in the commentary, it would not produce the consequences which the Commission desired.

14. On the other hand, the expression "change in the personality" was not a very happy one. Of the three situations to which Mr. Lachs had referred, one—the birth of a new State—could be disregarded, because in such a case there was no question of the termination of a treaty. The situations that had to be borne in mind were where a change had taken place in a State and, particularly, where a State had disappeared.

15. The expression "change in the personality of a State" was also rather ambiguous; it would be better to refer just to State succession, a term whose meaning was well understood. On the other hand he would not welcome the reduction in the scope of the article which would result if the reservation were placed at the beginning of the paragraph. The first two sentences should be left as they stood and a third sentence added, based on the language of article Z and worded "The present provisions are without prejudice to any consequences which may result from State succession". That would cover the problem of State succession satisfactorily

¹ See 888th meeting, para. 61.

² *Yearbook of the International Law Commission, 1963*, vol. II, p. 293.

³ *Ibid.*, p. 224.

⁴ 888th meeting, para. 32.

while at the same time avoiding the negative impression produced by having a reservation at the beginning of a rule which, after all, was extremely important.

16. But the question then arose whether, in including a reservation to cover the problem of State succession, the Commission had taken all the precautions it needed to take. Since it was including a reservation to cover State succession, why should it not do the same for hostilities. He appreciated the Commission's reluctance to touch on the question of war, but it might for once be desirable to refer to it.

17. Mr. TUNKIN said that, since the Commission's work had now reached such a late stage, he was prepared to accept the Special Rapporteur's suggestion, as reformulated by Mr. Ago. He had, however, the same doubts as Mr. Lachs with regard to the scope of the reservation.

18. Mr. ROSENNE said that his general views on the subject of State succession had been placed on record in 1963.⁵ If the Commission wished to include a saving clause in article 30, he himself would prefer Mr. Ago's formula. He agreed, however, with Mr. Lachs that the reservation should not be confined to article 30.

19. Sir Humphrey WALDOCK, Special Rapporteur, said that in view of the broader issues which had been raised, the Commission should perhaps consider introducing a general article which would exclude from the scope of the draft article all questions arising from hostilities, State responsibility and State succession.

20. Mr. BRIGGS said that he was in favour of a separate article, to be formulated on the lines suggested by Mr. Ago. The article would specify that the provisions of the draft articles were without prejudice to the consequences which State succession, State responsibility and hostilities might have on treaties. A general provision of that type would serve to meet the criticisms expressed in certain scientific quarters, where the Commission's position had not been fully understood. It had to be made clear that the Commission's intention was not to prejudice its future work on State succession and State responsibility.

21. Mr. JIMÉNEZ de ARÉCHAGA said that, even if a general article were introduced, a specific reservation would still be needed in article 30. Otherwise, the article would appear to prejudge the issue of the effects of State succession on treaties.

22. He himself did not believe that a general article was required, since it would be assumed that the Commission was not dealing with either State responsibility or State succession in its draft articles on the law of treaties. A reservation was necessary in article 30 because its provisions would otherwise be misleading.

23. Mr. ROSENNE said that a general reservation was needed because State succession could have an effect not only on the termination of treaties but also on other aspects of the law of treaties, particularly participation and reservations.

24. Mr. JIMÉNEZ de ARÉCHAGA said that, in the draft articles on reservations, unlike article 30, there

was no specific provision which might be construed as prejudging the Commission's future decisions on State succession.

25. Mr. LACHS said it would be better to adopt a general formula, which would refer not only to State succession but also to State responsibility. He was opposed to any reference to the effect of hostilities on treaties, since the Commission was legislating for peaceful relations.

26. Mr. TUNKIN said that a general reservation would be useful for the purpose of attracting the attention of a future conference to the matter. A codification convention did not cover the whole field of international law and there was always an interrelationship between the branch of international law which it codified and other branches of that law.

27. Mr. AGO said he thought that, all things considered, it would be better to adopt a general formula in the form of a separate article. He accordingly proposed a text reading "The present articles are without prejudice, with respect to a treaty, to any consequences which may arise from international responsibility, State succession or armed hostilities". That text would not only meet the concern expressed by members of the Commission, but would also dispose of the necessity for the reservation in article 63 concerning questions of responsibility.

