

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1964

Volume I

*Summary records
of the sixteenth session*

11 May-24 July 1964

UNITED NATIONS



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INTRODUCTORY NOTE

The summary records in this volume include the corrections to the provisional summary records requested by the members of the Commission and such editorial changes as were considered necessary.

The symbols appearing in the text, consisting of letters combined with figures, serve to identify United Nations documents.

The reports by the Special Rapporteurs on the topics of the law of treaties and special missions and certain other documents, including the Commission's report on this session, are printed in volume II of this *Yearbook*.

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MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Nationality</i>	<i>Name</i>	<i>Nationality</i>
Mr. Roberto AGO	Italy	Mr. Angel M. PAREDES	Ecuador
Mr. Gilberto AMADO	Brazil	Mr. Obed PESSOU	Dahomey
Mr. Milan BARTOS	Yugoslavia	Mr. Paul REUTER	France
Mr. Herbert W. BRIGGS	United States of America	Mr. Shabtai ROSENNE	Israel
Mr. Marcel CADIEUX	Canada	Mr. José M. RUDA	Argentina
Mr. Erik CASTRÉN	Finland	Mr. Abdul Hakim TABIBI	Afghanistan
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Mr. Taslim O. ELIAS	Nigeria	Mr. Grigory I. TUNKIN	Union of Soviet Socialist Republics
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Mr. Victor KANGA	Cameroon	Sir Humphrey WALDOCK	United Kingdom of Great Britain and Northern Ireland
Mr. Manfred LACHS	Poland		
Mr. Liu CHIEH	China		
Mr. Antonio de LUNA	Spain		
Mr. Radhabinod PAL	India	Mr. Mustafa Kamil YASSEEN	Iraq

Officers

Chairman : Mr. Roberto AGO

First Vice-Chairman : Mr. Herbert W. BRIGGS

Second Vice-Chairman : Mr. Grigory J. TUNKIN

Rapporteur : Mr. Mustafa Kamil YASSEEN

Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

AGENDA

*[Document A/CN.4/164]
[20 January 1964]*

The Commission adopted the following agenda at its 722nd meeting, held on 11 May 1964 :

1. Filling of casual vacancies in the Commission (article 11 of the Statute)
2. Prolongation of the session
3. Law of treaties
4. Special missions
5. Relations between States and inter-governmental organizations
6. Organization of future sessions
7. Date and place of the seventeenth session
8. Co-operation with other bodies
9. Other business

YEARBOOKS OF THE INTERNATIONAL LAW COMMISSION

Consolidated list of volumes published to date

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INTERNATIONAL LAW COMMISSION
SUMMARY RECORDS OF THE SIXTEENTH SESSION

Held at Geneva, from 11 May to 24 July 1964

722nd MEETING

Monday, 11 May 1964, at 3 p.m.

Chairman : Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Later : Mr. Roberto AGO

Opening of the Session

1. The CHAIRMAN, after opening the sixteenth session of the International Law Commission, said that since the last session he had represented the Commission before the Sixth Committee of the General Assembly and the Asian-African Legal Consultative Committee.

2. The General Assembly, in resolution 1902 (XVIII), had expressed "appreciation to the Commission for the work accomplished at its fifteenth session, especially with regard to the law of treaties". It had rejected the Commission's proposal to hold a three weeks' session in January 1964, but only because it considered that the cost might not be altogether justified for so short a period. He believed that the Assembly could be expected to approve a winter session if it was not too short. He understood that several members of the Commission thought the ten-week summer session too long, but would be prepared to devote 14 or 15 weeks a year to the Commission, if the time was more evenly spread over two sessions. The Commission would no doubt wish to bear those facts in mind when it came to consider item 2 (Question of the continuation of the present session) and item 6 (Question of the organization of future sessions) of its provisional agenda.

3. The sixth session of the Asian-African Legal Consultative Committee had been held at Cairo from 23 February to 6 March 1964. Since he had prepared a report on the subject which would soon be circulated to members of the Commission, he would confine himself to saying that the Consultative Committee had considered not only subjects of indirect interest to the Commission, such as the legality of nuclear tests in connexion with State responsibility, but also one subject of direct interest — the law of treaties — and had

decided to send an observer to the Commission's meetings.

Election of Officers

4. The CHAIRMAN called for nominations for the office of Chairman.

5. Mr. VERDROSS proposed Mr. Ago, whose qualities both as a scholar and as a member of the Commission made him eminently fitted for the post.

6. Mr. TUNKIN seconded the proposal.

7. Mr. AMADO, Mr. BRIGGS, Mr. de LUNA, Mr. ROSENNE and Mr. PAREDES supported the proposal.

Mr. Ago was unanimously elected Chairman and took the Chair.

8. The CHAIRMAN called for nominations for the office of First Vice-Chairman.

9. Mr. JIMÉNEZ de ARÉCHAGA proposed Mr. Briggs.

10. Mr. CADIEUX, Mr. PAL, Mr. PESSOU, Mr. TSURUOKA, Mr. VERDROSS, Mr. EL-ERIAN, Mr. YASSEEN and Mr. AMADO supported the proposal.

Mr. Briggs was unanimously elected First Vice-Chairman.

11. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

12. Mr. de LUNA proposed Mr. Tunkin.

13. Mr. AMADO, Mr. TSURUOKA, Mr. PESSOU, Mr. PAL, Mr. VERDROSS, Mr. YASSEEN, Mr. BARTOŠ, Mr. CASTRÉN and Mr. TABIBI supported the proposal.

Mr. Tunkin was unanimously elected Second Vice-Chairman.

14. The CHAIRMAN called for nominations for the office of Rapporteur.

15. Mr. TSURUOKA proposed Mr. Yasseen.

16. Mr. VERDROSS, Mr. TUNKIN, Mr. BARTOŠ, Mr. BRIGGS, Mr. EL-ERIAN, Mr. ELIAS,

Mr. AMADO, Mr. TABIBI, Mr. PESSOU, Mr. PAL, Mr. ROSENNE and Mr. de LUNA supported the proposal.

Mr. Yasseen was unanimously elected Rapporteur.

Adoption of the Agenda

The provisional agenda (A/CN.4/164) was adopted.

17. Mr. LIANG, Secretary to the Commission, expressed the hope that the Commission would take up item 2 at an early stage, so as to give the Secretariat time to make the necessary arrangements if it were decided to prolong the session beyond the proposed date of closure.
18. The CHAIRMAN said that the item would be taken up as early as possible.
19. Mr. BRIGGS said he hoped that in future the Commission's yearbooks would be published more promptly. Neither the printed version of the two volumes for the fourteenth session nor the final mimeographed text of the summary records of the fifteenth session had yet reached him.
20. Mr. ROSENNE suggested that the drafting committee should be made responsible for preparing the texts of draft articles in all three working languages, not only in English and French as in the past.
21. Mr. de LUNA said he supported that suggestion, particularly because representatives in the Sixth Committee of the General Assembly had had occasion to point out imperfections in the Spanish text of the draft articles on the law of treaties.
22. The CHAIRMAN said that suggestion would be borne in mind, but he hoped the Commission would not take a hasty decision, lest responsibility for the Spanish text might prevent the drafting committee from completing what was already an onerous task.
23. Mr. LIANG, Secretary to the Commission, informed the Commission that Mr. Lachs would not be arriving until the following week and Mr. Liu not until 25 May.

The meeting rose at 3.45 p.m.

723rd MEETING

Wednesday, 13 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Filling of casual vacancies in the Commission (Article 11 of the Statute) (A/CN.4/168 and Add.1)

[Item 1 of the agenda]

1. The CHAIRMAN announced that, at a private meeting, the Commission had elected Mr. Paul Reuter of France and Mr. José María Ruda of Argentina to

fill the casual vacancies caused by the resignations of Mr. André Gros and Mr. Luis Padilla Nervo on their election to the International Court of Justice.

Special Missions

(A/CN.4/166)

[Item 4 of the agenda]

2. The CHAIRMAN invited the Commission to consider item 4 of the agenda and called on the Special Rapporteur for special missions to introduce his report (A/CN.4/166).
3. Mr. BARTOŠ, Special Rapporteur, said he had thought it necessary to preface his draft articles with a fairly long introduction, because the question was a new one which had not been clearly settled either in the literature or in case-law; even the concept of *ad hoc* diplomacy had been a subject of controversy.
4. As to the object of the report, the question was whether the concept of *ad hoc* diplomacy should be treated entirely by analogy with that of resident, permanent diplomacy. It was hardly possible to proceed from the premise that resident diplomacy was normal diplomacy and that *ad hoc* diplomacy was exceptional, for history showed that up till the Treaties of Westphalia, and even as recently as the Congress of Vienna, resident diplomacy had been the exception. The existing rules on resident diplomacy could not be automatically applied to *ad hoc* diplomacy, for a distinction in kind should be drawn between two forms, *ad hoc* diplomacy having become more important in consequence of more frequent use.
5. He would hesitate to say whether the concept of *ad hoc* diplomacy should include visits by heads of State and ministers for foreign affairs, specialized permanent missions working alongside regular diplomatic missions, government delegations to institutional commissions set up under international agreements, whose status was established beforehand, and certain classes of diplomats representing their governments in international organizations, who in fact constituted a new class of resident diplomat. Before he could define special missions, he thought it necessary to ascertain the views of the Commissions as to whether they included only missions of a strictly political nature or technical missions as well. He himself was firmly convinced that the distinction should be based not on the mission's purpose, but on its nature; in other words, on whether or not it represented a State vis-à-vis other subjects of public international law.
6. Another preliminary question was whether the rules governing special missions should also cover the legal status of delegations and delegates to international conferences and congresses. In his opinion, the position of delegations and delegates to conferences convened by States and not by international organizations was in every respect assimilable to, and even almost identical with, that of special missions. He suggested, however, that that preliminary question should not be discussed until the main question, and Mr. El-Erian's report on

relations between States and inter-governmental organizations, had been considered.

7. The most difficult question was whether to draft only an additional protocol to the Vienna Convention on Diplomatic Relations, or a separate, independent instrument on special missions. In his opinion, a mere reference to the rules governing resident diplomatic missions would not be sufficient in many cases, which called for special rules for special missions. It therefore seemed necessary to draft a set of special rules and it might be asked whether, in doing so, it would be better to try to maintain historical continuity with the formerly existing rules relating to special missions, or, on the contrary, since the nature of special missions had changed, to draw up new rules combining codification in the strict sense with progressive development. In the end he had abandoned the idea of trying to maintain historical continuity with the rules which had existed before the Congress of Vienna, and had studied the practice which had grown up during the Second World War and after 1945.

8. Another question was whether there were any normative rules of positive public international law relating to special missions. The Commission had hesitated between three different approaches. First, the limited application to *ad hoc* missions of the rules relating to permanent missions proposed by Mr. Sandström;¹ in his view, that approach was unrealistic, for there were too many differences between ordinary missions and *ad hoc* missions. Secondly, the integration theory, advocated by Mr. Jiménez de Aréchaga, that all provisions of diplomatic law concerning permanent missions applied also to special missions, though additional provisions were required to take the special nature of those missions into account.² Although he did not entirely accept that theory, he found it more attractive than the first. The third approach was that of Sir Gerald Fitzmaurice who had urged that the rules relating to permanent diplomacy, in so far as they were applicable to particular cases, should be applied, *mutatis mutandis*, to *ad hoc* diplomacy.³ That approach, based on the rule of reason assisted by the case method, was sound enough; but the difficulties of interpreting the rule of reason had deterred him from adopting it.

9. With regard to the content of the concept of special missions, he believed that such missions should have the following characteristics: they should be appointed by a State to perform a special task with respect to another State; they should not be regarded as permanent, and their duration should depend on the completion of a specific, temporary task; that task should consist in representing a State as the lawful holder of sovereignty vis-à-vis another State.

10. Certain kinds of mission with ceremonial or courtesy functions, should also be classed as special missions. The functions of *ad hoc* diplomacy could be very diverse; he had listed sixteen groups. He was reluctant,

however, to include secret emissaries, members of the suite of heads of State, political agents not possessing diplomatic status (a problem which had arisen, for instance, during the Evian negotiations, since the Algerian Provisional Government had been recognized only by some States, and not by France which was negotiating with it) and private agents.

11. His own conclusion was that special missions were a separate class, distinct from regular missions; as they had become more frequent, they had gained in importance and the topic deserved study with a view to codification of the rules on special missions.

12. The CHAIRMAN suggested that in the general discussion the Commission should deal with the various aspects of the subject in turn. He therefore asked the Special Rapporteur what order it would be best to follow.

13. Mr. BARTOŠ, Special Rapporteur, said that in his opinion the concept of *ad hoc* diplomacy should be studied first, but without attempting a precise definition at that stage. The first question which arose was whether the study should be confined to special missions of a political character or should also cover missions of a technical character if they represented a State. The second question to be considered should be that of delegations to international conferences and congresses.

14. The CHAIRMAN invited the members of the Commission to state their views on the first question raised by the Special Rapporteur.

15. Mr. VERDROSS, after complimenting the Special Rapporteur on the quality of his work, said that he accepted his distinction between the old *ad hoc* diplomacy, which had been mainly ceremonial, and modern *ad hoc* diplomacy, which was concerned with concrete and practical problems. He also accepted his distinction between specialized, resident diplomatic missions, which were permanent, and *ad hoc* diplomatic missions, which were only temporary.

16. As to the first of the Special Rapporteur's questions — whether the Commission should confine its study to special missions of a political character — he agreed with him that such a restriction was not justified so far as genuine official diplomacy was concerned; special missions of a technical character were employed, like political missions, in official relations between States.

17. Mr. YASSEEN said that on the first question he fully agreed with the Special Rapporteur — whose report deserved every praise — that it would be neither right nor practical to limit special missions to missions of a political character. It was a direct result of the development of modern diplomacy that, in continually widening its field, it had come to regulate matters formerly outside the scope of international regulation. Hence it would be neither right nor practical to exclude technical missions, provided, of course, that they were official and represented the State.

18. However, he did not see why special missions should not include visits by ministers for foreign affairs

¹ *Yearbook of the International Law Commission, 1960, Vol. II, p. 108, para. 7.*

² *Ibid.*, pp. 115-117.

³ *Op. cit.* Vol. I, p. 259, para. 16.

and heads of State, which, though they might not have any specific programme, did nevertheless have a certain diplomatic purpose and performed a certain function in international relations. Recognition of certain kinds of special mission as *ad hoc* diplomacy did not mean adopting identical rules for all special missions.

19. Mr. de LUNA said that he did not draw any real distinction between special missions of a political character and special missions of a technical character. Power was a very broad notion and economic policy was an expression of power. As Mr. Yasseen had said, in view of the development of modern diplomacy it would be wrong to make such a distinction. Moreover, it would be difficult in practice to draw a dividing line between what was political and what was technical. He doubted, however, whether the Commission should discuss everything which concerned special missions.

20. The same applied to the problem of delegations to international conferences and congresses. From the legal point of view, they were undoubtedly special missions whose status was regulated by an international convention. If the Commission set out to deal with all the different kinds of special mission simultaneously, it would find that quite different rules were needed for some of them. From the theoretical point of view, missions of that sort must be classed as *ad hoc* diplomacy, but for practical purposes the Commission need not concern itself with them.

21. Mr. ROSENNE said he was grateful to the Secretariat for the valuable papers it had prepared, partly in response to requests by the Commission and partly in compliance with decisions of the General Assembly, on matters which were closely connected with the Commission's work even if they were not actually on its agenda. He was also glad that arrangements had now been made for sending documents to members by airmail.

22. He congratulated the Special Rapporteur on having brought out so clearly in his report the real nature of the problems raised by special missions. He hoped that most of the material in the introduction could be included in the Commission's own report, for the benefit of the General Assembly and of all international lawyers.

23. With regard to the scope of the topic of special missions, he fully accepted the general concept described in paragraphs 68-71 of the report as far as it went. But that concept was not sufficiently comprehensive to cover certain types of special mission, in particular, missions sent by two States to meet in the territory of a third State, with its consent, for the purposes of a particular negotiation. An example of that type of situation was the negotiations at Wassenaar in the Netherlands in 1952, between Israel and the Federal Republic of Germany, which had ended in the conclusion of an agreement at Luxembourg, with the consent and co-operation of the two third States concerned. He therefore suggested that the scope of the study should not be limited to the case in which one State sent a special mission to another for negotiations between the two of them.

24. With regard to visits by heads of States, heads of government and ministers, he inclined to the view that the Commission should confine itself to the more normal type of diplomatic activities likely to be entrusted to special missions, as distinct from visits of a more esoteric kind. Few important practical problems arose out of such visits, and any which might arise in connexion with the suites of the personages concerned could generally be solved with the aid of the rules governing permanent diplomatic missions.

25. He reserved his position on the question of embodying rules on special missions in a protocol until the Commission came to discuss the form the rules should take.

26. Mr. CADIEUX, after complimenting the Special Rapporteur on his distinguished contribution to the Commission's work, said that instead of trying to decide whether a special mission was of a ceremonial, political or technical character, it would be simpler just to ask whether it was official and whether the person in charge of it represented the State. In any case, there were two essential criteria: the temporary nature of a special mission and the consent of the receiving State.

27. But there was another important criterion, namely, the level or importance of the mission. Like Mr. Yasseen, he was reluctant to exclude visits by heads of State from the definition of special missions, since the right to commit the State was theirs *par excellence*.

28. In practice, the level or importance of the mission could raise difficult problems. Some countries were uncertain what status should be granted to members of special missions; in certain cases it was thought that they should be subject to the ordinary law. It would be difficult to extend to other classes of representatives, even if they were instruments of the national will, the immunities granted to professional diplomats whose whole career was devoted to their country's foreign relations. The Commission would therefore need to prepare its draft carefully if it was to have any chance of acceptance by parliaments. Admittedly special missions had multiplied and they served a most useful purpose, but the Commission should act cautiously and be tactful in regard to traditional diplomats, especially as they would play a decisive part in deciding the fate of its draft.

29. Mr. PAL, after paying a tribute to the Special Rapporteur, said he agreed with previous speakers that there was no reason to restrict the concept of special missions to purely political activities; in the light of recent developments, following which, with a general retreat of creative individuality from its functions in the social structure, the State acted as the very source of the criteria of community, assuming the social function of being the initiator, promoter and dictator of social cohesion, it was clear that the study should cover technical missions as well. At that stage he would not go into the details of the study, but could say that, broadly speaking, he agreed with the Special Rapporteur's comprehensive treatment.

30. Mr. ELIAS said that the Special Rapporteur's report showed remarkable insight and breadth of vision

in its treatment of a very amorphous subject. For the present, he would confine his remarks to the one issue which the Commission was called upon to deal with at that stage. He agreed with those speakers who had stressed the difficulty of drawing a distinction, in *ad hoc* diplomacy, between political and technical matters. Indeed, the very use of the word "diplomacy" implied that a political element was involved, even if the matters under discussion were economic, technical or scientific.