28. The CHAIRMAN, speaking as a member of the Commission, said he agreed that it was desirable to include a general reservation concerning State responsibility and State succession, but he would be reluctant to accept the third element in Mr. Ago's reservation, that relating to armed hostilities, since he thought it best to make no mention of that subject.

29. Mr. TUNKIN said that he was prepared to accept the formula proposed by Mr. Ago, but without the reference to hostilities.

30. Sir Humphrey WALDOCK, Special Rapporteur, said that he would have no objection to leaving the question of hostilities to be dealt with in the introduction. For the text of the general provision, however, he was not attracted by the wording suggested by Mr. Ago and would prefer something on the lines of article 0, stating that nothing in the present articles affected any question in relation to treaties which might arise from State responsibility or State succession.

31. Mr. AGO said that the Commission was not at the moment concerned with reserving the questions of State responsibility and State succession, which would be dealt with separately; it was only concerned with the consequences which might result, for a treaty, from State succession. The question had arisen because the Commission had decided to provide that a treaty could not be terminated except for the reasons stated in the present articles: however, a treaty could also terminate as a consequence of State succession or State responsibility. What had to be safeguarded was not the question of responsibility or succession, it was the consequences for the life of a treaty which might result therefrom.

32. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's formula was more general and therefore, in his opinion, more useful.

⁵ *Yearbook of the International Law Commission, 1963, vol. II, p. 285.*

33. Mr. LACHS suggested that the formula presented by the Special Rapporteur could perhaps be combined with that suggested by Mr. Ago.

34. Mr. de LUNA said he supported that suggestion. What had to be made clear was that the Commission's concern was with the consequences which State succession or State responsibility might have with regard to treaties.

35. Mr. ROSENNE suggested that the Commission suspend its consideration of article 30 until the Special Rapporteur had prepared a suitable wording for the proposed general article.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that he would prepare a text for the next meeting and also make the necessary adjustments to the commentary.

37. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to postpone consideration of article 30 until the next meeting.

*It was so agreed.*⁶

Meaning of word "termination"

38. Mr. AGO said he was very concerned that the French translation of the article should be accurate and for that purpose would like to have the Special Rapporteur's opinion of the precise meaning of the word "termination" as used in article 30 (*bis*).

39. Sir Humphrey WALDOCK, Special Rapporteur, said that in his opinion the word "termination" was used in article 30 (*bis*) to mean the fact of the disappearance of the treaty.

40. Mr. AGO said that the English word "terminate" sometimes had a passive sense, as when it meant that the treaty came to an end, and sometimes an active sense, as when it meant that the treaty was put an end to, and so should be translated differently in French according to the sense in which it was used. If it was used to describe, for example, the procedure employed to put an end to a treaty, it should be translated, in French, by "*en vue de mettre fin*", but if it was used in connexion with the emergence of a new rule of *ius cogens* or the operation of the *rebus sic stantibus* clause, the French text should then say that the treaty "*prend fin*". In article 30 (*bis*), in the light of the Special Rapporteur's explanations, the correct expression to be used in the French version as the equivalent of the English word "termination" would be "*le fait qu'un traité prend fin*".

41. Mr. TSURUOKA said that Mr. Ago had made an excellent suggestion, but he would point out that the word "termination" was sometimes translated in French by "*extinction*".

42. The CHAIRMAN, speaking as a member of the Commission, said that the word "*extinction*" was used in French private law in connexion with obligations.

43. Mr. AGO said he agreed that the French word "*extinction*" was sometimes appropriate, but only where the English word "termination" was used in the passive and not in the active sense.

COMMENTARY TO ARTICLE 31 (Provisions of internal law regarding competency to conclude a treaty) (A/CN.4/L.116/Add.1) (*resumed from the previous meeting*)[43]

Paragraph (5) (continued) and Paragraph (6)

44. The CHAIRMAN invited the Commission to resume its consideration of the commentaries to chapter II.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that at the previous meeting it had been suggested that paragraph (5) of the commentary to article 31 conflicted with the Commission's conclusions on the article.⁷ That was not the case, but in order to remove any appearance of contradiction he would propose that paragraphs (5) and (6) be combined with paragraph (4) to form a single paragraph, so as to make it clear that the purpose was to introduce the opinions of certain jurists; the Commission had to discuss those views in order to explain the special conclusion which it had reached.