31. He thought that visits by heads of State or ministers should be covered in the report. It should first be ascertained whether they were dealt with in the 1961 Vienna Convention on Diplomatic Relations; if not, the Commission should support the Special Rapporteur's view that the question should be included in its study.

32. He agreed with the Special Rapporteur regarding the theory of functional necessity: the emphasis should be placed, not on the representative character of the persons concerned, but on the functions they performed.

33. The CHAIRMAN, speaking as a member of the Commission, said he agreed with most of the previous speakers on the point at issue. In his opinion it would be absurd to try to make a distinction between a political special mission and a technical special mission; for a "technical" mission was in fact nothing more than a mission dealing with a question of policy on economic, cultural, health or other matters, and was therefore always political in the broad sense of the term, even if it did not come within the traditional sphere of politics. The number and variety of such missions was bound to increase.

34. To avoid any ambiguity, it would be well to drop the term "*ad hoc* diplomacy" altogether and speak only of "special missions". That would make it clear that the Commission was not considering the situation which had prevailed before permanent diplomacy, but was dealing with the existing fact of missions whose functions were outside the normal sphere of diplomacy. The term "special mission" would also make it easier to examine the status of a person who represented a State without having the ordinary diplomatic functions.

35. To the case quoted by Mr. Rosenne, of a meeting held in the territory of a third State, should be added that of diplomats normally accredited to a third State, who might be entrusted with a special mission; such diplomats were usually protected by their diplomatic status, but there might be cases in which it would be necessary to regard them as members of a special mission.

36. Mr. BARTOŠ, Special Rapporteur, replying to the comments made, and dealing first with those of Mr. Yasseen, said it was not for any theoretical reason that he had hesitated to include visits by heads of State in his report on special missions, but because special rules on the subject already existed.

37. To Mr. Cadieux and Mr. Rosenne he pointed out that the questions of the consent of the receiving State and meetings in a third State were covered by articles 1, 4 and 14 of his draft.

38. He recognized the need to preserve the prerogatives of traditional diplomats; and in fact the term "*ad hoc* diplomacy" was not used in any of his draft articles.

39. As Mr. Elias had pointed out, the Commission should take the function as the basic criterion. It had to draft rules concerning special missions whose function was to represent the State.

40. Mr. YASSEEN said he understood the Special Rapporteur's concern, but he still maintained that a visit by a head of State or government, a minister for foreign affairs or other minister, was in fact a special mission. Such visits, particularly by a head of State, were so important that they were often the subject of a special agreement. But surely rules should be laid down for application in the absence of such an agreement.

41. Mr. BARTOŠ, Special Rapporteur, said that was a point on which the Commission would have to take a decision.

42. Mr. EL-ERIAN said that the scholarly study prepared by the Special Rapporteur was a valuable contribution not only to the work of the International Law Commission, but also to the literature of international law in general.

43. With regard to the scope of the topic, he agreed that special missions were something quite distinct from permanent missions and should therefore be treated separately.

44. He also agreed that it was difficult to draw a distinction between political and other missions. Both the preamble to the Vienna Convention on Diplomatic Relations⁴ and article 3 of the Convention itself showed that the scope of diplomatic relations could not be confined to the traditional political functions. It was perhaps worth noting that, in his own country, a law of 1925 on diplomatic regulations used the phrase "Political and Consular Corps" in its title, whereas a law of 1954 on the same subject spoke of the "Diplomatic" corps and no longer used the word "Political".

45. He agreed that the status of visiting heads of State and ministers should be excluded from the scope of the study. The immunity of visiting heads of State was regulated by general international law and occasionally also by constitutional law. The position of members of the suite of such visitors probably needed regulation, but that was no reason for including visiting heads of State or government in a study of special missions. With regard to ministers for foreign affairs, some further elucidation was necessary before he could express an opinion; in its discussion on the law of treaties, however, the Commission had agreed that a minister for foreign affairs did not in principle have to produce evidence of his authority to act on behalf of his country. In its study of special missions, the Commission intended to deal with persons authorized by a head of State to act for the purposes of a specific mission. That

⁴ United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, Vol. II, p. 82.

made him very reluctant to see heads of State and ministers for foreign affairs brought within the scope of the study.

46. Although he was inclined to agree with the Special Rapporteur that the basis of diplomatic immunity should be functional necessity, he must point out that not only the Commission, but also the 1961 Vienna Conference on Diplomatic Intercourse and Immunities had decided to adopt as the basis the representative character of the diplomatic mission coupled with functional necessity.

47. Mr. JIMÉNEZ de ARÉCHAGA said that the remarkable report by the Special Rapporteur broke new ground in international law in general and diplomatic law in particular. The Special Rapporteur had succeeded in a task which had been attempted in vain by the Commission at five meetings towards the end of its twelfth session.⁵ At most of those meetings it had unfortunately not had the benefit of the assistance of those members who, being members of the Drafting Committee, were then engaged in the formulation of the Commission's draft articles on consular relations.

48. With regard to the discussion of the report, he would have preferred the Commission's usual method of a discussion article by article, but he would, of course, agree to follow the method which had now been adopted.

49. As to the scope of the subject, he agreed with the Special Rapporteur's suggestion in paragraph 88 of his report "that both missions of diplomatic and political importance and those of a strictly technical nature should be recognized as special missions". It was impossible in practice to draw a distinction between political and technical missions. But while he agreed that technical missions should be included in the study, he must make it clear that in his view their inclusion did not mean that all missions should be subject to the same body of rules.

50. That applied particularly to the question of personal immunity from criminal, civil and administrative jurisdiction, which was the subject of the Special Rapporteur's article 26. For instance, it was extremely unlikely that States would be prepared to grant such immunity to the members of a technical mission engaged in discussions on a matter such as the control of animal diseases. For members of missions of that kind, privileges and immunities should be confined to those necessary for the performance of their duties; they should be similar to those enjoyed by consuls under the 1963 Vienna Convention on Consular Relations rather than to those enjoyed by diplomatic agents under the 1961 Vienna Convention on Diplomatic Relations. He fully agreed with Mr. Cadieux that an unduly liberal attitude to the question of the privileges of members of special missions would meet with strong resistance from parliaments. He need only remind the Commission of the objections raised in cer-

tain parliaments to the privileges embodied in the Convention on the Privileges and Immunities of the United Nations.⁶

51. With regard to visiting heads of State and ministers, the Commission could do no more than put forward rules governing precedence, as had been done by the Special Rapporteur in article 9, paragraph 2, of his draft. Any attempt to cover a wider field than that of diplomatic law would involve the Commission in needless controversy.

52. The CHAIRMAN agreed that the Commission should consider separately the important question whether visits by heads of State, heads of government or ministers, should be dealt with in the report on special missions.

53. Speaking as a member of the Commission, he said he had some doubt about the possibility of making any clear distinction between missions by a head of State, head of government or minister for foreign affairs, and missions led by any other personage.

54. Mr. BARTOŠ, Special Rapporteur, reiterated that there were rules of positive international law on that matter, which was why he had not dealt with it in his draft articles. As such visits had become much more frequent, the Commission might, as Mr. Yasseen had suggested, prepare general rules for any cases not already covered.

55. The CHAIRMAN, speaking as a member of the Commission, said he thought that if there were rules of customary international law, rather than leave the question aside the Commission should codify those rules.

56. Mr. TUNKIN said that there were many arguments in favour of dealing with such visits in the Commission's draft. But the Commission should consider the matter carefully before it took a decision.

57. The CHAIRMAN noted that the Commission agreed to defer taking a decision on the question whether visits by heads of State, heads of government or ministers should be considered as special missions.

58. He invited the Commission to take up the second question: should the draft articles on special missions be confined to direct relations between States, or should they also deal with delegations to conferences or congresses convened by States or by international organizations?

59. Mr. BARTOŠ, Special Rapporteur, pointed out that the previous year the Commission had decided to reserve its decision until it had heard the views of the two special rapporteurs dealing respectively with special missions and with relations between States and inter-governmental organizations. Theoretically, the draft articles should deal only with special missions concerned with relations between States, but in prac-

⁵ *Yearbook of the International Law Commission, 1960*, Vol. I. 565th, 567th, 569th, 576th and 577th meetings.

⁶ *United Nations Treaty Series*, Vol. 1, p. 16.

tice it could hardly be maintained that there should be different sets of rules for missions to conferences convened by States and missions to conferences convened by international organizations, which were almost identical and differed only as to the entity convening them.

60. Mr. EL-ERIAN said that some consultation between the two special rapporteurs was necessary, but in the meantime he had no hesitation in saying that he would prefer the status of delegations to international conferences convened by States to be dealt with in the report on special missions, for such conferences were among the most common examples of *ad hoc* diplomacy. Admittedly, the number of international conferences convened by States outside international organizations was diminishing as a result of the growth of international organizations, but they nevertheless remained a distinct phenomenon in international life.

61. Mr. BRIGGS said he would have spoken with some diffidence had it not been for the masterly report by the Special Rapporteur, which had filled the gaps in the knowledge of the law on special missions. He certainly did not consider that the subject should be confined to diplomacy outside international conferences. It was purely fortuitous that the diplomacy conducted within international conferences, which was an important aspect of the subject, might have been covered under either of the topics assigned to two different special rapporteurs, and he welcomed Mr. El-Erian's willingness for it to be dealt with in the report on special missions. He was sure the Special Rapporteur would bear in mind the distinction between the two categories of conference and it should be for him to pronounce on whether or not the status of delegations to conferences convened by States was governed by residual rules.

62. Mr. VERDROSS said that the Commission must leave no gaps if its work was to be useful. The Convention on Diplomatic Relations, the Convention on Consular Relations, and the report begun by Mr. El-Erian on relations between States and inter-governmental organizations, dealt with certain specific questions; all the other questions should be settled in the report on special missions. It would accordingly have to deal with special diplomacy in the broadest possible sense, though that did not mean that the same rules should apply to every kind of special mission.

63. Mr. de LUNA agreed with Mr. El-Erian and Mr. Verdross. Delegations to conferences should be treated as special missions, whether the conferences were convened by international organizations or by States. Their functions were obviously the same in both cases; but in practice, in the first case the organization had established rules, whereas in the second case there might be rules or there might not. In other words, in the second case there was a problem of the progressive development of international law.

64. It should be noted that observers, who were considered in paragraph 100 of the report, were not necessarily envoys of States which had refused to

participate in a conference: they might also be sent to a regional conference by a State which, although situated outside the region concerned, had some interest in the questions to be discussed. Spain, for instance, often sent observers to conferences of the Hispano-American States.

65. Mr. ELIAS said that the status of delegations to conferences, whether convened by international organizations or by States, should be dealt with under one general heading as part of the topic of special missions. He had personally experienced the need for uniform rules on the privileges and immunities of special missions when he had been appointed by the United Nations, together with a Canadian, an Indian and a Swiss expert, to go to the Congo for the purpose of assisting the Government to settle certain constitutional problems and legal matters connected with Katanga and the copper mines. The Congolese Government had received them as persons accredited by their governments and not as a United Nations mission of experts, and had insisted on providing them with cars. An anomalous situation had then arisen when United Nations cars flying United Nations flags had been assigned to their assistants, who had consequently enjoyed privileges and immunities not granted to the experts themselves.

66. Mr. JIMÉNEZ de ARÉCHAGA said he must warn the Commission against a hasty reversal of the decision to exclude the status of delegations to conferences from the scope of the study on special missions, which he regarded as sound. In taking that decision the Commission had been guided largely by the importance of distinguishing between traditional bilateral diplomacy and what had been termed multilateral diplomacy. It had also been aware that some rules, such as those pertaining to the *agrément* and to the declaration of a person as *non grata*, were far from being the same for special missions and delegations to conferences.

67. In his report on *ad hoc* diplomacy⁷ Mr. Sandström, the Special Rapporteur, had examined the differences between the positions of delegations enjoying full diplomatic privileges and those enjoying the privileges and immunities conferred under the United Nations Convention on Privileges and Immunities, in regard to such matters as immunity from jurisdiction and exemption from customs duties. He had pointed out the anomaly of having two different sets of rules governing two types of conference, as a result of which delegations to conferences convened by international organizations might enjoy a lesser degree of diplomatic protection. In his (Mr. Jiménez de Aréchaga's) opinion, the privileges and immunities and the status of delegates to conferences should be the same whether the conference was convened by a State or by an international organization.

68. Sir Humphrey WALDOCK said that Mr. Bartos's report was bound to be of great value, since it would

⁷ *Yearbook of the International Law Commission, 1960, Vol. II, p. 108.*

apparently cover matters not regulated by the Vienna Convention on Diplomatic Relations.

69. During the discussion on special missions at the previous session he had thought that it would be somewhat artificial to distinguish between the status of delegations to conferences convened by States and that of delegations to conferences held under the auspices of international organizations. It would be helpful if the Special Rapporteur on relations between States and inter-governmental organizations could say what matters he thought should come within the scope of his report.

70. Mr. EL-ERIAN observed that he had not prepared a second report because, owing to the cancellation of the proposed winter session, the Commission had not concluded its preliminary consideration of the first (A/CN.4/161 and Add. 1). His initial intention had been to deal with the privileges and immunities of international organizations as such, of their officials, of experts appointed by them, of permanent missions to them and of representatives to conferences convened by them or held under their auspices. As members would have noted, the Special Rapporteur on special missions, in paragraph 21 of his report, had distinguished between the status of delegations and delegates to conferences convened by international organizations or held under their auspices, and that of delegations and delegates to conferences held outside international organizations.

71. He understood Mr. Jiménez de Aréchaga to favour a different distinction, namely, between bilateral and multilateral diplomacy. If that line were followed, presumably the status of delegations to international conferences, however convened, would be the same.

72. The CHAIRMAN, speaking as a member of the Commission, said he found it difficult to decide whether it was better to deal with everything, as Mr. Verdross had suggested, or whether questions which were perhaps very different ought not to be dealt with together. For the time being, he thought the Commission would be wise to confine its study to special missions sent from one State to another; later on, after it had examined Mr. El-Erian's report, it could decide whether there were any gaps to be filled in regard to missions to international conferences.

73. Mr de LUNA, referring to a comment by Mr. Cadieux, said he agreed that parliaments and governments were often reluctant to grant immunity; that was a practical point which should not be overlooked. The Commission would certainly have to draft rules covering delegations to conferences convened by States.

74. Mr. YASSEEN said that the question was whether missions sent to conferences should be dealt with in the report on special missions or in the report on relations between States and inter-governmental organizations. In his view, missions sent to conferences — whether convened by an international organization or by a State — must logically be regarded as special missions. If the Commission adopted a different posi-

tion, it might find itself dealing with matters that had nothing to do with relations between States and international organizations.

75. He agreed with Mr. Jiménez de Aréchaga that conference diplomacy was multilateral, whereas the diplomacy of special missions was usually bilateral.

76. The Commission might consider entrusting the whole question of conferences to a third Special Rapporteur, but there seemed to be no insurmountable obstacle to assigning it to the Rapporteur on special missions. In any case the two Special Rapporteurs were already agreed on that point.

77. Mr. ROSENNE said that, even if the functions of delegations to conferences held under the auspices of international organizations were to all intents and purposes identical with those of delegations to conferences convened by States, as Mr. de Luna had argued, the legal framework within which those two types of conference took place was so different that the difficulty of assimilating the status of delegations to them was virtually insurmountable. The difficulty would arise not so much over the privileges and immunities to be accorded, as over the procedure for waiver of privileges in a given case and the settlement of any differences that might arise. If the conference were convened by States, those matters would be dealt with through normal diplomatic channels, but the legal situation would be very different if it were held under the auspices of an international organization; in that case the organization would be interposed and the matters in question would be governed by the arrangements concerning the privileges and immunities of the organization. For example, so far as the United Nations was concerning, he believed that in certain cases the Secretary-General personally had to take decisions regarding the waiving of immunities.

78. Perhaps it would be advisable to postpone further discussion for a few days so that the two Special Rapporteurs could consider the problem and submit a joint proposal on how it should be handled and in which of the two reports. The Commission would then have a clearer picture of the scope of the report on relations between States and inter-governmental organizations.

79. He was uncertain whether the Special Rapporteur's argument that it would be difficult to draw up two sets of rules for the two types of conference was valid. In fact, there were already two sets of rules, those laid down in the Vienna Convention on Diplomatic Relations and those contained in the conventions on the privileges and immunities of international organizations. The substantive content of those rules might be very similar, but their legal basis was entirely different.

80. The CHAIRMAN said that the two Special Rapporteurs, Mr. Bartoš and Mr. El-Erian, would think the matter over, come to some agreement, and inform the Commission of their conclusions.

81. Speaking as a member of the Commission, he said that the differences between missions sent from

one State to another and delegations to international conferences seemed to him to be greater than the differences between delegations to conferences convened by States and delegations to conferences convened by international organizations.

The meeting rose at 1 p.m.

724th MEETING

Thursday, 14 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Welcome to Mr. Reuter

1. The CHAIRMAN welcomed Mr. Reuter and congratulated him on his election to fill the casual vacancy caused by the resignation of Mr. Gros.

Special Missions

(A/CN.4/166)

(resumed from the previous meeting)

[Item 4 of the agenda]

2. The CHAIRMAN invited the Commission to resume consideration of the report on special missions (A/CN.4/166).

3. Mr. EL-ERIAN said that, in accordance with the request made at the previous meeting,¹ Mr. Bartoš and he had discussed the question of how the status of delegations to conferences should be handled. In view of the complexity of the matter and the different opinions on it expressed in the Commission, they had concluded that for the time being Mr. Bartoš' report should be confined to inter-State special missions and his own report should deal with the status of delegations to conferences convened by international organizations. They considered that the Commission should wait until it had examined both reports before deciding how to deal with the status of delegations to conferences convened by States.

4. Mr. TSURUOKA said he wished first of all to congratulate the Special Rapporteur on his masterly report and draft. As a career diplomatist of more than thirty years' standing, he (Mr. Tsuruoka) would like to make a few practical comments. The Commission should not lose sight of its objective, which was to facilitate international co-operation. The special mission was an adaptation of diplomatic machinery to changed conditions; it was thus a part of diplomacy and, like permanent diplomacy, was designed to pro-

mote the interests of the country represented, in collaboration with the other countries concerned.

5. The special mission had two distinctive characteristics. First, in bilateral relations, whereas the resident mission was permanent and general, the special mission was occasional and partial. The Special Rapporteur had brought out that distinction very well. Secondly, whereas classical diplomacy was bilateral by definition, the special mission was often concerned with multilateral or collective relations.

6. The existence of those two forms of diplomacy raised a question of responsibility. There might be conflict between the permanent diplomatic mission and a special mission of a State in another State. However, the presumption must always be that the will of the States was one: both missions had the same purpose and the special mission became part of permanent diplomacy. A visit by a head of State, a head of government or a minister might have a very general purpose, but it nevertheless retained an occasional character; in the longer term, the responsibility still rested with the ambassador. The Commission should therefore draft the rules concerning special missions very carefully, without detracting from the role of permanent diplomacy.

7. The distinction between political and technical missions was not very important in practice. In Japan, the decision to send a special mission was taken by the Ministry of Foreign Affairs, and it was the ambassador on the spot who was responsible for ensuring its success.

8. Another point very clearly brought out in the report was that the principle of autonomy of the will of the parties prevailed. The Commission was to draft rules which would, of course, permit certain exceptions; it should confine itself to essentials, in other words, to considering the normal situation, and should not include rules relating only to details and special cases.

9. With regard to the discussion procedure, he would have preferred the Commission to examine the draft article by article.

10. Mr. CASTRÉN congratulated the Special Rapporteur on his excellent report, which seemed very complete; the ideas in it were progressive, and the solutions proposed sound and practical. With regard to the definition of special missions, they could certainly perform all sorts of official functions. As several speakers had said, the rules governing special missions might vary with their functions.

11. The questions of State and ceremonial visits had been set aside; it was certainly worth examining in greater detail, and the comments by Mr. El-Erian and Mr. Yasseen had already thrown much light on it.

12. Opinions were divided on the subject of delegations to international conferences and congresses. In strict logic, as Mr. Yasseen had said at the previous meeting,² such delegations were in fact entrusted with

¹ Paragraphs 78 and 80.

² Paragraph 74.

special missions ; but there was no reason why a part of the subject — namely, the legal status of representatives to conferences held within an inter-governmental organization or convened by such an organization — should not be dealt with in the draft concerning relations between States and inter-governmental organizations. Nevertheless, a distinction based on the purely formal criterion of who convened a conference was a rather artificial one. For example, in what category would conferences convened jointly by an inter-governmental organization and by one or more States be placed ? But after all, the question which draft would deal with delegations to conferences was of minor importance. He was inclined to accept the joint proposal of the two Special Rapporteurs, as presented by Mr. El-Erian. The essential point, as Mr. Verdross had said, was that the Commission should leave no gaps in the codification of diplomatic law.

13. Mr. TUNKIN said that the Special Rapporteur, in dealing with a new, very complex and little studied topic, had successfully identified the problems and outlined possible solutions.

14. With regard to the definition of a special mission, the first question that had arisen was whether a distinction should be made between political missions and so-called technical missions. He agreed with the general view that it was immaterial whether a mission was to carry out a political or a technical task ; the essential point was that it should represent the State in its relations with another State. As Mr. Tsuruoka had said, special missions formed part of diplomacy ; the position of special missions was analogous to that of ordinary diplomatic missions in that both were organs of the State.

15. It had been said that the second characteristic of a special mission was that its task was limited ; but that was not in accordance with the facts. Special missions had very varied tasks, some of which might be of a very general kind. For instance, a mission led by a deputy foreign minister could discuss with another government all matters within the competence of the permanent mission.

16. The third characteristic of a special mission was that it was temporary, and that was essential from the theoretical viewpoint — so much so that it might perhaps be better to drop the term "special mission" in favour of "temporary mission".

17. Most of the members of the Commission seemed to agree that missions led by a head of State, head of government or minister constituted special missions. If that were so, it might be asked why such visits should not be dealt with. His first reaction to Mr. Yasseen's remarks at the previous meeting was that for practical reasons the Commission should deal with such visits in its draft ; there would always be time later on to decide whether they fitted in or not.

18. With regard to delegations to conferences, he was of the opinion that, as Mr. de Luna had observed, the nature of a conference was the same whether it was convened by an international organization or by States ; for even if a conference was convened by an organi-

zation, it was still a conference of States ; the two cases should therefore be dealt with together.

19. The rules concerning international conferences could perhaps be treated as a separate branch of international law, so Mr. Yasseen's suggestion that a third Special Rapporteur might be appointed was worth considering. It seemed hardly likely that the question of conferences could be fully dealt with in the draft concerning relations between States and inter-governmental organizations. The Commission could, of course, as the two Special Rapporteurs had suggested, defer taking a decision on where that matter was to be dealt with, but it would have to take a decision of some kind sooner or later.

20. Mr. AMADO said that the Special Rapporteur deserved all the praise that had been lavished on his report : he had succeeded in extracting rules from veritable chaos. Diplomacy was the whole body of the acts and processes which regulated contacts between sovereign States — permanent contacts through regular missions and temporary contacts through special missions. The members of the Commission were right in not wishing to place technical missions in a separate class, for sovereignty now found expression in technical matters as well as in the traditional processes of politics.

21. The rules derived by the Special Rapporteur were the most that the Commission could aspire to for the time being ; it must go forward step by step. The Commission would be wise to defer any decision to extend its study to special missions concerned with multilateral relations.

22. The CHAIRMAN, speaking as a member of the Commission, said it seemed to him that special missions concerned with bilateral relations formed a subsidiary question related to the subject-matter of the Vienna Conventions, whereas the question of delegations to conferences was subsidiary to that of relations between States and inter-governmental organizations ; there was no great difference between the case of conferences convened by international organizations and the now exceptional case of conferences convened direct by States. It should be remembered too that some conferences were in fact the constitutional bodies of organizations. The problem was therefore a complex one and hard to delimit.

23. Mr. CADIEUX said that the second question put by the Special Rapporteur raised three other subsidiary questions. First, as to substance, what was the legal basis of the rules to be formulated, and how, in practice, could the support of governments best be secured ? Secondly, was the question of delegations to conferences an independent or a subsidiary one ? Thirdly, should the Commission deal with that question now or later ? If it was considered to be an independent question, it could easily be deferred, but if it was regarded as subsidiary, the rules to be drawn up might take the form of an extension of existing rules. The two Special Rapporteurs concerned were in the best position to guide the Commission ; he hoped they would think the matter over in the course of their work and submit their suggestions to the Commission.

24. Mr. BARTOŠ, Special Rapporteur, said he was grateful for the kind remarks which had been made about his report; he would reply to some of the comments on it. First, with regard to the question of the responsibility of diplomats and the unity of the will of the State, he had had access to the chancery reports of eleven States, and had found evidence of numerous conflicts between ambassadors at the head of permanent mission and heads of special missions: the former feared that the latter would infringe their prerogatives, while the latter accused the former of hindering them in the performance of their duties. For example, the head of a special mission might receive instructions direct from the cabinet, which were not communicated to the ambassador first. A high-level political mission sometimes changed the line of approach decided on earlier, and initiated a new policy. A mission of economic or financial experts, for example, might be given a free hand to establish new relations between two States, to settle a problem, or to seek a friendly settlement. In every case, it was necessary to maintain the unity of the State's will; but that was a matter which should be settled within each State, not at the international level. The question which arose in connexion with relations between States was that of the binding force of acts performed by special missions; in that respect it was necessary to create a presumption that all powers were vested in the permanent mission except those temporarily and expressly conferred on the special mission.

25. He fully agreed with Mr. Tunkin that the essential characteristic of the special mission was that it was temporary. Its task was limited in time but not always in subject-matter; its terms of reference might be very broad and go so far as establishing new bases for the relations between two States.

26. He also agreed that missions led by a head of State, a head of government or a minister, were special missions, despite the theoretical objection that a head of State could not himself lead a mission, because the characteristic of a mission was that it held its powers by authority of the head of State.

27. As Mr. Cadieux had said, it was important to decide whether the question of delegations to international conferences was an independent or a subsidiary one; if it was an independent question, it could, as Mr. Tunkin had suggested, be brought within the general framework of the "law of conferences". The two Special Rapporteurs were willing to study the question and propose a solution to the Commission.

28. He would like, at that stage, to submit a third question to the members of the Commission: that of the privileges and immunities to be granted to special missions. He had been guided in that matter by the functional theory, and had consequently made a great difference between what was granted to diplomatic agents and what should be granted to special missions. The Commission must decide whether privileges and immunities should be fixed according to the task assigned to the special mission rather than its representative character. As Mr. Rosenne had pointed out, some special missions had duties ordinarily performed by

consular missions.³ It would therefore be unfair to grant them greater advantages than consular agents. He was mainly concerned over criminal matters, for there had been cases of a member of a special mission being falsely charged with a crime in order to prevent him from carrying out his task. Special missions must be safeguarded in that respect.

29. Mr. TSURUOKA agreed that safeguarding the unity of the State's will was largely an internal matter. Nevertheless, it also had an international aspect, for the will of the States was expressed in two different ways, that might affect relations between two States and international law relating to special missions should endeavour to prevent such conflicts, taking full account of the fact that the permanent mission assumed responsibility for maintaining good relations between its own country and the receiving country.

30. The CHAIRMAN observed that the two questions put to the Commission by the Special Rapporteur really related to two entirely separate matters.

31. With regard to the privileges and immunities to be granted to members of special missions, the Special Rapporteur had clearly shown that two contradictory requirements had to be reconciled: first, States did not seem prepared to treat special missions and permanent missions on an equal footing, and secondly, special missions should have at least the minimum of privileges and immunities essential for the performance of their tasks.

32. As to the will to be attributed to a State when the will expressed by its special mission differed from that expressed by its permanent mission, that was a very delicate question, especially as a special mission was often made up of members of other departments whose relations with the ministry of foreign affairs were not always of the best. The problem was connected with that considered by the Commission at its previous session, regarding the attribution to the State of the will expressed by its representative.

33. He suggested that for the time being the Commission should consider only the question of privileges and immunities.

34. Mr. YASSEEN said that special missions were so varied that it would be impossible to draft uniform rules for all of them. Accordingly, the Commission should try to find criteria by which special missions could be differentiated according to their importance and their tasks, with a view to drafting rules that would differ in certain respects. That was not a new method; the Vienna Convention on Diplomatic Relations gave different status to different classes of persons in "resident" diplomacy — diplomatic agents, administrative and technical staff, service staff and private servants.⁴

35. With regard to the second question, his view was

³ *Yearbook of the International Law Commission, 1963, Vol. I, 711th meeting, para. 77.*

⁴ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, pp. 85-86.*

that the functional theory should be followed, without excessive restrictions. For example, the Commission should not confine itself to proclaiming the immunity of members of special missions in respect of offences committed in the course of their duties. Members of special missions should be protected against every activity designed to interfere, directly or indirectly, with the performance of their task; and it should not be forgotten that they might be exposed to blackmail or to an obstructive attitude on the part of the State or private persons. Such protection seemed necessary in the interest of the function performed.

36. Mr. ROSENNE said it seemed to him that the Special Rapporteur had put the question of what privileges and immunities should be granted to special missions in too abstract a form. He would have thought that the matter was one of detail to be taken up under article 26 of the draft. In view of the decision reached by the Commission at its previous session, and recorded in the last sentence of paragraph 62 of its report to the General Assembly,⁵ he was inclined to favour following the provisions of the two Vienna Conventions as closely as possible where privileges and immunities were concerned.

37. He would be interested to know whether, at the present stage, the Special Rapporteur wished the Commission to express an opinion on the form his work of codification should take: once that major issue had been decided, it would be easier to see how numerous problems of detail should be solved.

38. Mr. ELIAS said that in the main he agreed with the comments made by Mr. Yasseen. It would not be easy to assimilate the status of members of special missions to that of consuls, because special missions differed so widely in their composition. The rules to be devised would have to take account of different categories of special missions, which might be broadly classified as special missions led by heads of State, heads of government or ministers for foreign affairs; special missions led by persons with the rank of permanent secretary or head of department, special missions composed of more junior officials and technical missions. Special provisions would have to be made for subordinate members of special missions.

39. Concern was growing in a number of countries, including his own, at the increasing number of persons attached to embassies for whom privileges and immunities were claimed by the sending State. There was a strong feeling against any further extension of privileges and immunities.

40. Mr. VERDROSS said that the present general tendency was to restrict rather than to widen the privileges and immunities of temporary diplomats. For example, the immunities granted to United Nations delegates and officials were more limited than those granted in the days of the League of Nations. It must be recognized that even the immunity of permanent

diplomats in civil matters was not based strictly on the functional theory, but rather on the need to give diplomats the feeling that they were completely free in the receiving State; that was justified in the case of diplomats residing permanently in a State, but not in the case of diplomats staying there only temporarily. In principle, therefore, it would be right to restrict the privileges and immunities of temporary diplomats to those accorded by the 1946 Convention on the Privileges and Immunities of the United Nations.⁶ There were exceptions, however, and he agreed with Mr. Yasseen that different rules were justified.

41. Mr. de LUNA said he agreed with Mr. Verdross. The privileges and immunities of temporary missions were based on law and not on the comity of nations. States were not prepared to grant any more privileges than necessary. Mention had sometimes been made of the principle of reciprocity, which might attenuate that tendency, but reciprocity was not always possible. Hence he did not think that members of temporary special missions could be granted full and unlimited immunities, but only those necessary for the performance of their functions. According to the functional theory, members of a special mission carrying out the same functions were only entitled to the same privileges and immunities. True, it sometimes happened that a head of mission was also a head of State; in that case, his special privileges derived not from his functions but from international custom, which granted him the right to additional privileges and immunities. When considering the same function, the practice of international organizations, which had already been tested, should be taken into account. If the Commission tried to go further, it might be objected that limitations were accepted in normal practice without hindering the accomplishment of special missions.

42. Mr. LIANG, Secretary to the Commission, commenting on the practice of international organizations, said that heads of State, heads of government and ministers for foreign affairs often attended meetings of the principal organ of the United Nations, namely, the General Assembly, and it was clearly envisaged in Article 28, paragraph 2, of the Charter, that members of governments would attend periodic meetings of the Security Council as representatives. However, such representation had never been equated to special missions, either in the work of any learned writer or in United Nations practice, nor would any international lawyer describe a minister for foreign affairs as a diplomat. The very concept of a diplomatic mission, whether permanent or special, implied an authorization or a mandate. A head of State visiting another State would be regarded as discharging State functions not diplomatic functions.

43. The Commission would be wise to bear in mind the clear distinction made by Oppenheim between relations between States and diplomatic relations;⁷ he regarded the latter as but one aspect of the former.

⁵ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 37.

⁶ *United Nations Treaty Series*, Vol. 1, p. 16.

⁷ See Oppenheim, L., *International Law*.

44. The discussion had not yet thrown any light on the precise nature of special missions and, in particular, its bearing on the privileges and immunities they should enjoy. He feared that the concept of special missions might be unduly enlarged; if that enlargement were carried to the extreme, theoretically it might even encompass permanent missions, and special missions might have more extensive functions than permanent missions. It would then be very difficult to decide what privileges and immunities should be granted to special missions and the precedents to be found in the practice of international organizations would not be helpful.

45. He was pleased to note that the Special Rapporteur seemed to be following the same line of approach as that outlined at the previous session by the present Chairman, who had put forward the view that diplomatic law could be divided into three branches: permanent missions, special missions and relations between States and international organizations. He (Mr. Liang) wished to emphasize that the subject of special missions should be confined within the framework of diplomatic law and should not be identified with some of the multifarious functions of the State itself, such as visits to another country by heads of State, heads of government or ministers for foreign affairs, who were the authorities entitled to send missions, either permanent or special.

46. Mr. CADIEUX said he thought that there was general agreement in the Commission that it was impossible to envisage a single uniform status for all categories of special mission. Hence the problem would be to establish criteria for determining what types of special mission might receive treatment as far as possible analogous to that already accorded to certain categories of State agents operating abroad. There might perhaps be certain special cases to which the rules already drawn up did not apply; that was where the Special Rapporteur would have to break new ground.

47. With regard to the criteria to be established, the first distinction that must be made was between State agents and their assistants; that would make it possible to apply existing rules to a large group of persons. The second distinction related to the rank of agents; he thought that the distinction usually made between ambassadors and agents of lower rank could be applied *mutatis mutandis* to special missions. A third distinction could be made, though not absolutely, according to the functions of agents. For in certain cases ministers and agents of senior rank might be entrusted with general political missions which clearly involved the will of the State in a very wide field. Moreover, in the case of technical operations involving the will of the State, a distinction could be drawn between technical missions on a very high level whose members should enjoy a special treatment, and technical missions on a lower level, which did not commit the State to the same extent and so did not call for the same privileges.

48. Mr. EL-ERIAN said he would like the Special Rapporteur to state his position on the question whether the topic of special missions should or should not include the status and immunities of a visiting

head of State or government or a minister for foreign affairs. He noted that Mr. Tunkin appeared to favour a study of that question, though he agreed that the decision whether to cover it in the draft articles might be left until later.

49. At the previous meeting, he had expressed doubts regarding the advisability of including the question of heads of State or government and ministers for foreign affairs in the topic of special missions.⁸ His doubts had increased after listening to the interesting observations of the Secretary to the Commission. In international relations, a head of State or a minister for foreign affairs could not be said to be acting as a representative; they were themselves State organs. The reason for associating them with diplomatic representatives was probably that they were usually treated together in traditional text-books. A typical example was to be found in the work of the Italian writer Anzilotti, who in connexion with his theory of individual and collective representation, had included in his scheme, in the following order, heads of State, ministers for foreign affairs, commanders-in-chief for the purposes of an armistice or other military convention — and last, diplomatic and consular officers.⁹ There was, however, a fundamental difference between a head of State and a minister for foreign affairs, on the one hand, and the members of a diplomatic mission, whether permanent or special, on the other.

50. At the previous meeting, the Chairman had suggested that the fact that the status of a head of State or government was governed by general international law was not an argument for not codifying the matter.¹⁰ He agreed with that view, but wished to point out that the status of such personages was fundamentally different from that of members of special missions and therefore did not come within the scope of the topic. The position of the suites of such visiting personages, however, certainly needed to be regulated.

51. Mr. TUNKIN said that the Vienna Conference on Diplomatic Relations had based its conclusions not only on the functional theory, but also on the representative theory; that was clear from the fourth paragraph of the preamble to the Convention.¹¹

52. He did not think it possible to discuss the subject of special missions, without first considering their nature. It was the nature of special missions, not the choice between two theories, which should govern the Commission's conclusions. A special mission, like a permanent diplomatic mission, was a State organ representing one State vis-à-vis another. Its status should enable it to carry out its functions in the territory of a foreign State.

53. With regard to the rank of special missions, in addition to missions led by a head of government,

⁸ 723rd meeting, para. 45.

⁹ Anzilotti, D., "Cours de droit international", trans. Gidel, Paris, 1929, *Recueil Sirey*, chapter II.

¹⁰ 723rd meeting, para. 55.

¹¹ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, p. 82.*

minister or head of State, there were many kinds of special missions at very different levels. The diversity of temporary missions was therefore a matter which must be taken into account.