46. The text of the three paragraphs had been taken from the 1962 commentary, which had not given rise to any difficulties: Governments had understood the Commission's motives, even though some of them did not agree with the Commission's conclusions.

47. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to combine paragraphs (4), (5) and (6) to form a single paragraph.

It was so agreed.

Paragraphs (5) and (6) were approved.

Paragraph (7)

Paragraph (7) was approved.

Paragraph (8)

48. Mr. ROSENNE pointed out that the two cases mentioned in the last sentence of paragraph (8) had been decided by the Permanent Court of International Justice. It was therefore not altogether appropriate to derive from the Permanent Court's pronouncements in those cases any indication of what the attitude of the present International Court of Justice might be.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that the reference to "the International Court" should be replaced by a reference to "international courts" generally.

It was so agreed.

Paragraph (8), as thus amended, was approved.

Paragraph (9)

Paragraph (9) was approved.

Paragraph (10)

50. Mr. ROSENNE suggested that, in the second sentence of paragraph (10), the word "accession" be added to the enumeration "ratification, acceptance and approval" in order to complete it.

⁶ For resumption of discussion, see 890th meeting (paras. 1-17), new article on cases of State succession and international responsibility.

⁷ See 888th meeting, paras. 78-80.

51. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept that suggestion, which was based on existing practice, although he himself was not entirely in sympathy with that new development, since it further confused the procedures of treaty-making.

Paragraph (10), as thus amended, was approved.

Paragraph (11)

52. Mr. LACHS said he noted the statement in the third sentence in paragraph (11) that it would be "in the courts" that "the validity of the treaty as internal law" would be "challenged on constitutional grounds". That statement would be true of the constitutional system of certain countries, but there were others where it was the legislative body itself that had the right to challenge the validity of the treaty on constitutional grounds.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the sentence would be amended so as to cover both systems.

Paragraph (11), as thus amended, was approved.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were approved with minor drafting changes.

Paragraph (14)

Paragraph (14) was approved with minor drafting changes.

The commentary to article 31, as amended, was approved.

COMMENTARY TO ARTICLE 32 (Specific restrictions on authority to express the consent of the State) (A/CN.4/L.116/Add.1) [44]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

54. Mr. ROSENNE said there was an inaccuracy in the third sentence of paragraph (3) where it referred to the incident in 1923 when the Hungarian Government had disavowed "the Hungarian representative's signature of a resolution of the Council of the League". He suggested that the sentence be corrected by speaking instead of "the Hungarian representative's initialling of a portion of the text of a draft resolution of the Council of the League", and that an appropriate reference to the League of Nations Journal be added in a footnote.⁸

55. Mr. RUDA, supported by Mr. LACHS and Mr. JIMÉNEZ de ARÉCHAGA, suggested that it would be simpler to delete the example altogether.

It was so agreed.

Paragraph (3), as thus amended, was approved.

The commentary to article 32, as amended, was approved.

COMMENTARY TO ARTICLE 33 (Fraud) (A/CN.4/L.166/Add.1) [46]

Paragraph (1)

56. Sir Humphrey WALDOCK, Special Rapporteur, said that in the second line of the first sentence, the word

"since" should be replaced by the word "while", and in the fourth line, the comma after the word "error" should be replaced by a semi-colon and the word "therefore" inserted after the words "the question".

Paragraph (1), as thus amended, was approved.

Paragraph (2)

57. Mr. TUNKIN proposed that the second sentence, reading: "Thus, it is doubtful whether the French term 'dol' corresponds exactly with the English term 'fraud'; and in any event it is not always appropriate to transplant private law concepts into international law without certain modifications", be deleted, and that in the third sentence, the words "no guidance" be replaced by the words "little guidance". In the fourth sentence, he thought the wording "to define with precision the conditions necessary to establish fraud in the law of treaties" was rather inappropriate.

58. Mr. AGO said that, if Mr. Tunkin's amendments were accepted, he would propose that the present third sentence be reworded to read: "In international law, the paucity of precedents means that there is little guidance..." and that the opening words of the last sentence be reworded to read: "The Commission concluded that it would suffice to formulate...".

59. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept the amendments proposed by Mr. Tunkin and Mr. Ago, but in the passage in the fourth sentence criticized by Mr. Tunkin it might be better to say simply "to define fraud" instead of "to define with precision the conditions necessary to establish fraud".