54. In his earlier remarks, he had touched on the question of the functions of special missions. Practice had shown that they could be entrusted with the most varied functions. A diplomatic mission was a representative organ of a State in all spheres of its relations with another State; the situation with regard to special missions, was different. As the Special Rapporteur had pointed out, most special missions had a limited and special function, but others, though equally temporary in character, had very wide functions. In any discussion of limitations on privileges and immunities, the problem of functions must therefore be taken into consideration.

55. It might prove difficult to draft a single text covering every category of special mission; if so, it might be better to distinguish between the various categories and to give them different status, but he preferred not to take a definite stand at that early stage.

56. Sir Humphrey WALDOCK said he agreed with Mr. Tunkin on the need to adopt a practical approach and to avoid taking a definite stand on theoretical issues at so early a stage in the discussion. Special missions could be very different in character, both as to the level of representation and as to the functions entrusted to them.

57. Like Mr. Elias and M. Jiménez de Aréchaga, he thought that the Commission should not lose sight of the position of the receiving State, for which the privileges and immunities of members of a special mission were something of a burden. He was in favour of giving the maximum protection necessary for the efficient performance of the functions of a special mission, but the privileges granted to such a mission should be kept within reasonable limits. There was a strong feeling in many countries, including the United Kingdom, that privileges and immunities must be kept within bounds. If the Commission were to lose sight of that feeling, its proposals might meet with resistance.

58. The CHAIRMAN, speaking as a member of the Commission, said that the Commission would have to discuss the question from a practical standpoint and would be making a serious mistake if it looked either to the functional or to the representative theory for a solution. The elements of a solution must be sought in the essential character of special missions and be based mainly on their temporary and occasional nature. In the Vienna Convention, certain privileges and immunities were based on the fact that the mission was established permanently on foreign territory. Or course, the essential was that the special mission should be able to carry out its task, but it would be absurd to try to grant it privileges which were essentially those of permanent missions.

59. Nor should the Commission, in the desire to distinguish between the status of permanent diplomats

and that of temporary missions, draw dangerous analogies with the position of consular missions. Special missions bore no relation to consular missions, whose functions were chiefly concerned with municipal law.

60. The only difference between diplomatic missions and special missions was that special missions were temporary and occasional; both were concerned with relations between States. In addition, as several previous speakers had pointed out, regular diplomatic missions were generally uniform in character. Special missions on the other hand were of very diverse kinds ranging from the missions led by heads of State to those led by heads of minor departments. But there again, the status of the head of the mission should not be given too much weight. True, some distinctions should be made on that account, but it would be difficult to set limits, and hasty conclusions on the subject should be avoided.

61. The present debate could hardly enable the Commission to adopt a final position, but the exchange of views at least had the advantage of giving the Special Rapporteur a general idea of the Commission's opinion on the questions he had put to it.

62. Mr. AMADO said that from the outset of the discussion he had opposed the idea of taking the rules on consular immunities as a model. The Commission's duty was, precisely, to take into account the development of modern diplomacy, which was characterized by the numerous and rapid journeys of heads of State and other leading persons. It must be remembered that a head of State was not an envoy; he travelled in his capacity as head of State.

63. After listening to the comments of Mr. Cadieux, Mr. Elias and Sir Humphrey Waldock, he wished to stress especially that States were always mainly concerned with their own interests. They would certainly take the necessary steps to ensure that difficulties relating to the status of special missions responsible for conducting negotiations of vital interest to themselves did not prejudice the result of the negotiations. Preliminary rules for that purpose had already taken shape, and articles had been drafted in sufficiently clear terms; that in itself was a valuable achievement, and it would always be possible to make improvements later.

64. Mr. ROSENNE said that at the previous session he had pointed out that "special missions fulfilled a variety of functions, some diplomatic or quasi-consular in character; for example, they dealt with migration problems, many of which were now covered by the Vienna conventions".¹² He would now like to clarify that statement, in the light of the remark in paragraph 29 of the Special Rapporteur's report that he had "also adopted, in part, the argument put forward at the meetings of the Commission by Mr. Rosenne, that although special missions represent sovereign States in international relations they cannot, because

¹² *Yearbook of the International Law Commission, 1963, Vol. I, 711th meeting, para. 77.*

of their functions, always be treated as diplomatic missions but must, in some cases, be treated as consular missions." When speaking at the previous session, he had not had in mind any separate recognition for special missions which fulfilled quasi-consular functions. He had not wished to suggest that there should be two sets of regulations for special missions, to parallel the two Vienna conventions. His purpose had merely been to point out that, for the purpose of drafting the substantive provisions on special missions, the Commission could not only draw inspiration from the Convention on Diplomatic Relations, but could also bear in mind the contents of the Convention on Consular Relations.

65. Attention had been very aptly directed by Mr. Tunkin to the fourth paragraph of the preamble to the 1961 Vienna Convention which stated that the purpose of diplomatic privileges and immunities was "to ensure the efficient performance of the functions of diplomatic missions as representing States".¹³ It was interesting to compare that language with the words used in the corresponding preambular paragraph of the 1963 Vienna Convention: "to ensure the efficient performance of functions by consular posts on behalf of their respective States".¹⁴ There was clearly a difference between the members of a diplomatic mission which represented the State and officials who acted on behalf of their State. An examination of the various types of special mission included in the Special Rapporteur's list in paragraph 86 of his report showed that many of them could properly be said to act "on behalf of" their State rather than as "representing" it. However, that distinction would not necessarily have a bearing on the question of privileges and immunities. His own view was that the legal regulation of privileges and immunities should follow a single pattern, and draw a distinction between the different categories of staff of a mission, along the lines of both the Vienna conventions.

66. Mr. BARTOŠ, Special Rapporteur, said he did not regard the functional theory as meaning that privileges and immunities should apply only to acts performed by international agents, but that such agents should be able to carry out their tasks in full liberty and under conditions safeguarding the prestige and dignity of the State they represented. For it was impossible to limit the acts of members of special missions to certain acts they performed in the exercise of their functions. The functional theory should accordingly be taken as a basis, but the representative character of special missions should also be taken into account to some extent.

67. Moreover, while it was true that there were many kinds of special mission, the decisive factor in his opinion was not the rank of the head of the mission, but the task assigned to the mission. The essential consideration was the full powers granted to agents

representing a State. On that point, he had for the time being based his work on the Vienna Convention which had, with some exceptions, abolished the former distinctions between diplomatic staff of higher rank and subordinate administrative and technical staff of diplomatic missions. Thus special missions could be divided into several categories according to their functions and according to the functions of the various members of the same mission, but rank could not be taken as the criterion for doing so.

68. The debate had revealed certain weaknesses in his report and he would bear them in mind. With regard to the point which the Secretary to the Commission had rightly drawn attention to, he himself had also drawn certain conclusions from United Nations practice; that was a theoretical basis, but the practical object was to ensure that members of special missions were free to perform their functions.

The meeting rose at 12.55 p.m.

725th MEETING

Friday, 15 May 1964, at 10 a.m.

Chairman: Mr. Herbert W. BRIGGS

Special Missions

(A/CN.4/166)

(continued)

[Item 4 of the agenda]

1. The CHAIRMAN invited the Commission to continue consideration of item 4 of the agenda.

2. Mr. BARTOŠ, Special Rapporteur, said he would first put a preliminary question to the Commission, namely, whether the rules governing special missions should be rules of international comity or rules of law. In his opinion they should be rules of law. From that followed a second question: whether the draft should take the form of an additional protocol to the Vienna Convention on Diplomatic Relations or of a separate convention. The study he had just made had led him to the conclusion that the difference between special missions and resident diplomacy was too great for an additional protocol to be adequate. He was therefore in favour of drafting a separate instrument, to be linked to the Vienna Convention by a cross-reference, which would contain a body of residual rules but would leave States free to conclude bilateral agreements. The draft should not contain *jus cogens* rules, except perhaps a few broad substantive rules concerning, for instance, the need for a State's consent to receive a mission and the freedom of a mission to perform its functions.

¹³ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, p. 82.*

¹⁴ *United Nations Conference on Consular Relations, Official Records, Vol. II, p. 175.*

3. Mr. ROSENNE said that the two questions put to the Commission by the Special Rapporteur were closely linked. With regard to the second, in paragraph 9 of his report (A/CN.4/166), the Special Rapporteur quoted a passage from the Commission's report on its fifteenth session which showed that the draft articles could take the form of an additional protocol to the Vienna Convention of 1961, a separate convention, or some other appropriate document. Articles 20 and 23 of the Commission's Statute were relevant to the third possibility; however, the Special Rapporteur had not considered it.

4. In paragraph 28, the Special Rapporteur rejected the idea of an additional protocol, a conclusion with which he (Mr. Rosenne) fully agreed. The draft articles to be formulated by the Commission should be as complete and as self-contained as possible, although some reference to the 1961 Vienna Convention, particularly in the commentary, might be appropriate.

5. He doubted very much whether the form of a separate convention was appropriate. The Commission should consider the effects of the severance of diplomatic relations on the operation of a convention on special missions, bearing in mind that special missions were frequently sent to a receiving State with which the sending State did not have diplomatic relations, or with which diplomatic relations had been suspended.

6. Another point which deserved consideration was how a convention on special missions would operate where there was no recognition between the sending State and the receiving State. A case in point was that of the special mission sent by the Federal Republic of Germany to Israel to attend the eighteen-month trial of Eichmann. The Commission also should not overlook the situation that would arise if one of the States concerned was not a party to the proposed convention.

7. The Special Rapporteur's first question, relating to the nature of the draft articles, was connected with the question whether the matter was an appropriate one for regulation by a general multilateral treaty within the meaning of that term as defined in article 1(c) of the Commission's draft articles on the law of treaties.¹

8. He agreed that the draft articles on special missions could contain elements of *jus cogens* in the limited sense indicated by the Special Rapporteur, and provisions from which States would be able to depart at will; the latter should, in his view, be in the form of residual rules. The provisions of article 47, paragraph 2, of the Vienna Convention of 1961,² and article 73 of the Vienna Convention of 1963,³ were hardly adequate in that respect. In fact, there existed a considerable number of bilateral treaty provisions on the subject of special missions and no clear pattern emerged from them with regard to the policy of States. There was a wide difference between what a State would ask for

its own special missions and what it was prepared to grant to the special missions it received, varying with the circumstances of each particular case and with the relations between the two States at the time of the agreement to send and receive the mission. Such lack of uniformity could hardly be fortuitous and he thought that the formulation of a general code might create additional difficulties for States.

9. Nor was it sufficient to state that the rules to be formulated would be residual rules. The concept of a residual rule needed elucidation. It could be held that the residual rules applied where two States agreed to send and to receive a special mission, without agreeing on any details; it could also be held that the residual rules applied only in the absence of a contrary provision in the agreement between the parties. An example of such a provision was to be found in the agreement signed at Moscow on 13 November 1945 between Yugoslavia and the USSR, concerning the conditions of work of Soviet experts assigned to Yugoslavia.⁴ Article 5 of that agreement read: "The assigned experts shall be entitled to import into Yugoslavia free of duty personal and household effects for private and professional use." Where there was a simple clause of that kind covering one particular point, the question would arise whether all the residual rules were excluded or only those relating to customs exemptions.

10. Another conception of residual rules was that of a set of rules made available to States for incorporation in their own agreements as desired.

11. The Commission should also bear in mind the problems to which a convention would give rise with regard to entry into force and the transformation of international obligations into provisions of domestic law. He therefore suggested that the draft articles should be submitted to governments and that the Commission should review them in the usual manner in the light of government comments with a view to adopting a text which would not be self-executing, but would need the agreement of States to bring it into effect on a bilateral basis.

12. Mr. TABIBI said that the two Vienna conventions dealt with matters on which there were well accepted usages. The topic of special missions presented greater difficulties, one of them being that it was related to a number of other topics, including relations between States and international organizations, international conferences, permanent diplomatic missions and representation at various levels.

13. Another difficulty was that members of special missions often represented their countries in other capacities as well. He himself was frequently instructed by his Government to perform a special mission on his way to or from an international conference at which he had acted as its representative.

14. He agreed with those members who thought that the question of visiting heads of State was outside the scope of the topic. Certain usages were emerging in the matter and could perhaps be codified at a later

¹ *Yearbook of the International Law Commission, 1962, Vol. III, p. 161.*

² *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, p. 87.*

³ *United Nations Conference on Consular Relations, Official Records, Vol. II, p. 187.*

⁴ *United Nations Treaty Series, Vol. 116, p. 146.*

stage. For present purposes, however, it should be remembered that heads of State did not carry out negotiations; that was usually left to the specialists who accompanied them.

15. The Commission was called upon to complete diplomatic law by adding a new chapter to the two Vienna conventions, and it should therefore bear in mind the need to promote friendly relations between States; it should reconcile the need to protect members of special missions with the need to safeguard the rights of both the receiving and the sending State.

16. He had noted the interesting points raised by Mr. Rosenne with regard to the form which the draft articles should take. Personally, he doubted the wisdom of taking a decision at that stage; it should be postponed until the Commission had examined the draft articles on special missions and the report on relations between States and inter-governmental organizations.

17. The Commission should also consider whether it was necessary to appoint a separate rapporteur for the law governing international conferences.

18. Mr. VERDROSS said he thought the first of the Special Rapporteur's questions — whether the rules governing *ad hoc* or temporary diplomacy should be rules of law or rules of international comity—could be answered at once, for under its Statute the Commission was clearly expected to draft rules of law.

19. A separate convention seemed the better choice and the more logical one. Although there were certain analogies between temporary and resident diplomacy, they were not very precise, and special missions really formed a separate class.

20. As to the problems mentioned by Mr. Rosenne and Mr. Tabibi, it would be better to discuss them when the Commission came to consider the articles submitted by the Special Rapporteur.

21. Mr. YASSEEN thought the Commission should produce draft rules of law constituting the ordinary law of *ad hoc* diplomacy. Admittedly, it might be said that such law was special law, inasmuch as it was established largely by bilateral agreements; but that was no obstacle to its formulation, any more than the existence of many bilateral conventions on consular law had been an obstacle to the drafting of the Vienna Convention on Consular Relations. Of course, a State would still be free to derogate from the general convention constituting the ordinary law on the subject by means of bilateral agreements, so long as such derogations did not conflict with *jus cogens* rules.

22. With regard to the form to be adopted — an additional protocol or a convention — the more *ad hoc* diplomacy was studied the clearer it became that its similarity to resident diplomacy was much more apparent than real. The Commission should therefore prefer an instrument which was sufficiently independent to emphasize the separate character of *ad hoc* diplomacy, but did not preclude certain references, which might be useful, to the other relevant conventions, in particular the Vienna Convention on Diplomatic Relations.

23. Mr. CASTRÉN said that the question what form the Special Rapporteur should give to his draft was already settled, because the Commission was called on once again to draft a set of articles, in other words a body of rules of law, some of which might be rules of *jus dispositivum*. The Special Rapporteur himself had adopted that form in his report. Some speakers at the previous meeting had urged the desirability of using the terminology of the 1961 Vienna Convention on Diplomatic Relations as far as possible in the draft; that was precisely what the Special Rapporteur had tried to do, and in other respects too the articles in his draft were satisfactorily worded.

24. With regard to the relation that the new draft should bear to the 1961 Vienna Convention, he agreed with the Special Rapporteur that the Commission should not merely prepare an additional protocol to that Convention. He even thought it should draft a convention completely independent of the two Vienna conventions. Hence there would be no need to link the new convention to the previous ones by a cross-reference. It would be sufficient to refer to the 1961 Convention in the preamble.

25. In his section on general and final clauses, the Special Rapporteur had suggested adopting only two articles of the 1961 Convention. There was no reason why they should not be incorporated word for word in the future convention on special missions, just as the Vienna Convention on Consular Relations contained several provisions similar to provisions of the 1961 Convention. But it would be better to draft a separate convention, as that would make it easier to secure acceptance and would avoid difficulties if one of the Vienna conventions did not enter into force or became obsolete. As the Special Rapporteur had observed, however, it would be better to leave that question aside until the final clauses of the draft were considered.

26. Mr. de LUNA agreed with Mr. Castrén and Mr. Tabibi that it was only after concluding its consideration of the question that the Commission would be able to see how far the articles it had drafted involved inviolable rules of *jus cogens*, or rules of *jus dispositivum* which ranked as residual rules in cases where States had not provided otherwise by bilateral agreements.

27. It would also be well to await the conclusion of the debate before settling the problem raised by Mr. Rosenne, for one point was agreed: the Commission should draft a separate convention, and not an additional protocol to the Vienna Convention on Diplomatic Relations.

28. In so far as the choice was between a separate convention and a set of model rules to be followed in bilateral agreements, both formulas certainly had advantages; but the history of diplomatic relations had shown that the second had not produced satisfactory results. On the other hand, a separate convention, even though its ratification might cause some difficulties, had an authoritative status and might very well serve as a model. It offered the advantage of being binding on the States which had ratified it. Many conventions remained in force when diplomatic relations were

broken off or even during an armed conflict. It should be remembered that most missions were sent to a State without their status being fixed beforehand by bilateral agreement. A mere set of model rules would not be binding, whereas a convention would. Those were merely preliminary remarks, however; the Commission would be better able to weigh the advantages of one solution against the other at a later stage in its work.

29. Mr. ELIAS said that the history of the subject clearly showed that the Commission was called upon to draw up a body of legal rules; it might perhaps draft only a few, but they would be rules of law for the guidance of States. If necessary, some of the rules adopted might indicate whether it was permissible for States to contract out of them. The Commission would then be laying down the minimum provisions on the subject of special missions.

30. With regard to the second question put to the Commission by the Special Rapporteur, the historical antecedents suggested that the draft articles on special missions should constitute an independent set of rules, neither ancillary nor subsidiary to the Vienna conventions. Of course, as pointed out by the Special Rapporteur, appropriate cross-references would be made where necessary to one or other of the Vienna conventions. When work had been completed on the four parts of diplomatic law—diplomatic relations, consular relations, special missions and relations between States and inter-governmental organizations—the Commission might wish to consider whether to revise them in order to ensure that they formed a coherent body of diplomatic law.

31. The Commission should not defer decisions on too many questions; it was necessary to give guidance to the Special Rapporteur, who had included a number of tentative or alternative solutions in his draft articles.

32. Mr. TUNKIN said that the Special Rapporteur's first question was very easy to answer: the Commission was called upon to codify or to draft rules of international law.

33. The next two questions—the document's final form and its relation to the Vienna Convention—were closely linked, and the answer to them depended on the kind of articles the Commission drafted. If a great many of the rules were identical with those of the Vienna Convention on Diplomatic Relations, the Commission might consider drafting an additional protocol to that Convention; but if the rules on special missions differed from those of the Convention, that very fact should lead the Commission to seek another solution.

34. He therefore shared the opinion of the Special Rapporteur, which had been endorsed by several previous speakers, that the Commission should not take any decision at present. Draft articles should be prepared with the necessary references to the Vienna Convention on Diplomatic Relations. When it had examined the articles, the Commission would decide whether those references should be retained, or be replaced by appropriate clauses. It had been the Commission's consistent practice not to decide on the form of a document until it had examined the articles.