It was so agreed.

Paragraph (2) as thus amended, was approved.

Paragraph (3)

60. Sir Humphrey WALDOCK, Special Rapporteur said that, in the third sentence, the words "broad principle" should be amended to read "broad concept".

Paragraph (3), as thus amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

The commentary to article 33, as amended, was approved.

COMMENTARY TO ARTICLE 34 (Error) (A/CN.4/L.116/Add.2) [45]

Paragraph (1)

61. Mr. RUDA, supported by Mr. AMADO and Mr. AGO, said he thought the expression "which may nullify the reality of consent to a contract" was not very felicitous.

62. The CHAIRMAN, speaking as a member of the Commission, suggested that a better formulation would be "which vitiates consent".

It was so agreed.

Paragraph (1), as thus amended, was approved.

Paragraph (2)

63. Mr. AGO asked that the title of the *Temple of Preah Vihear* case be reproduced correctly in the French text.

⁸ See *League of Nations, Official Journal*, 4th Year, No. 8, p. 1011.

64. Sir Humphrey WALDOCK, Special Rapporteur said that some International Court case references were extremely long and it seemed hardly necessary to repeat them in full every time.

65. Mr. ROSENNE said that a list of abbreviated references had now been given in the Court's latest yearbook and the Secretariat might be asked to make the necessary adjustments throughout the Commission's report on the work of its eighteenth session.

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

66. Mr. ROSENNE suggested that the word "précisent", as the French translation of the words "throw light", was too strong.

67. Mr. AGO suggested the word "clarifient".

It was so agreed.

68. Mr. ROSENNE said that there was a discrepancy between the end of the paragraph and the wording of the article itself. The words "its consent" should be substituted for the words "their consent".

69. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the commentary must conform with the terms of the article, but he wondered whether it was correct to argue that an individual State could determine unilaterally what was considered by the parties to constitute an essential basis of consent to the treaty.

70. The CHAIRMAN, speaking as a member of the Commission, said he thought the material point was the consent of the State rather than the error.

71. Mr. AGO suggested that the end of the paragraph be amended to read: "to vitiate consent to a treaty, an error must relate to a matter which forms an essential basis of its consent to the treaty".

72. He also suggested that, in the second line of the paragraph, the words "error will not nullify the reality of the consent" be replaced by the words "error does not have the effect of invalidating consent".

73. Sir Humphrey WALDOCK, Special Rapporteur, said that he could accept Mr. Rosenne's amendment in a slightly different form so that the end of the paragraph would read "to vitiate the consent of a State to a treaty, an error must relate to a matter constituting an essential basis of its consent to the treaty."

74. In the first sentence the word "vitate" should be substituted for the words "nullify the reality of the".

It was so agreed.

Paragraph (4), as thus amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

75. Mr. ROSENNE said that some consequential changes were needed in paragraph (6) in view of the changes made in paragraph (4) and in order to bring

the commentary more closely into line with the wording of the article itself.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the first sentence should be modified to read: "Paragraph (1) formulates the general rule that an error in a treaty may be invoked by a party as vitiating its consent where the error related to a fact or situation assumed by that party to exist at the time that the treaty was concluded and constituting an essential basis of its consent to the treaty".

It was so agreed.

Paragraph (6), as thus amended, was approved.

Paragraph (7)

77. Mr. AGO suggested that, in the fourth line of the French text, the word "obtenu" be replaced by the word "provoqué".

78. Sir Humphrey WALDOCK, Special Rapporteur, said that in the English text the word "caused" could be substituted for the word "induced".

It was so agreed.

Paragraph (7), as thus amended, was approved.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

Paragraph (9) was approved.

The commentary to article 34, as amended, was approved.

COMMENTARY TO ARTICLE 34 (*bis*) (Corruption of a representative of the State) (A/CN.4/L.116/Add.1) [47]

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

79. Mr. CASTRÉN suggested that, since the article had been adopted by 9 votes to 3, with 2 abstentions, the words "plusieurs membres" in the first line of the French text be replaced by the words "certains membres".

80. Mr. TSURUOKA, referring to the second sentence of the paragraph, said he remembered having put forward the argument that the principle of estoppel should also apply,⁹ and he would therefore like the words "in particular" to be inserted in the second sentence to cover that point.

81. Sir Humphrey WALDOCK, Special Rapporteur, said that as the purpose of the paragraph was to summarize the minority view, he would have no objection to inserting the words "in particular" after the word "provision" in the second sentence.

It was so agreed.

Paragraph (2), as thus amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

82. Mr. AGO suggested that the words "of a different order of gravity from" be replaced by the words "less serious than".

⁹ See 863rd meeting, paras. 21-26.

83. Mr. de LUNA said he did not think the Commission had considered corruption as being less serious than coercion; it regarded both acts as equally serious but it merely wished to attach different consequences to each.

84. Mr. LACHS said that he was inclined to agree with Mr. de Luna. The degree of gravity depended on the circumstances. In the past, coercion of representatives had been of various kinds, but in the modern world other techniques had been developed for imposing treaties on States.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been anxious to justify the distinction drawn by the Commission between the two grounds of nullity—corruption and coercion of a representative. He would be reluctant to drop the introductory phrase of the first sentence, reading “Although regarding ‘corruption’ as being of a different order of gravity from ‘coercion of a representative’ and placing it in a separate article...”

86. Mr. ROSENNE said that he shared the Special Rapporteur’s view. The difficulty might be overcome by reversing the order of the two sentences which made up paragraph (4).

87. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed and suggested that the paragraph be redrafted. The first sentence would begin “The strong term ‘corruption’ is used”, and go on down to “purported to give on behalf of his State”. The second sentence would then be modified to read: “The Commission did not mean to imply . . . as a pretext invalidating the treaty” and so on, and the introductory phrase could be dropped.

It was so agreed.

Paragraph (4), as thus amended, was approved.

Paragraph (5)

88. Mr. TUNKIN said that perhaps the text of article 34 (*bis*) itself was a little rigid because in the majority of cases the corruption of a representative would not be direct or imputable to a State. He had in mind corruption by private companies. However, he did not wish to make any suggestion at that stage for modifying either the article or the commentary.

89. Mr. de LUNA proposed that the third sentence, beginning “It is possible to conceive of cases in which financial circles”, be deleted; it was better not to mention the example of financial circles.

90. Mr. AGO suggested that, instead of “financial circles”, they should say “private circles”.

91. Sir Humphrey WALDOCK, Special Rapporteur, said that in English the expression “private interests” would be preferable.

92. Mr. de LUNA said that in making his proposal his purpose had been not to weaken the article but to strengthen it, because he considered that the example given detracted from the psychological force of the text.

93. Mr. AMADO said he was strongly opposed to the inclusion of the expression in question; if it were omitted, the reader’s imagination could easily fill the gap. He had voted against the article itself.

94. Mr. TUNKIN said he thought the first sentence in paragraph (5) was useful and ought to be retained.

95. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was now dealing not with the text of the article but with the commentary, where it was expected to give examples. It was a fact that the majority of the cases to which the articles applied would be covered by the terms of that sentence.

96. Mr. TUNKIN said that Mr. de Luna’s suggestion was worth considering as a means of securing that the force of the article itself was not weakened. Corruption of a representative even by private interests certainly invalidated the consent of the State. No reference should be made, however, to corruption by private interests in the representative’s own State, since such a situation must be regulated by the State’s internal law; on the other hand reference should be made in the commentary to private interests in another State seeking to influence a representative.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Tunkin’s argument was quite unacceptable because the other State could not be responsible for every act of a private individual; that was a fundamental principle of international law. He had inserted the first sentence in paragraph (5) in order to indicate the trend of opinion in the Commission, but as it had given rise to objection perhaps it should be dropped.

98. Mr. AGO said he thought the best course was to delete the sentence in question. However, since the Commission stated that “The corruption must be imputable to the other contracting State” and then in the last sentence of the paragraph added the words “directly or indirectly”, it would be better to insert, after the words “The corruption must be” the words “in some way”, to emphasize that corruption through the intermediary of private individuals was also corruption imputable to the other contracting State.

99. The CHAIRMAN, speaking as a member of the Commission, said he thought the point at issue was not the question of imputability, which was an essential condition for the application of the article. The sentence which Mr. de Luna wanted to see deleted gave a clear typical example of the kind of case which the Commission had had in mind. He would not, however, oppose its deletion.

100. Sir Humphrey WALDOCK, Special Rapporteur, suggested that, to meet Mr. Ago’s point, the best course would be to delete the second and third sentences in the English text of paragraph (5).