35. Sir Humphrey WALDOCK said that he largely shared Mr. Tunkin's views. The Commission must draft a set of legal rules on special missions. As States had considerable latitude in making their own arrangements in respect of diplomatic and consular relations as well as special missions, the Commission should follow the example of the two Vienna conferences and refrain from trying to determine which rules governing special missions had the character of *jus cogens*.

36. The decision on whether the rules should take the form of a protocol attached to the Vienna Convention on Diplomatic Relations, a separate convention or model rules, would be a political one; the Commission's own task was to prepare a self-contained draft that would enable States to understand the nature of the problem and how it should be regulated. The Special Rapporteur had already provided the Commission with an admirable document on which it could base its study, and the detailed examination of the individual articles would show where a reference back to the Vienna Convention on Diplomatic Relations would be appropriate and where different rules were required. The Commission had been engaged in a similar process during the final stages of examining its draft Convention on Consular Relations, when it had had to decide which provisions could be modelled on those of the Vienna Convention on Diplomatic Relations, which had already been adopted by States.

37. Mr. EL-ERIAN said he shared the opinion of those members who considered that an independent set of legal rules in the form of a draft convention was what was needed; that opinion was strengthened by the considerations set out in paragraph 28 of the Special Rapporteur's report. There was great diversity in the rules being applied and the Commission would be rendering a real service to the international community if it succeeded in introducing some measure of uniformity.

38. From personal experience he could confirm the justice of Mr. de Luna's argument in favour of a draft convention rather than a set of model rules. In his official capacity he had found himself relying on the provisions of the Vienna Convention on Diplomatic Relations as a standard, even though that instrument had not yet been ratified by his country and was not legally binding on it.

39. He agreed with Mr. Elias that the Commission ought not to defer taking a provisional decision to incorporate the draft articles in a draft convention, because such a decision would undoubtedly influence the course of the discussion and would give the Special Rapporteur the guidance he needed.

40. Mr. AMADO said he was in agreement with all those had spoken before him, and in particular with Mr. Yasseen. It was certainly out of courtesy, and also to show how barren was the ground he had had to clear, that the Special Rapporteur had appeared to hesitate between the intention to draft legal rules and the intention to stay within the bounds of the comity of nations. No one knew better than the Special Rapporteur that

the Commission's task was to draft rules of international law.

41. He was grateful to Mr. Rosenne for systematically seeking out the difficulties and pointing them out to the Commission. Like Mr. de Luna and Mr. El-Erian, he (Mr. Amado) thought that the Commission should decide at once whether to draft a protocol or a convention; in any case, its decision need not be more than provisional.

42. Sir Humphrey Waldock had rightly drawn attention to the question of the attitude to be adopted towards the existing conventions, especially the Vienna Convention on Diplomatic Relations. But the Commission should not let itself be obsessed with the Vienna Convention; its draft should be as independent as possible, though there would be no objection to cross-references.

43. "Temporary" diplomacy, to use the adjective suggested by Mr. Tunkin, had taken root and become a tree in the forest of law. The Commission should therefore formulate, on the basis of the text prepared by the Special Rapporteur, rules of law which were general, but nevertheless sufficiently precise.

44. Mr. TUNKIN said that the Commission was preparing a document which was separate and would in any case remain so; the only problem was to what extent it would be linked to the Vienna Convention. It was too early to decide whether it would take the form of a protocol or of a convention; the Commission should prepare draft articles which, for the time being, it could regard as being intended for a convention.

45. Sir Humphrey WALDOCK said he agreed with Mr. Tunkin; the Commission already had before it a draft convention prepared by the Special Rapporteur. In saying that the report constituted an admirable basis for the Commission to work on, he had meant to suggest that the Commission should provisionally approve of the subject being handled in that form on the lines indicated by the Special Rapporteur, and should defer consideration of the question how and to what extent the draft should be linked to the Vienna Convention on Diplomatic Relations until the articles had been discussed in detail.

46. Mr. ROSENNE said that the two previous speakers had helped to clarify the issue: any differences of view that had emerged were perhaps more superficial than real. In his opinion, the draft articles already provided a satisfactory basis for discussion and their formulation on first reading would not be greatly affected by the question what legal form they should ultimately be given: that could be decided later. The situation was not the same as in the case of the law of treaties, because the Vienna Convention already provided a framework for rules on special missions.

47. Mr. TSURUOKA said he approved of the method of work suggested by Mr. Tunkin and Sir Humphrey Waldock. The Commission could now tackle the heart of the problem; the time to decide on the form of the document would come later.

48. The CHAIRMAN,* speaking as a member of the Commission, said that his views accorded closely with those of Mr. Tunkin and Sir Humphrey Waldock.

49. Mr. BARTOŠ, Special Rapporteur, said that he was firmly opposed to the idea that the question under study pertained to the comity of nations. It was clear that, under its Statute, the Commission was required to formulate rules of law that were general in scope — rules of principle. He had raised the question of international comity because he knew from experience that States always tended to claim the right to privileges and immunities for members of their own special missions, but contested that right where the special missions of other States were concerned. The matter was already subject to law; in some cases the general principles of international law had been applied and in others rules based on analogy.

50. As to the choice between model rules and a draft convention, his opinion was that the Commission should draft an instrument — a convention. Although a broader view could be taken in model rules, they were seldom very successful. Moreover, a draft convention could be changed into model rules or a convention could be taken as a model. But the preparation of a draft convention demanded greater caution.

51. On the question whether the new rules would be rules of *jus cogens* or of *jus dispositivum* he did not entirely agree with Sir Humphrey Waldock. At the two Vienna conferences the aim had been to ensure that the rules embodied in the two new conventions could not be amended by bilateral agreements; only the broadening of the conventions had been authorized. The question had even been the subject of a formal vote during the drafting of the Convention on Consular Relations, when India and Yugoslavia had submitted an amendment, the effect of which had been to leave earlier conventions in force even if they conflicted with the Convention on Consular Relations.⁵ Moreover, States were free only to broaden, not to restrict the application of the rules of the Convention. *Jus cogens* had been created, but not *jus cogens superveniens*. That was why he had inquired whether the Commission proposed to draft residual rules or strict rules. He had not reached a definite opinion on that point. The topic was a new one, not only in regard to practice, but also by reason of the nature of temporary missions. He had therefore proposed leaving some latitude to States.

52. He did not share Mr. Rosenne's pessimism — though it was, incidentally, most useful to the Commission. The question of the obligation to apply substantive rules of international law and that of the existence of relations between States were not closely related. For example, conventions relating to armed conflict had to be applied even where there were no diplomatic relations, and the Vienna Convention on Diplomatic Relations itself specified the duties of States

* Mr. Briggs.

⁵ *United Nations Conference on Consular Relations, Official Records, Vol. II, p. 64.*

in the event of such a conflict — even those of States not parties to the conflict.⁶

53. It was a characteristic of international law that when universal rules on a matter existed, they were mandatory even for those who had not signed the relevant instruments. That was shown, for example, by the case-law of the Nuremberg trials. Mr. Rosenne had therefore been right in mentioning the case in which no relations existed; that was a delicate question linked with the recognition of governments. For example, at the time of the Evian negotiations, Switzerland had had to decide how to treat a special mission sent by a provisional government which had not been recognized by all States and which France, in particular, regarded as merely a political party or movement.

54. As Mr. Verdross had said, the Commission was doing pioneer work. It should endeavour to draft rules which would not be imposed on States, but would be acceptable to them as universal rules. Hence it could not confine itself to mere codification, but must undertake the progressive development of international law.

55. A last question, which had been touched on by Mr. Tunkin and Sir Humphrey Waldock, was that of linking the draft articles to the Vienna Convention on Diplomatic Relations. If, on completion of its examination, the Commission found many differences between its draft and the Convention the cross-references would be few and very cautious; but if, on the contrary, it found that the two instruments had many points in common, they might be more closely linked. The Commission's task was to draft an instrument which provided, for the problems of temporary missions, solutions in keeping with the nature of those missions.

The meeting rose at 12 noon.

726th MEETING

Tuesday, 19 May 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167)

[Item 3 of the agenda]

1. The CHAIRMAN invited the Commission to take up item 3 of the agenda.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the considerations which had guided him in preparing his third report (A/CN.4/167), covering the

⁶ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, p. 87, articles 44-46.*

application, effects, revision and interpretation of treaties, were set out in the introduction.

3. The articles on revision were almost ready for circulation. When drafting them he had been keenly aware of their close connexion with the articles concerning the priority of conflicting provisions and their effect on third States.

4. He was doing his best to prepare some basic articles on interpretation, but owing to other commitments they were not yet ready. The subject was a vast and difficult one and he was anxious not to penetrate too deeply into the realm of logic and what might be described as the art of interpretation.

5. He urgently needed guidance from the Commission on how far he should deal with issues involving State responsibility, given the decisions already taken by the Commission about that topic, and on whether he should include provisions concerning the obligation on States to bring domestic legislation into line with treaty obligations. His own view was that the latter point would naturally be dealt with as part of the topic of State responsibility, since it was a general principle not confined to treaty obligations.

6. He also needed guidance on whether he should include provisions concerning the effect on the application of treaties of the suspension of diplomatic relations, which was not a matter pertaining exclusively to the law of treaties and might involve the Commission in a discussion of the consequences of the outbreak of hostilities and of non-recognition, which it was perhaps desirable to avoid.

7. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had been quite right to leave aside all questions arising out of State responsibility proper, in other words, out of the breach of a treaty; for while the law of treaties comprised everything relating to the treaty itself — its formation, application and effects — the question of breach came within the sphere of State responsibility.

8. The Special Rapporteur had raised another problem: that of the obligation to bring national law into line with the rule of international law followed in the treaty. It had been said that that obligation might come within the sphere of responsibility, but surely it derived rather from the very existence of the rule of international law. Failure to bring national law into line with international law constituted a breach of the obligation. He did not think that question came within the scope of the law of treaties, or for that matter within the scope of State responsibility. He was more inclined to regard it as an aspect of the more general problem of bringing national law into line with the requirements of international law. The problem raised by the Special Rapporteur should be carefully considered, for it was of great importance.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that he had not envisaged that the report on State responsibility would be exclusively concerned with violation of rights and reparation. Presumably it would also cover such points as the justification put forward

by States that internal constitutional provisions were an impediment to compliance with international obligations.

10. Mr. ROSENNE said he was not altogether certain that examination of the effects of the suspension of diplomatic relations between States on the application of a treaty properly belonged to the topic of State responsibility.

11. As far as the law of treaties was concerned, it would not be necessary to consider the separate subject of the effect of the outbreak of hostilities on the application of treaties; in 1949 the Commission had declared itself opposed to the study of the general topic of the laws of war,¹ and in 1963 it had decided not to consider the effect of the outbreak of hostilities on treaties.²

12. He thought that the effect of suspension of diplomatic relations ought to be covered, as had been done by the previous special rapporteur in article 4 of his fourth report.³ It would be remembered that McNair in his "The Law of Treaties" had devoted a special section to the subject⁴ and had drawn particular attention to the effects of rupture of diplomatic relations on treaties the application of which required contact between the two parties at the diplomatic level; extradition treaties and treaties of judicial assistance were possible instances.

13. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne's point was well taken. The Harvard Research Draft⁵ contained specific provisions on the matter, but he was not altogether convinced that such provisions need be included in his present report. Even in the case of treaties the application of which was dependent on the existence of diplomatic relations between the parties, the situation was perhaps one of temporary impossibility of performance. He would be glad to have further time for reflection before final decision was taken.

14. Mr. YASSEEN said that treaties of judicial co-operation were an example of treaties which had to be applied through the diplomatic channel; but it seemed to be merely a question of the application of the treaty, especially in the examples which had been given.

15. Mr. VERDROSS congratulated the Special Rapporteur on his treatment of a particularly difficult aspect of international law. With regard to the question whether rules concerning the interpretation of treaties should be included in the report, he thought the Commission ought first to decide whether it recognized the existence of such rules; for it was highly controversial whether the rules established by the case-law

of arbitral tribunals and international courts were general rules of international law or merely technical rules. As the Special Rapporteur referred to those rules in article 55, paragraph 1, it seemed necessary to include an article on the interpretation of treaties. If the reference were omitted, the situation would be different. He would revert to that point when the Commission came to consider article 55.

16. Mr. BARTOŠ, after praising the Special Rapporteur's report, turned to the question of the connexion between the application of treaties and the existence of diplomatic relations. He noted that in practice the severance of diplomatic relations between two States did not necessarily entail suspension of the treaties in force between them. In the cases mentioned by Mr. Rosenne, he did not think that the rupture of diplomatic relations necessarily involved impossibility of performance of the treaties. In such cases treaties were regularly applied through the States responsible for protecting the interests of the countries which did not maintain diplomatic relations; that situation raised no special difficulties, as was shown, for example, by the case of Yugoslavia and the Federal Republic of Germany, whose interests were represented by Sweden and France respectively.

17. A distinction should be made, however, between the case in which diplomatic relations had been broken off or did not exist and that in which one government was not recognized by the other, even if the States concerned recognized each other as States. That was the situation between Yugoslavia and Spain, for example; Yugoslavia had voted for the admission of Spain to the United Nations as a State, but there were political and legal differences between the two countries, and their governments did not recognize each other. He therefore agreed with the Special Rapporteur that that very complex question should be carefully examined and that the members of the Commission could help the Special Rapporteur, by their suggestions, to produce a suitable solution.

18. Mr. LIANG, Secretary to the Commission, said that an analogy had been drawn between the effect of the suspension of diplomatic relations on the application of treaties, and the effect of war on treaties. In the well-known case of *Techt v. Hughes*, in 1920, Judge Cardozo had thrown new light on the problem by stating that "International law to-day does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact."⁶ Thus some treaties were abrogated, while others continued in existence. *A fortiori* the suspension of diplomatic relations between States did not necessarily put an end to all treaty relations between them, but in some cases the application of treaties was suspended for lack of the requisite machinery of implementation, namely, the continuance of diplomatic missions in each other's territory.

¹ *Yearbook of the International Law Commission, 1949*, p. 281, para. 18.

² *Official Records of the General Assembly, Eighteenth session, Supplement No. 9*, p. 2, para. 14.

³ *Yearbook of the International Law Commission, 1959*, Vol. II, p. 42.

⁴ *Op. cit.*, Part VII, chapter 41.

⁵ *American Journal of International Law, 1935, Supplement*, Vol. 29, No. 4, Part III.

⁶ Hudson, M. O., *Cases on International Law*, second edition, p. 906.

19. He agreed with Mr. Yasseen that it was a matter of the application of treaties, but he thought it should perhaps be dealt with towards the end of the draft, in the same way as provisions relating to abnormal situations had been inserted at the end of the Vienna Conventions on Diplomatic and on Consular Relations.

20. As reference had been made to the Harvard Law Research drafts, he would point out that it was the Draft on State Responsibility, not the Draft on Treaties which contained the provision to the effect that the internal law of a State could not absolve or excuse it from fulfilling an international obligation.⁷ Also of interest in that connexion was a statute enacted by the United States Congress towards the end of the nineteenth century prohibiting the immigration of Chinese into the United States, which conflicted with the provisions of a treaty on the matter concluded earlier by the United States and China. The Supreme Court of the United States had subsequently decided that the statute, though incompatible with the treaty, must override its provisions because the statute had been enacted after the treaty.⁸ In the view of the Supreme Court, that was the only correct conclusion from the point of view of American constitutional law. From the point of view of international law, however, the United States was not relieved of its responsibility for acting contrary to its treaty obligations.

21. There was no imperative need to include a provision on that matter in the draft articles on the law of treaties; it belonged more properly to the topic of State responsibility. International law had primacy over internal law not only in regard to treaty obligations, but also in regard to obligations resulting from customary international law. The preamble to the United Nations Charter stated the determination of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". It seemed to him, therefore, that the primacy of international law over internal law was not confined to the obligations resulting from treaties; it was a problem of wider scope which might have to be dealt with separately.

22. Mr. ELIAS said that breach of treaty obligations might prove too broad a subject to fit into provisions on application and might involve issues of State responsibility which should be left aside.

23. Perhaps after further thought the Special Rapporteur might make some suggestions as to whether provisions concerning the effect of the suspension of diplomatic relations on treaty obligations should be included in the draft.

24. He was anxious that the Commission should not go too deeply into the extensive and controversial subject of interpretation, though some detailed rules on specific matters might need to be included. It would be preferable, therefore, to delete the latter part of

article 55, paragraph 1, following the words "in accordance with its terms".

25. Mr. de LUNA, after congratulating the Special Rapporteur on his very interesting work, said he entirely agreed with Mr. Bartoš about the distinction to be drawn between severance of diplomatic relations and absence of diplomatic relations as a result of some event entailing non-recognition of the government of the State concerned.

26. There had been much argument about whether recognition was declaratory or constitutive. According to one very clear thesis, supported in particular by Mr. Verdross, the act of recognition of a State comprised two simultaneous juridical acts, one of them purely declaratory, by which the existence of a State was recognized as a fact, the other constitutive, by which a State signified that it wished to have diplomatic relations with the State recognized. It was the constitutive act which was lacking in the case of Yugoslavia and Spain quoted by Mr. Bartoš. The two countries complied with all the rules resulting from the existence of a State or the existence of a regular government on the territory of that State, but not with certain rules which would result from the constitutive act, in other words from the will to establish normal diplomatic relations with that State.

27. The point raised by Mr. Ago concerning the co-ordination of national with international law, should not be studied separately in connexion with the law of treaties. For there were two kinds of responsibility: responsibility by omission, where rules of national law did not coincide with rules of international law; and active responsibility, where national law laid down rules which conflicted with international obligations, whether they derived from a treaty or from custom. The question raised was therefore a special case of a more general problem covering both active responsibility and responsibility by omission, in respect of both treaty law and customary law.

28. Mr. PAREDES said it would leave a serious gap in the draft if the Commission did not include certain general rules on the interpretation of treaties, which were lacking at present.

29. It was also essential to safeguard the binding character of treaties by inserting a rule which clearly stated the primacy of treaty obligations over municipal or regional law.

30. Mr. AMADO said that the discussion seemed to be giving undue prominence to secondary questions. The Commission should not lose sight of the essential point, merely, that in considering the draft articles proposed by its Special Rapporteur, its main concern should be to prepare texts worthy of the task with which it had been entrusted by the United Nations. Accordingly, it should first endeavour to formulate in satisfactory terms the ordinary rules—the rules of law—relating to the application of treaties. If it decided to study every question that arose it might be carried too far from the subject, for it would have to reconsider

⁷ *American Journal of International Law*, 1929, Supplement, Vol. 23, special number, p. 142, article 2.