It was so agreed.

101. Mr. TUNKIN said that the resulting new text of paragraph (5) was certainly an improvement, because it meant that the Commission took no stand on the issue of whether or not the corruption had to be imputable to the State concerned.

Paragraph (5), as thus amended, was approved.

Paragraph (6)

102. Mr. BARTOŠ said that in the first sentence it would be better to say “produces the same effects as fraud” instead of “should be treated in the same manner as fraud”.

103. Mr. BRIGGS said that the French translation of the first sentence in the English text was not quite accurate.

104. Sir Humphrey WALDOCK, Special Rapporteur, asked whether it would satisfy the two previous speakers if some such wording as “on the same footing” were substituted for the words “in the same manner” in the English text.

105. Mr. AGO suggested that, in the French text, it would be better to say “*doit être assimilée au ‘dol’*” instead of “*doit être traitée comme un cas de ‘dol’*”.

106. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept Mr. Ago’s amendment. The English text would then read “shall be assimilated to ‘fraud’”.

The commentary to article 34 (bis), as thus amended, was approved.

The meeting rose at 1 p.m.

890th MEETING

Thursday, 14 July 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldoock.

Draft report of the Commission on the work of its eighteenth session

(A/CN.4/L.116 and Addenda)

(continued)

CHAPTER II: LAW OF TREATIES (continued)

NEW ARTICLE ON CASES OF STATE SUCCESSION AND INTERNATIONAL RESPONSIBILITY [69]

1. The CHAIRMAN invited the Special Rapporteur to introduce his proposal for a new article to deal with cases of State succession and international responsibility, as had been agreed during the discussion of the commentary to article 30 at the previous meeting.¹

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, in co-operation with Mr. Ago, he had prepared the following text for a general article to be entitled “Cases of State succession and international responsibility”;

“The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State.”

3. The CHAIRMAN, speaking as a member of the Commission, said he supported the proposed text.

4. Mr. LACHS suggested that it would be more accurate to refer to “the succession of a State” rather

than “a succession of States”, since there were cases where only one State was involved.

5. Mr. BRIGGS said he supported the text proposed by the Special Rapporteur, which covered all possible cases.

6. Mr. AGO said that the use of the plural was essential in the French version.

7. The CHAIRMAN, speaking as a member of the Commission, said he agreed with that remark.

8. Sir Humphrey WALDOCK, Special Rapporteur, said that the proposed new article could be placed either in Part I, immediately after article 3 (*bis*), or in Part VI (Miscellaneous provisions).

9. Mr. BRIGGS said he thought it should be placed in Part I rather than in Part VI, which contained article Z, dealing with the totally different case of the aggressor State. If it were placed early in the draft, it would provide a warning of the exclusion relating to State succession and international responsibility.

10. Mr. TUNKIN said he was in favour of placing the article in Part VI, since like article Z, on the case of an aggressor State, it was a provision of a very general character.

11. Mr. ROSENNE said he supported that view. The new article constituted a general reservation affecting the whole draft. The articles in Part I dealt more specifically with treaties as such.

12. Mr. TSURUOKA said he would abstain on the question of the place of the article.

13. The CHAIRMAN, speaking as a member of the Commission, said that there was a great difference between the proposed new article, the purpose of which was to express a general reservation in regard to treaties as to the consequences of State succession and international responsibility, and the provisions contained in Part I, which served to limit the scope of the draft articles. He was therefore in favour of placing the new article in Part VI.

14. Mr. JIMÉNEZ de ARÉCHAGA said that he agreed with the Chairman. Such articles of Part I as article 3 (*bis*) did not constitute reservations.

15. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that there was an essential difference between an article like 3 (*bis*), which made all the law of treaties subject to the rules of an international organization, and the proposed new article. He could therefore agree to the placing of the new article in Part VI, where it would also be close to the articles on termination to which its provisions more particularly related.

16. Mr. BRIGGS said he withdrew his suggestion to place the new article in Part I.

17. The CHAIRMAN said that, if there were no objections, he would consider that the Commission agreed to adopt the proposed new article in the form proposed by the Special Rapporteur and to place it in Part VI.²

It was so agreed.

¹ See 889th meeting, paras. 35-37.

² Final text adopted at the 893rd meeting as article Y.