⁸ 130 U.S. 581, 9 S. Ct. Rep. 623.

the whole of international law. However interesting the question of the general rules governing the interpretation of treaties might be, it could well be left till later.

31. As to the definition of good faith in article 55, paragraph 2, volumes could be written about it, and it could be debated for hours. The Commission should first go straight to the heart of the matter, to what was of immediate importance, to the general structure.

32. Mr. TUNKIN said that he largely shared Mr. Amado's view, but he thought the discussion had served some purpose by helping to clarify the points raised by the Special Rapporteur. Perhaps the Commission might take up the detailed consideration of the articles themselves and after members had had a chance for further thought, revert to those points so as to give him the clear guidance he sought.

33. The CHAIRMAN, speaking as a member of the Commission, said that in order to continue his work, the Special Rapporteur needed the Commission's guidance on the three questions he had put to it. It seemed that he had received a satisfactory reply to one of them. The Commission could defer consideration of the question of adapting national law to treaty obligations and the question of the effect of the rupture of diplomatic relations on the application of treaties, which might be settled by consultation between the Special Rapporteur and various members of the Commission.

34. The interpretation of treaties, however, was of capital importance for the Commission's work and for the law of treaties in general. It had been said rather too glibly that interpretation was an art; the question was whether there were any rules for practising that art. Technical rules had also been mentioned; but what precisely was a technical rule? Was it or was it not mandatory? Was there or was there not a rule under which the terms of a treaty must be construed in the etymological sense or having regard to the context of the treaty? Was there or was there not a rule that in deciding between two possible interpretations of a treaty the preparatory work, the object of the treaty and the practice of the parties concerned must be taken into account? Those were problems which the Commission could not leave aside. The reason why the United Nations had entrusted it with the codification of international law, and in particular the law of treaties, was that the main objective was certainty of the law; and certainty of the law of treaties depended mainly on certainty of the rules of interpretation. The Commission was not expected to take any decision immediately, but it should give the Special Rapporteur an answer on that point as soon as possible, without going into theoretical discussions or excessive detail.

35. Speaking as Chairman, he suggested that further discussion on those questions be postponed and that the Commission should begin to examine the draft articles.

36. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the Chairman that the question of interpretation was an exceedingly important one, but

it could lead the Commission into great difficulties because the approach of jurists to it was so varied. There were two different kinds of rules; general ones, such as the rule that the treaty must be read as a whole, and strictly technical ones. Some rules of a practical nature could be usefully summarized but he would view with apprehension any attempt to delve too deeply into the theoretical issues.

37. Mr. YASSEEN said that the Commission was bound to take a position on theoretical questions and, in particular, on the static and the dynamic theories of interpretation.

38. Mr. TSURUOKA congratulated the Special Rapporteur on his report. The most practical and the quickest way of deciding the question of the interpretation of treaties was to ask the Special Rapporteur to draft some articles on the subject; the Commission could then examine them and decide whether or not to include them in its draft.

39. Mr. BARTOS said that the Commission had a duty to the international community to draft provisions encouraging "respect for the obligations arising from treaties and other sources of international law", in accordance with the terms of the preamble to the United Nations Charter. It was regrettable that certain States agreed to sign treaties but did not apply them, on the pretext of some constitutional impediment. He understood the scruples of some members of the Commission, but he thought it better to leave States to dissociate themselves from the rules drawn up by the Commission than to offer them a means of evading their obligations on the basis of the Commission's formulation.

40. The CHAIRMAN invited the Commission to proceed to the detailed examination of the articles contained in the Special Rapporteur's third report (A/CN.4/167).

ARTICLE 55 (*Pacta sunt servanda*)

41. Sir Humphrey WALDOCK, Special Rapporteur, said that there was no need to enlarge on the explanation of the content of article 55 given in the commentary. For the time being paragraph 3, which dealt with the application of the *pacta sunt servanda* rule to other States, could be left aside.

42. He could assure Mr. Amado that the reference to "good faith" in paragraph 2 was not intended simply as a piece of ornamentation; the reasons for its inclusion were explained in the commentary. It seemed necessary to mention that obligation, however, so as to be consistent with the provision inserted in article 17 of the draft⁹ which enjoined negotiating or signatory States to refrain from acts calculated to frustrate the objects of the treaty.

43. Mr. BRIGGS said that the Special Rapporteur's report constituted an admirable working instrument for

⁹ *Yearbook of the International Law Commission, 1962, Vol. II, p. 175.*

the Commission. With regard to article 55, he agreed with the purpose of each of the four paragraphs, but considered the *pacta sunt servanda* principle so important that it should be formulated in its stark simplicity, without adding too many qualifications that might weaken it.

44. In paragraph 1, he suggested that the words "in force" after the word "treaty" should be deleted; in the light of the definition of a "treaty" contained in article 1, paragraph 1 (a) of the Commission's draft articles on the law of treaties adopted at the fourteenth session,¹⁰ the words "in force" were redundant. He suggested, however, that the word "legally" should be introduced before the word "binding". In that connexion, he was somewhat surprised at the last sentence of paragraph 1 of the commentary on the article; the obligation to observe a treaty was a legal obligation, not merely a moral one.

45. With regard to the point raised by Mr. Verdross in connexion with the interpretation of treaties, he suggested the deletion from paragraph 1 of the concluding words "in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties". He agreed that the Special Rapporteur should prepare draft articles on the rules of interpretation of treaties, but saw no need for any reference to those rules in paragraph 1. He accordingly suggested that paragraph 1 read simply: "A treaty is legally binding upon the parties and must be applied by them in good faith".

46. As to paragraph 2, in his opinion the obligation to refrain from any acts calculated to prevent the due execution of a treaty constituted much more than an obligation of good faith; it was a legal obligation, even if it was not based on the actual terms of the treaty. Indeed, he noticed from the penultimate sentence of paragraph 4 of the commentary that the Special Rapporteur was in agreement with that position. He therefore suggested the deletion of the first six words of paragraph 2 which then would begin: "A party to a treaty shall refrain...".

47. The references to articles 59, 62 and 63 seemed to him unnecessary and he therefore suggested that paragraph 3 be deleted.

48. In paragraph 4, he suggested that the words "the preceding paragraphs" be replaced by the words "a treaty"; it was the obligations of a State under a treaty and not its obligations under article 55 that were in question. In the same paragraph, he suggested the deletion of the concluding phrase "unless such failure is justifiable or excusable under the general rules of international law regarding State responsibility". If the failure to comply with an obligation was legally justifiable or excusable, then there was no obligation at law.

49. Mr. CASTRÉN said he had no comment to make on the introduction to the report, in which the Special Rapporteur had very clearly drawn the boundary between the law of treaties proper and the questions

of State responsibility and succession of States and governments.

50. With regard to article 55, he approved of paragraphs 1 and 4. Paragraph 3 was unnecessary, but could be retained if the Special Rapporteur so wished.

51. He supported Mr. Briggs's suggestion that the first six words of paragraph 2 should be deleted, because he thought they weakened the *pacta sunt servanda* rule stated in the article. As the Special Rapporteur himself said in paragraph (4) of his commentary, "acts calculated to frustrate the objects of the treaty" were "not only contrary to good faith, but also to the undertaking to perform the treaty according to its terms which is implied in the treaty itself." Paragraph 2, thus abridged, should be placed before paragraph 1.

52. Mr. ELIAS said he supported the suggestion that the words "in force" should be deleted from paragraph 1; they did not seem to add anything to the meaning of the provision. He also supported the deletion of the words "and in the light of the general rules of international law governing the interpretation of treaties"; but he could agree to the retention of the words "in accordance with its terms", if that was the wish of the Commission.

53. In his opinion, paragraphs 2, 3 and 4 should simply be deleted; the principle stated in paragraph 1 was so important and self-contained that it ought not to be qualified in any way by the addition of non-essential matter.

54. The difficult question of good faith, dealt with in paragraph 2, could best be treated in the commentary. Paragraph 3 attempted to define who were the parties to a treaty, a matter already covered in the draft articles adopted by the Commission at its fourteenth session. If it were considered appropriate, cross-references to article 55 could be introduced in articles 59, 62 and 63.

55. Paragraph 4 dealt with a matter which was closely connected with the binding character of treaties, but belonged to the law of State responsibility rather than the law of treaties.

56. Mr. VERDROSS said he approved, in principle, of the ideas underlying article 55. With regard to the reference in paragraph 1 to the "general rules of international law governing the interpretation of treaties", the theoretical objection that writers were reluctant to admit the existence of such rules could be ignored. The reference to those rules should stand, for without it the whole question of the application of treaties would remain in doubt.

57. He supported Mr. Briggs's suggestion that the words "in force" after the word "treaty" should be deleted and that the word "legally" should be inserted before the word "binding".

58. The idea express in paragraph 2 was correct, but was already embodied in paragraph 1. Paragraph 2 could stand, however, because the words "*inter alia*" clearly showed that what followed was a partial explanation.

¹⁰ *Ibid.*, p. 161.

59. Paragraph 3 could be simplified by saying merely that the obligations applied also to any State bound in any other way by the treaty.
60. Paragraph 4 expressed an idea that was correct, but might appear in any convention; its inclusion in a set of draft articles on the application of treaties was superfluous.
61. Mr. PAREDES said that although the spirit of article 55 was entirely reasonable and just, it dealt only with the negative aspect of the rule that the parties must show good faith by refraining from acts calculated to prevent the execution of the treaty or otherwise to frustrate its objects. But there were positive attitudes and acts which were not provided for in the article: direct and complementary measures which, though not expressly mentioned in the clauses of the treaty, were implicit in the purpose of its negotiation.
62. That principle formed the counterpart of the *rebus sic stantibus* rule and reinforced its element of justice, for the Commission had recognized to some extent that that rule applied the will of the parties themselves inasmuch as it assumed that if the circumstances had been such as they were later, the treaty would not have been concluded or would have been concluded in different terms. It must also be presumed that the parties had wished to agree on the elements necessary for the exact fulfilment of their intentions, but had not expressly stipulated them. That idea could be formulated in the following terms: "Treaties must be concluded in good faith; consequently, they bind the parties not only to fulfilment of their express provisions, but, also to what follows from their nature and purpose."
63. The parties might forget or neglect to provide for some of the consequences, or consequences might be brought about by supervening causes which made new action necessary for complete performance of the treaty; it was even possible that the negotiators had thought it unnecessary to provide for some of the consequences. That might apply for instance to the repair and reconditioning of wharfs at which a State had undertaken to load or unload goods for another State.
64. An example of the silence of a treaty might serve to illustrate the positions in which negotiators could be placed *vis-à-vis* their partners. Suppose it had been agreed to open to navigation by another State a river which flowed through certain areas, but the river changed its course and began to pass through other places. What would be the consequences for the navigation agreed on? Was the right extinguished? Was the servitude, and consequently the consideration, increased? Or would the obligation remain the same as before? If the new route threatened the security of the State, for instance by making vulnerable certain regions which required special protection, the *rebus sic stantibus* rule would apply. If only the necessary services were increased, the injured party should be compensated. If there were no additional costs, the obligation should be fulfilled as stipulated. The principle he had stated had many applications, which he would point out as the discussion proceeded.
65. Mr. BARTOŠ said he had only a few comments to make on article 55, which he approved and could even accept as it stood.
66. With regard to paragraph 1, provision should be made for cases in which a treaty was not in force for all the parties. For example, a treaty entered into force as soon as the requisite number of parties had ratified it; it then bound those parties, but only them, and not all the signatories. That was self-evident, but it might be stated in the commentary.
67. He was grateful to the Special Rapporteur for having introduced the idea of good faith into the first article of his draft. That idea had gained renewed popularity at the beginning of the twentieth century and it exerted a salutary influence on the development of law. No opportunity of stating it should be neglected; it might perhaps introduce a subjective element into international law, but precisely on that account it should gradually be "objectified" through the application of treaties and through case-law.
68. The phrase "and in the light of the general rules of international law governing the interpretation of treaties" was not unnecessary, for it warned States that they were required to interpret the treaty in the manner generally accepted by international law; thus it condemned arbitrary interpretations.
69. In paragraph 2, the expression "to frustrate its objects" was perhaps not entirely satisfactory; it might happen that the objects of the treaty were diminished or distorted without being frustrated.
70. The Commission would do well to follow the advice of the Special Rapporteur and postpone consideration of paragraph 3 until it came to consider articles 59, 62 and 63.
71. With regard to paragraph 4, he agreed with the Special Rapporteur; nevertheless, he feared that States might find in the last phrase encouragement to seek excuses and justifications for evading their obligations. It might perhaps be possible to excuse a failure, but it would be dangerous to justify it. A State which signed a treaty engaged its international responsibility; how it could divest itself of that responsibility was another question, which need not be dealt with in that context. Although he had argued the existence of general rules of international law on the interpretation of treaties, he was not sure that general rules of international law on State responsibility existed as yet. The expression "failure . . . to comply with its obligations" struck him as rather weak. It would be better also to mention, at least in the commentary, the case of deliberate violation of a treaty by a positive act.
72. Mr. ROSENNE, associating himself with the tributes paid by other speakers to the excellent report by the Special Rapporteur, said he was in general agreement with article 55 but thought that it would be desirable, if possible, to combine paragraphs 1 and 2, while at the same time taking into consideration the point raised by Mr. Bartoš that the obligation of good faith should be couched in more objective terms. In the Guardianship Convention Case of 1958, the International Court of Justice had considered not "the real or alleged reasons which determined or influenced

the decisions complained of", but the "compatibility of the measure with the obligations binding upon Sweden under the 1902 Convention".¹¹ The idea of the compatibility of an action was an objective one and was preferable to the idea expressed in paragraph 2, which was subjective in character and rather too wide in its terms. Those terms might well cause disputes, rather than reduce international tensions.

73. Paragraph 3 could well be omitted: if a link were needed between article 55 and articles 59, 62 and 63, the reference should be in the latter group rather than in article 55.

74. The idea contained in paragraph 4 should be retained, but embodied in a separate article, perhaps even in a different section of the draft, as suggested by the Secretary to the Commission. With regard to the language of the provision, he supported the suggestion that the words "obligations under the preceding paragraphs" should be replaced by the words "obligations under a treaty".

75. It seemed to him that there was some value in the words "in force" in paragraph 1, which he understood as fixing in point of time the application to treaties of the *pacta sunt servanda* rule. The Commission had adopted draft articles dealing with the rights and obligations of the parties prior to the entry into force of a treaty; it had adopted draft articles dealing with the entry into force of a treaty and its termination; provision had also been made for the obligations which endured after the termination of a treaty. It was therefore perhaps appropriate to speak in paragraph 1 of a "treaty in force".

76. He feared that some mistake, perhaps due to a misprint, might have crept into the last sentence of paragraph 1 of the commentary, which was not acceptable as it stood.

77. Mr. REUTER said that he had joined the Commission too recently to venture to congratulate the Special Rapporteur. He thought that in paragraph 2 of the article, the English word "objects" might be better rendered in French by the expression "*l'objet et la fin*"; that was the wording used by the International Court of Justice in connexion with the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide;¹² in other cases it had used the French word "*but*" alone as the equivalent of the English word "object". If it adopted that suggestion, the Commission would be introducing a teleological nuance into article 55 which might perhaps satisfy both Mr. Paredes and Mr. Bartoš. But that question of form also affected the substance, for the object of an obligation was one thing and its purpose was another.

78. Mr. YASSEEN paid a tribute to the Special Rapporteur, who had once again provided the Commission with an excellent working tool. Article 55 reflected the reality of positive law. He approved of it in general, and, as suggested by the Special Rapporteur, he would confine his comments to paragraphs 1, 2 and 4.

79. In paragraph 1, there would be no objection to deleting the words "in force", as Mr. Briggs had suggested; the paragraph referred to an obligation, and it was clear that the treaty must be in force. Mr. Briggs had also suggested deleting the whole of the latter part of paragraph 1, after the words "in good faith". It was true that that part might perhaps be superfluous, for it stated a self-evident truth; but if it was thought essential to retain the reference to the rules governing interpretation, it would be better to delete the word "general", because there might be particular rules governing the interpretation of treaties.

80. The obligation laid down in paragraph 2 derived from the idea that the treaty was mandatory; he was therefore reluctant to regard that obligation as a consequence of the idea of good faith. Moreover, the reference in the text to good faith gave the impression that the Commission was trying to justify the rule it had stated, and it seemed neither necessary nor useful for the wording of the rule itself to contain a justification.

81. Paragraph 4 was essential; a draft on the law of treaties should state the principle of conventional responsibility, but should go no further. To mention justifying causes and excuses was to enter into the theory of the binding force of treaties. He would therefore prefer to see the words "regarding State responsibility" deleted, and also the word "general" before the word "rules", because there were cases, such as self-defence, in which a failure was justifiable or excusable under certain rules of international law which, owing to their importance and scope, could not be regarded as applying only to State responsibility.

82. Mr. AMADO said that the text submitted by the Special Rapporteur was so clear and explicit as to substance that only the form was open to discussion.

83. He did not agree with Mr. Briggs's proposal that the word "legally" should be inserted before the word "binding" in paragraph 1. As to the words "in accordance with its terms", they merely served to lead on to the following phrase. He had at first been opposed to the idea of introducing the obscure subject of interpretation into the article, but had been impressed by the arguments put forward in favour of doing so, in particular by Mr. Bartoš.

84. With regard to paragraph 2, he yielded to Mr. Yasseen's reasoning: good faith was the honour of international law. The need for good faith was already stated in paragraph 1, but it was dangerous to seek to define the concept.

85. With regard to paragraph 3, Mr. Rosenne had been right to point out that it was better to refer back to an earlier article than to refer in advance to later articles.

86. He hesitated to accept paragraph 4, for it was always disagreeable to formulate the obvious. A treaty could not be broken without there being responsibility. If that paragraph were retained, it would be well to take account of Mr. Bartoš's comment and mention not only the negative act of non-performance of the treaty, but also the positive act of violation.

¹¹ *I.C.J. Reports*, 1958, p. 67.

¹² *I.C.J. Reports*, 1951, pp. 15 *et seq.*

727th MEETING

Wednesday, 20 May 1964, at 10 a.m.

Chairman : Mr. Roberto AGO

Appointment of a Drafting Committee

1. The CHAIRMAN said that, having consulted the officers of the Commission, he wished to suggest that a drafting committee be set up comprising, in accordance with the Commission's practice, the two Vice-Chairmen, the General Rapporteur and the Special Rapporteur on the Law of Treaties; the other members could be Mr. Elias, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Reuter and Mr. Rosenne. Mr. Bartoš, as Special Rapporteur on special missions, should be invited to take part in the work of the drafting committee on that topic.

It was so agreed.

2. Mr. ROSENNE asked whether it was intended that in future the Drafting Committee should also assume responsibility for the Spanish text of the articles it drafted, as he had suggested at the opening meeting of the session.¹

3. The CHAIRMAN replied in the affirmative.

Law of Treaties

(A/CN.4/167)

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 55 (*Pacta sunt servanda*) (continued)

4. The CHAIRMAN invited the Commission to continue consideration of article 55.

5. Mr. PAL said that with his illuminating third report, the Special Rapporteur had made yet another signal contribution to the Commission's work. The principle *pacta sunt servanda* was axiomatic and fundamental to the international order. Nothing should be allowed to throw doubt on that proposition and, accordingly, together with some other members of the Commission, he was unable to subscribe to the statement in the last sentence of paragraph 1 of the commentary, where the obligation to observe treaties was characterized as one of good faith and not *stricti juris*. Good faith was in essence a matter of conscience and was too subtle and imprecise a concept to be taken seriously as a basis for international order. It really lay in the realm where rationalization had not yet penetrated and where decisions had to be made in situations that had not yet been subjected to regulation. In a realm where

a sequence of events was intended to follow a regular, expected course, as was the case with conventions, usages and custom, good faith would be relied on only to secure scrupulous observance of the obligation. By the very fact of undertaking to formulate general rules on treaty obligations, the Commission had assumed that the forces operating in that field followed some regular course, so that they were capable of being subjected to regulation.

6. With regard to the formulation of the article, he observed that the underlying principle was substantially acceptable, but perhaps it was not easily capable of being captured in a formula. Paragraph 1, if amended as suggested by Mr. Briggs, would be acceptable, but the word "observed" should be substituted for the word "applied".

7. Paragraph 2 was not acceptable.

8. He would comment on paragraph 3 when the Commission came to discuss it later, as suggested by the Special Rapporteur.

9. Paragraph 4 would be acceptable if re-worded, on the lines suggested by Mr. Briggs at the previous meeting,² to read: "The failure of any State to comply with its obligations under a treaty engages its international responsibility".

10. Mr. TABIBI, after paying a tribute to the Special Rapporteur's scholarly report, said that the cardinal rule *pacta sunt servanda* needed to be framed in clear precise terms at the beginning of the section on the application and effects of treaties.

11. There was no need for the words "in force" in paragraph 1; they were not only redundant, but also conflicted with article 17, paragraph 1,³ according to which a State that took part in the negotiation of a treaty or signed it subject to ratification was under an obligation to refrain from acts calculated to frustrate the objects of the treaty, even before it had come into force. The word "general", qualifying the word "rules", should be deleted, as there might be some detailed rules of interpretation that were applicable.

12. Paragraph 2 should be combined with paragraph 1 and should be amplified, as suggested by Mr. Paredes and Mr. Bartoš at the previous meeting,⁴ so as to take account of both the positive and negative aspects of good faith.

13. As no general rules on State responsibility had yet been framed by the Commission, the limiting clause in paragraph 4, beginning with the words "unless such failure", should be dropped.

14. Mr. TUNKIN said that the *pacta sunt servanda* rule should be stated concisely and in precise terms and he therefore advocated the deletion of paragraphs 2, 3 and 4. The rule was, in his opinion, of much wider application than the law of treaties, as agreement between States underlay every norm of international law.

² Para. 48.

³ *Yearbook of the International Law Commission, 1962, Vol. II, p. 175.*

⁴ Paragraphs 61-64 and 67.

¹ 722nd meeting, para. 20.

But he would not, of course, object to its being stated with regard to treaties. It was enunciated in the third paragraph of the preamble to the United Nations Charter. It was also mentioned in the Czechoslovak draft resolution on the principles of international law concerning friendly relations and co-operation among States in accordance with the United Nations Charter,⁵ submitted to the Sixth Committee of the General Assembly at its seventeenth session, paragraph 18 of which read: "Every State is liable to fulfil, in good faith, obligations ensuing for it from international treaties concluded by it freely and on the basis of equality, as well as obligations ensuing from international customary law".

15. As far as the wording of paragraph 1 was concerned, the phrase "in accordance with its terms" seemed self-evident and served no useful purpose. If the latter part of the paragraph were retained it should not be in its present restrictive form: treaties must be applied in the light of fundamental principles of international law. The words "in force" were useful and established a link with the earlier articles on validity. He did not favour the insertion of the word "legally" to qualify the word "binding", as suggested by Mr. Briggs, because it might convey the impression that in some other respect a treaty was not binding. He supported Mr. Pal's suggestion that the word "observed" should be substituted for the word "applied".

16. The last sentence of paragraph 1 of the commentary suggested that the concept of good faith was a moral rather than a legal one, in which case it had no place in the present draft.

17. Sir Humphrey WALDOCK, Special Rapporteur, explained that the last sentence of paragraph 1 of the commentary was intended to convey that it was not enough for States to fulfil treaty provisions to the letter and to maintain that their actions did not conflict directly with the terms of the treaty; they were also under a legal obligation to refrain from doing anything which might impede its proper execution.

18. Mr. TUNKIN observed that if that were the case, paragraph 2 of article 55 did not express the Special Rapporteur's intention precisely. If the principle of good faith were a legal one it could be formulated, but that should be done in a separate article.

19. Paragraph 3, which was to be discussed later, should be transferred to another part of the draft.

20. The principle laid down in paragraph 4 was correctly stated but belonged to the topic of State responsibility and not to the law of treaties.

21. Mr. TSURUOKA said that the Special Rapporteur had been right to begin his draft with an article on the principle *pacta sunt servanda*, which was the fundamental rule of the law of treaties. A further reason for endorsing his proposal to state the rule at that

particular point was that the Commission had already taken the principle *pacta sunt servanda* as a basis for drafting articles 32, 33, paragraph 1, and article 34, paragraph 1.⁶

22. With regard to the drafting, since the article was to state a fundamental principle of international law, the Commission should endeavour to express the full force of the idea in clear and simple language. He agreed that the words "in force" should be deleted in paragraph 1; in any case, the sentence would be more concise without those words. He could see no objection to deleting the last part of the paragraph, from the words "in accordance with its terms..." down to the end, though it might perhaps be useful to retain some of that wording in an amended form, such as "in accordance with the spirit of the treaty and with its terms", in order to place more emphasis on the nature of the principle of good faith, which went beyond the obligations resulting from the letter of the treaty.

23. Paragraph 2 was not absolutely necessary, and as several members of the Commission had suggested, it would perhaps be better to combine paragraphs 1 and 2. Discussion of the ideas expressed in paragraph 3 could be postponed.

24. Paragraph 4 was perhaps redundant, but there would be no harm in retaining it. Perhaps it could be put into a more concise form.

25. The CHAIRMAN, speaking as a member of the Commission, said that one of the features of the Special Rapporteur's report was that it dealt very fully with all the points that might arise. The Special Rapporteur always included, in each of the articles he submitted to the Commission, more than he himself would wish to see included, leaving it to the Commission to make a selection. That was particularly true of article 55, which might well be drafted more concisely.

26. He agreed with Mr. Tunkin that the principle *pacta sunt servanda* might be taken in a broad sense as the basis of the binding force of any rule of international law, whether conventional or customary. But the members of the Commission were agreed that, in the particular context, it should be construed only in the strict sense as a fundamental rule of the law of treaties. In that sense the rule formulated was a rule of general customary law which recognized the binding force of treaty provisions.

27. He hesitated to give an opinion on paragraph 2. The idea it expressed came from article 17, which concerned the obligation of good faith under which a State taking part in the negotiation was required, before the treaty came into force, to refrain from acts calculated to frustrate the objects of the treaty. That, however, was a very special obligation which existed at a time when the treaty was not yet in force and when, consequently, there were no obligations under the treaty. But, should that principle be repeated in

⁵ Official Records of the General Assembly, Seventeenth Session, Annexes, Vol. III, agenda item 75, document A/C.6/L.505.

⁶ Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, pp. 6-8.

respect of a time when the treaty, being in force, produced its effects and itself gave rise to obligations? An act such as that contemplated in paragraph 2 probably constituted a breach of treaty obligations in itself. Even if the Commission decided to state that principle, it seemed better not to do so in article 55, so as not to weaken the principle, stated in paragraph 1 of that article.

28. Mr. Rosenne had already demonstrated that it would be advisable to insert a reference to the principle of article 55 in the articles mentioned in paragraph 3, which were to be discussed later, rather than adopt the contrary solution.

29. Paragraph 4 stated a principle connected with responsibility, which might be thought out of place in an article on the law of treaties. One of the most firmly established principles of customary law was that breach of an international obligation engaged a State's responsibility. But a State's responsibility was engaged by the breach of an international obligation of any kind, whether imposed by a treaty or by customary law. Hence there was no need to introduce at that point an idea which the Commission would study in general in connexion with the circumstances excluding responsibility. It was a difficult problem, calling for much caution and reflection; it would be dangerous to tackle it prematurely. Moreover, paragraph 4 might seem designed to furnish States with an excuse for failing to respect a treaty, and Mr. Verdross had already pointed out how inappropriate it was to include such a clause concerning State responsibility in article 55.

30. To revert to paragraph 1, like Mr. Briggs and Mr. Tsuruoka, he thought the wording should be as concise as possible, but he urged that the expression "in force" should be retained. It had been argued that it was superfluous, because a treaty which was not in force was not binding; but at its fifteenth session the Commission had considered a number of cases in which a treaty ceased to be in force; for example, in consequence of a new peremptory norm of general international law supervening after the treaty's entry into force, or by the operation of a resolute condition in a treaty. If article 55 did not specify that it referred to a treaty in force, a State might require the performance of an obligation deriving from a treaty which had in fact ceased to be in force.

31. The expression "in good faith" should also certainly be retained, for those words were the very essence of the rule stated. The obligation was not only a moral, but also a legal one. On the other hand, although he was in favour of codifying certain principles relating to the interpretation of treaties, he saw no need to refer to them in article 55. It was sufficient to say that the treaty was binding upon the parties and must be applied by them in good faith.

32. Mr. BRIGGS, in answer to the objections made by Mr. Amado and Mr. Tunkin to the insertion of the word "legally" before the word "binding" in paragraph 1, said he admitted that it might appear redundant, but he had been prompted to make the suggestion by the last sentence in paragraph (1) of the

commentary, in the light of which it seemed necessary to emphasize that the *pacta sunt servanda* rule was a legal obligation and not merely one of good faith; he had been reassured by the Special Rapporteur's oral explanation of the meaning of that sentence. Part of the difficulty was perhaps due to the not very felicitous expression "obligation of good faith" used in article 17, paragraph 1, and in paragraph (4) of the commentary on article 55. The concept was imprecise and could be read as either going beyond or falling short of a legal obligation. He had accordingly suggested that, if paragraph 2 were retained, it should start at the words "a party to a treaty", but he was inclined to think that the article would have more force if reduced to a single paragraph based on paragraph 1, with some of the changes suggested during the discussion.

33. Despite the arguments put forward by Mr. Tunkin and the Chairman, he still maintained that the words "in force" in paragraph 1 were superfluous, particularly in view of the definition in article 1 (a).⁷ Perhaps the opening words of paragraph 1 might be redrafted to read "When a treaty is in force it is binding . . . etc."

34. Mr. de LUNA said that the Special Rapporteur had very clearly perceived all the aspects of the problem dealt with in article 55, and he approved of its content. As to the drafting, he was in favour of concise, clear and convincing language. The concept of good faith was perfectly appropriate in that article and was important not only as a rule for interpreting a treaty, but as the very foundation of the principle *pacta sunt servanda*. True, the principle *pacta sunt servanda* could be construed as emanating from the principle *consuetudo est servanda*. But although in international practice States had always recognized that once they had declared their will together with other States they were bound by the declaration, that was not a requirement of logic; for why should past will prevail over future will? It was a requirement of the principle of good faith, without the observance of which no society could exist. But it was not necessary to define the principle at that point.

35. With regard to the points raised by Mr. Briggs, he agreed with Mr. Ago that the expression "in force" should be retained in order to make clear in what circumstances the principle *pacta sunt servanda* applied. On the other hand, there was no objection to deleting the last part of the sentence, from the words "in accordance with".

36. With regard to the general rules governing the interpretation of treaties, some argued mistakenly that only the rules of logic and grammar were applicable; but the social function of the law, which was to maintain order in society, must also be taken into account. That was precisely why the Special Rapporteur had referred to the general rules of international law governing the interpretation of treaties.

37. He associated himself with Mr. Rosenne's observations on paragraph 3 and with those made by the Chairman on paragraph 4.

⁷ *Yearbook of the International Law Commission, 1962, Vol. II, p. 161.*

38. Mr. BARTOŠ, referring to the question of the interpretation of treaties, said that most international disputes arose out of the interpretation, not the content, of treaty provisions. The case-law of the International Court of Justice, and most arbitral awards, showed that a State rarely contested the existence or wording of a treaty's provisions; the dispute was generally due to an interpretation incompatible with good faith. The Special Rapporteur had therefore been right to emphasize, at the end of paragraph 1, that treaties must be interpreted in accordance with certain international rules which ensured the application of the principle of good faith. The reference to those rules did not, of course, remove the obligation to apply the very general fundamental principles of international law. On that point he was arguing not only from the theoretical, but also from the practical point of view, for it was necessary to prevent the abuses which frequently occurred and remind States of their duty.

39. Mr. EL-ERIAN said he appreciated the way the Special Rapporteur had responded to the appeal made by some members at the previous session, that the articles should be presented in a rather more concise form than in his previous drafts. His scheme for combining in Part III provisions on the application, effects, revision and interpretation of treaties was to be welcomed; it was particularly appropriate to deal with application and interpretation together, as was often done in provisions on the pacific settlement of disputes in treaties in general.

40. An article on the principle of *pacta sunt servanda*, regarded as *la norme suprême* or the first foundation of the norms of international law by such authorities as Kelsen and Anzilotti, should certainly be placed at the beginning of Part III and be so drafted as to refer not only to the negative, but also to the positive aspects of the obligation. It was noteworthy that the preamble to the Covenant of the League of Nations spoke of the "maintenance of justice and scrupulous respect for all treaty obligations in the dealings of organized peoples with one another", whereas the preamble to the United Nations Charter was couched in more positive terms, since it referred to the establishment of "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The rule *pacta sunt servanda* required not only the formal performance of treaty obligations, but also respect for their spirit and the fulfilment of obligations deriving from general treaties to which the States concerned might be parties.

41. With regard to the actual drafting of the article, it would be useful to retain the words "in force" in paragraph 1 and to qualify them with the phrase "in accordance with the provisions of Part II", which would link article 55 with the clauses concerning essential validity. The latter part of paragraph 1 should be amended to remove the restrictive connotation; treaties must be applied in the light of fundamental rules of international law and the Charter, not merely in the light of rules of interpretation.

42. Paragraph 2 should be expanded to show that good faith required not only that the parties refrain

from certain acts, but also that they give effect to the spirit of the treaty. As drafted, the paragraph was too negative.

43. Mr. PESSOU, associating himself with the compliments paid to the Special Rapporteur on the quality of his work, said the comments he had intended to make on article 55 had already been made by previous speakers, in particular by the Chairman. In his opinion, the words "in force", in paragraph 1 should be retained, but the latter part of the paragraph, starting with the words "in accordance with", should be deleted. The question of the rules of interpretation could be dealt with in another part of the draft.

44. Mr. AMADO thanked the Chairman for pointing out that the Special Rapporteur had submitted a very complete text so that the Commission could make a selection from the ideas it embodied.

45. As to the question whether the words "in force" would be retained or deleted, he did not see how anyone reading the sentence could be led to believe that it applied to a treaty that was not in force.

46. Mr. LIANG, Secretary to the Commission, said that he would confine his remarks to the words "in force" in paragraph 1. Personally, he subscribed to the view that those words were not necessary, for the reasons already given by several members of the Commission.

47. It was true that the expression "treaties and conventions in force" was used in Article 36, paragraph 1, and Article 37 of the Statute of the International Court of Justice; it also appeared in the corresponding provisions of the Statute of the Permanent Court of International Justice. But the reason for using the words "in force" in that context was that time was of the essence of the matter. It was very important to find out whether, at the time when a dispute was submitted to the Court, a particular treaty conferring jurisdiction on the Court was in force or not. One example was the declarations made under Article 36, paragraph 2, of the Statute of the Court; some of the declarations made under Article 36 of the Statute of the Permanent Court of International Justice had lapsed in 1945 when the Statute of the International Court of Justice had come into force.

48. The third paragraph of the preamble to the United Nations Charter referred to the establishment of "conditions under which justice and respect for the obligations arising from treaties" could be maintained; it had not been considered necessary to add the words "in force" after the word "treaties", it being naturally assumed that the term "treaty" meant "treaty in force".

49. He could see no more reason for using the expression "treaty in force" in article 55 of the draft than in the other articles where the term "treaty" was used with the obvious meaning of "treaty in force".

50. Mr. YASSEEN said he still doubted the need for the words "in force". The characteristic of a treaty in force was that it was binding on the parties. Since

paragraph 1 spoke of a treaty being "binding upon the parties", obviously the treaty was in force. A treaty that was not in force could not bind the parties, and it was therefore tautological to say "A treaty in force is binding upon the parties".

51. He also doubted whether it was advisable to retain the last part of paragraph 1, from the words "in accordance with" to the end. A treaty should be interpreted in a reasonable manner, according to logic and to the rules of law governing interpretation. Mr. Tunkin had rightly argued that treaties must be applied in the light of all the general rules of international law. Every provision should be construed in the light of the entire body of law. The idea that good faith should also preside over the interpretation of a treaty was quite right, but it was already implicit in the first part of the sentence; to say that the treaty must be applied in good faith meant, *inter alia*, that it must be interpreted in good faith, for there could be no application without prior understanding of the meaning, and hence without interpretation.

52. He still thought it unnecessary to retain paragraph 2; and he had the impression that the Commission was moving towards that conclusion. What was said in paragraph 2 followed from the binding force of the treaty, and there was no reason to mention that consequence rather than the others.

53. With regard to paragraph 4, no one contested that the non-performance of a treaty engaged the international responsibility of the defaulting State. A general convention on the law of treaties would not be complete if that principle were not at least mentioned, but there was no need to go into details. It should, however, be added that the responsibility was not absolute, for there were cases in which a State could invoke other rules of international law which justified or excused a derogation. To insert a clause to that effect in article 55 would not be encroaching on the law of the international responsibility of States.

54. Mr. ROSENNE said he favoured Mr. Pal's suggestion that the word "applied" in paragraph 1 should be replaced by a more suitable term.

55. With regard to the words "in force", he did not support Mr. Briggs's suggestion that the opening words be amended to read: "When a treaty is in force...". If, as he believed, the intended reference was to a period of time rather than to the question of essential validity, an appropriate wording would be "Whenever a treaty is in force...", but he himself considered the word "Whenever" redundant and would prefer the opening words to remain as they stood. The Secretary to the Commission had commented on the use of the expression "in force" in articles 36 and 37 of the Statute of the International Court of Justice. That expression, which had first been inserted in the Statute of the Permanent Court of International Justice for special reasons, had given rise to a good deal of controversy, and the Court had attributed slightly different meanings to it in the different articles, according to the circumstances of each case.

56. With regard to paragraph 4, he pointed out that the Commission had already obliquely recognized the

connexion between the law of treaties and State responsibility in the concluding sentence of paragraph (6) of its commentary on article 42 (Termination or suspension of the operation of a treaty as a consequence of its breach), which spoke of "the injured party's right to present an international claim on the basis of the other party's responsibility with respect to the breach".⁸ It would be appropriate to include such recognition somewhere in the draft articles themselves.

57. Mr. ELIAS said that no case had been made for the retention of the words "in force"; nor did he favour the compromise suggestion by Mr. Briggs. The *pacta sunt servanda* rule was a basic rule of public international law and should be formulated in categorical terms. The qualification "in force" weakened the formulation of what was a paramount principle of international law by introducing an element of controversy. The controversy mentioned by Mr. Rosenne in connexion with articles 36 and 37 of the Statute of the Court strengthened the case for dropping the words "in force".

58. The issue raised in connexion with the words "in force" was one which had been disposed of when the Commission had adopted article 30 (Presumption as to the validity, continuance in force and operation of a treaty).⁹ That article provided that: "Every treaty concluded and brought into force in accordance with the provisions of Part I shall be considered as being in force and in operation with regard to any State that has become a party to the treaty...". Since Part III of the draft articles was an integral part of the whole draft, it was clear that any reference in it to a "treaty" meant a treaty brought into force in accordance with the provisions of Part I and therefore "in force" within the meaning of article 30. There was no more reason for using the expression "a treaty in force" in article 55 than in article 56 or any other article of Part III.

59. Mr. TABIBI said that in his opinion, the provisions of paragraph 2 were not consistent with those of article 17,¹⁰ which the Commission had adopted at its fourteenth session and which had been submitted to governments for their comments. Paragraph 1 of that article provided that a State which had taken part in negotiating a treaty, or which had signed it subject to ratification, was under an obligation, prior to the entry into force of the treaty, to refrain from acts calculated to frustrate its objects if and when it should come into force. A statement in article 55 that a State which was actually a party to a treaty was under a similar obligation would be difficult to reconcile with the terms of article 17.

60. The CHAIRMAN, speaking as a member of the Commission, said he wished to add three comments. First, he agreed with Mr. Amado, that article 55 could only refer to a treaty in force. Nevertheless, there

⁸ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 18.

⁹ *Ibid.*, p. 3.

¹⁰ *Yearbook of the International Law Commission, 1962, Vol. II*, p. 175.

was no harm in saying so, because the Commission had previously contemplated all sorts of circumstances in which, for extraneous reasons, a treaty ceased to be in force. In such cases, a State should not be able to invoke article 55 to argue that the treaty existed and must be applied.

61. With regard to paragraph 2, the Special Rapporteur's intention had not been to define good faith, but to add a principle related to the one stated in article 17.

62. As to the clause referring to State responsibility, he would bow to the Commission's decision, but he still thought it would be strange if the Commission inserted such a clause in the present draft although it had not done so in the other draft conventions it had prepared, and despite the fact that it was going to codify the topic of State responsibility. In the present draft, that question should, at most, be mentioned in the commentary, for it went beyond the law of treaties.

63. Mr. YASSEEN observed that it was precisely in order to avoid having to express the idea contained in paragraph 4, in every special convention, that the provision should be inserted in the general convention on the law of treaties.

64. Sir Humphrey WALDOCK, Special Rapporteur, said he would deal with the comments made on each paragraph separately.

65. There appeared to be a clear majority in favour of deleting the last part of paragraph 1. He attached no special significance to the words "in accordance with its terms"; he had introduced them merely to connect the first part of the sentence with the last part, which referred to the rules governing the interpretation of treaties.

66. He shared, to a large extent, Mr. Bartos's view that the observance of a treaty in good faith was very often a matter of interpretation. It was generally through specious interpretations that attempts were made to avoid the observance of treaties. It must be recognized, however, that the difficulty would not necessarily be overcome by including in paragraph 1 a reference to the rules of international law governing the interpretation of treaties, which themselves often provided arguments for arriving at divergent conclusions regarding the meaning of a treaty text. In principle, therefore, he was prepared to drop the reference from paragraph 1, which would then end with the words "in good faith". If the Commission decided to include, somewhere in the draft articles, provisions on the rules governing the interpretation of treaties, they would operate automatically in the application of article 55.

67. Nor was there any need to include in article 55 a reference to the principles of international law generally, because that point would be covered in effect in the succeeding article.

68. He saw no purpose in introducing the word "legally" before the word "binding", and he noted that the majority seemed to share that view.

69. He had included the words "in force", largely for the reasons given by Mr. Rosenne. The Commission had adopted a number of articles dealing with the

obligations incumbent on States with respect to a treaty prior to its entry into force and on the entry into force of treaties; there was also an article on provisional entry into force. Furthermore, the Commission had adopted a whole series of articles on the validity and termination of treaties. As a matter of drafting, therefore, he thought there was a lot to be said for using the expression "a treaty in force" in article 55. It had been suggested that the words "in force" weakened the formulation of the *pacta sunt servanda* rule. But it was not the presence of those words in paragraph 1 that weakened the rule; if the rule was weakened, it was by reason of the provisions on essential validity and termination which the Commission had adopted at its fifteenth session. The expression "a treaty in force" was merely an implicit recognition that those provisions existed.

70. With regard to paragraph 2, he did not think that it conflicted with the provisions of article 17. But perhaps the use of the expression "good faith" with slightly different meanings in the two articles could lead to some confusion. In article 55, the intended meaning was that a treaty must be applied and observed not merely according to its letter, but in good faith. It was the duty of the parties to the treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty. In article 17, on the other hand, good faith was the foundation of an obligation which did not, strictly speaking, arise out of the treaty itself.

71. There appeared to be a division of opinion in the Commission regarding the desirability of retaining paragraph 2; perhaps the Drafting Committee could be invited to consider the possibility of combining it with paragraph 1, so as to strengthen the principle stated there.

72. It seemed to be generally agreed that paragraph 3 had no place in the article and he was prepared to drop it. If the Commission ultimately agreed on the difficult provisions contained in articles 59, 62 and 63 in a form that called for the application of the *pacta sunt servanda* rule to States which were not parties to a treaty, the necessary references to articles 55 could be introduced in those articles.

73. He had included paragraph 4 mainly for the sake of completeness. He could not accept the suggestion that it should be abridged by deleting the concluding proviso, for it was not sufficient just to state the principle of international responsibility for the failure to comply with treaty obligations; there were certain exceptions to that principle, such as self-defence, and a reference should be made to them. Personally, he would prefer to see paragraph 4 deleted altogether if members thought that it weakened the article; the idea it expressed could either be put in a later article, or mentioned in the commentary.

74. The CHAIRMAN suggested that article 55 be referred to the Drafting Committee, together with the comments made during the discussion.

It was so agreed.

The meeting rose at 12.55 p.m.

728th MEETING

Thursday, 21 May 1964, at 12.20 p.m.

Chairman : Mr. Roberto AGO

Prolongation of the Session

[Item 2 of the agenda]

1. The CHAIRMAN announced that at a private meeting held to consider item 2 of the agenda, the Commission had decided to express in its report its deep regret that it would be unable to hold a winter session in 1965 as it had wished. The report would state that its inability to do so was due solely to the fact that because the General Assembly had changed the dates of its regular session, certain members of the Commission who also represented their countries at the Assembly would be unable to attend. The Commission would at the same time express its desire to hold a winter session from 1966 onwards. It had decided to submit to the General Assembly a proposal that the Commission should meet for a total of twelve weeks every year : eight weeks in the summer and four weeks in the winter, preferably in January, on the understanding, however, that it reserved the right to fix the exact dates according to circumstances.

2. With regard to the exceptional arrangements to be made for 1964, while bearing in mind the sacrifice which further prolongation of an already very long session might represent for some of its members, the Commission had accepted the Secretariat's offer in the interest of its work and decided to prolong the present session by one week. The session would accordingly end on 24 July.

Law of Treaties

(A/CN.4/167)

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 56 (The inter-temporal law)

3. The CHAIRMAN invited the Commission to take up article 56 in the Special Rapporteur's third report (A/CN.4/167).

4. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 56, said that although the application of the inter-temporal law might arise more frequently in the realm of interpretation than in that of application, it seemed more convenient to include the provision in section I (Application and effects of treaties) than among technical provisions concerning interpretation. He had always found the inter-temporal rule a particularly difficult one, even in territorial matters, to which Judge Huber had primarily applied it. The difficulty was to reconcile the idea that the interpretation

of a juridical fact had to be made in the light of the law in force at the time the fact occurred, with the proposition that the application of a treaty must be governed by the law in force at the time it was applied. He had attempted to explain his views on the matter in the commentary.

5. Mr. VERDROSS said that as paragraph 1 dealt with the legal interpretation of a treaty, it might be preferable to state the rule in the articles to be drafted on interpretation ; but that was mainly a question of form.

6. He did not think it was possible to draw a distinction between the interpretation of a treaty and its application, as the Special Rapporteur had attempted to do : for once a treaty had been correctly interpreted, in had to be applied according to that interpretation. In his opinion the question of the inter-temporal law arose only in the exceptional cases in which international law had changed after the conclusion of the treaty. Even then, the problem was not that there was a discrepancy between the interpretation of the treaty and its application, but the very different one of the treaty being modified by subsequent law — the problem of *lex posterior* which the Commission had settled at its previous session. The idea expressed in the article was correct ; what was needed was to change the wording of paragraph 2 to state that if international law changed after the conclusion of a treaty, the obligations arising from the treaty were thenceforth governed by the subsequent rule of international law.

7. There was another problem, however : was the principle stated in the article equally valid for law-making treaties ? In the case of bilateral or multilateral treaties covering specific matters, it was clear that the law applicable was that applied at the time when the treaty entered into force. But the position was quite different in the case of a law-making treaty, for such a treaty took on a life of its own, independent of the will of the parties at the time of its conclusion. It might be interpreted in a manner contrary to that will, as had happened, for instance, in the case of Article 27 of the United Nations Charter, the meaning of which had been entirely altered by practice, although the wording had remained unchanged, and of Article 18 of the League of Nations Covenant.

8. Mr. JIMÉNEZ de ARÉCHAGA, after congratulating the Special Rapporteur on his third report, said that he found Article 55 generally acceptable, but he was in some perplexity over Article 56, because he was not altogether convinced that the inter-temporal rule was already, or would become, part of the law of treaties. Contrary to his usual practice, the Special Rapporteur, in his commentary, had not adduced authorities in support of his proposal.

9. The inter-temporal rule applied to juridical facts, whereas a treaty was more in the nature of a juridical act and the rule seemed more relevant to the matters covered in Parts I and II of the report, such as authority to enter into a treaty and its validity. Persons authorized to bind a State at the time the treaty was entered into did so bind it whatever happened afterwards, and the

validity of the instrument was determined according to the law in force at the time it was drawn up. *Tempus regit actum*. In the *Grisbadarna* and the *North Atlantic Fisheries* arbitrations,¹ the rule had been applied not to the treaties as juridical acts, but to certain concepts contained in them that had undergone a process of historical evolution. The resulting decisions would have been the same whether applied to specific treaty provisions or to rules of customary international law, as in the *Island of Palmas* case.²

10. The wording of article 56 had increased his doubts, and he thought it unlikely that the rule proposed in paragraph 1 would prove workable. The intention of the parties should be controlling, and there seemed to be two possibilities so far as that intention was concerned: either they had meant to incorporate in the treaty some legal concepts that would remain unchanged, or, if they had had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belonged. The free operation of the will of the parties should not be prevented by crystallizing every concept as it had been at the time when the treaty was drawn up, as proposed in paragraph 1.

11. Paragraph 2, which laid down more or less the opposite rule to that given in paragraph 1, could give rise to serious practical difficulties, because it was hard to draw the dividing line between interpretation and application. Perhaps the Commission should not go beyond the particular application of the inter-temporal rule laid down in article 45,³ adopted at the previous session. The more general formulation now submitted by the Special Rapporteur might result, for instance, in long-standing treaties concerning frontiers being called in question on the ground that they had been secured by coercion, as proposed by the Commission the previous year.⁴ That might encourage a move towards revision beyond what was reasonable and justifiable. The Special Rapporteur had discussed, in his commentary, instances in which the rule proposed in paragraph 2 was not in fact applied because the intention of the parties had been to reach a definitive settlement. As that was surely the purpose of most treaties, the intention of the parties should be upheld rather than the rule proposed in paragraph 2.

12. Mr. PAREDES said that if the treaty corresponded, as it should correspond, to the will of the parties, and if it was the measure of the agreement reached, its interpretation must clearly be based on what the negotiators had had in mind when they contracted their obligations, that was to say on the circumstances or the prevailing doctrines and practices at the time. Consequently, the rule stated in paragraph 1 that "a treaty is to be interpreted in the light of the law in

force at the time when the treaty was drawn up" seemed to him to be clear and reasonable. He would prefer the words "at the time when the treaty was negotiated" because they covered, or might cover, a much longer period than the time when it was "drawn up"—a period during which much experience could be gained and there might sometimes be very substantial changes in accepted doctrine. During that period the parties would learn various things which could change their legal thought. The purpose of the treaty would be greatly clarified by those antecedents; the commitment would be illustrated and defined.

13. He could not quite understand the scope of paragraph 2, which at first sight appeared to be a contradiction, for it provided that "...the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied". Which took precedence, the rule in paragraph 1 or the rule in paragraph 2? The ideas and intentions at the time when the treaty was drawn up or those at the time when it was applied? In practice, interpretations were made in order to perform the treaty, to put it into effect, not merely for the sake of speculation: consequently, interpretation and application coincided in time. And if the logical rule of the time of drawing up the treaty was to be accepted, it was not possible to adopt the rule at the time of application if it had changed. That was the general case, but there were cases in which a particular rule prevailed: where the changes had occurred in the field of *jus cogens* or where they made it easier to fulfil the obligations, so that it was certain that if the parties had known of the changes at the time of concluding the treaty they would have accepted them.

14. Mr. Verdross had referred to cases in which the procedure was changed. That raised a very general principle of law: that procedural rules took precedence over former ones from the moment they came into effect. Hence it was necessary to separate and distinguish between substantive rules which created rights and subsidiary rules on the procedure for claiming them.

The meeting rose at 1 p.m.

729th MEETING

Friday, 22 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties (A/CN.4/167)

[Item 3 of the agenda]
(continued)

ARTICLE 56 (The inter-temporal law) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 56 in the Special Rapporteur's third report (A/CN.4/167).

¹ United Nations: *Reports of International Arbitral Awards*, Vol. XI, pp. 147 and 167.

² *Op. cit.*, vol. II, p. 829.

³ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 23.

⁴ *Ibid.* p. 10.

2. Mr. CASTRÉN said that the article stated two rules which were correct in themselves, at least in most cases, but which, when juxtaposed, gave the impression of being in some way contradictory. The Special Rapporteur himself stated in paragraph (5) of his commentary that the formulation of paragraph 2 had not been free from difficulty. It also appeared from the commentary that, although there were some problems concerning the relation between the two aspects of the so-called inter-temporal law, the second rule seemed just as valid as the first. It was true that the inter-temporal law was just as applicable to the interpretation of treaties as it was to their application.

3. In his opinion, it would be better to begin the article with the present paragraph 2, which stated the principal rule and related only to the application of the treaty. Mr. Verdross's comment concerning law-making treaty at the previous meeting¹ should also be borne in mind. The rule stated in paragraph 1 could be transferred to the commentary or to the section on interpretation. Another possibility would be to deal with the whole problem in that section.

4. Mr. PAL said that the principle enunciated in paragraph 1 was substantially acceptable, but its application must be made subject to the intention of the parties. The contemplated light of the law would also include that of the then prevailing law of interpretation.

5. Paragraph 2 was not acceptable and did not seem to him to reflect accurately the principle underlying Judge Huber's pronouncement on the inter-temporal law. In the *Island of Palmas* case² the matter for decision had related to a right conferred by law and not by treaty, and the pronouncement in question had been made in that context. The present provision would be a wrong projection of that principle. In the *North Atlantic Fisheries arbitrations*³ the relevant treaties did not cover the issue in dispute. The treaties determined the land boundaries, about which there was no dispute. As at present drafted, paragraph 2 embodied a conception of application different from that with which the cases cited in the commentary were concerned. Application, in the present context, might refer to obligations under a treaty, performance, remedy on breach, or relief available. It might also mean supplying some fact collateral to an issue arising otherwise, as in the *Fisheries* cases. Application would not be governed in all respects by the rules in force at the time.

6. Mr. TABIBI said he shared the doubts expressed by some other members of the Commission as to whether the article was in its proper place. Perhaps the matter dealt with in paragraph 1 should either be transferred to the commentary or put among the provisions concerning interpretation.

7. Admittedly, there was a close connexion between interpretation and application, but the two paragraphs dealt with entirely different matters and were mutually

contradictory, the latter nullifying the former. Paragraph 2 could be retained, however, since for purposes of application the rules of international law in force at the time must be taken into account.

8. Mr. REUTER said that the essential question raised by article 56 lay in the title rather than the text. The Special Rapporteur had been right to devote an article to the problem of the "inter-temporal law", although the term was not perhaps a very happy one.

9. It did, however, refer to a very important problem, the conflict between legal rules in time. If the Commission confined itself to treaties, it should consider the relation between an earlier treaty and later rules. Article 45, adopted at the previous session,⁴ settled the question of a conflict between an earlier treaty and supervening rules of *jus cogens*. Article 65, in the report before the Commission, dealt with the relation between two treaties concluded at different times. There remained the question of the relation between two treaties and a custom formed subsequently or a subsequent principle of law, but not of *jus cogens*; there were only allusions to that problem in articles 53 and 64.

10. In the case of article 56 the Commission had a choice between two solutions. First, it could consider that the article was included *pro memoria* and should be rather cautiously worded, because the subject-matter was extremely complicated. In that case, paragraph 1 should certainly be retained, for to delete it would mean ignoring the whole problem. Perhaps, to be on the safe side, the words "more particularly" should at the very least refer to all the articles that dealt with similar problems. Secondly, the Commission could deal with the problem as a whole, which would obviously be a very difficult task, since it would mean drafting a new text covering the relation between treaty rules and non-treaty rules in the various possible cases. He had formed no opinion as to which of those two solutions was to be preferred.

11. Mr. ROSENNE said that the article was acceptable in principle and fulfilled a useful purpose by drawing attention to an issue that could prove troublesome in practice. McNair treated the inter-temporal law as something more or less to be taken for granted and made the important point that the rule formulated by Judge Huber did not mean that all treaties should be brought up to date for the purpose of their application,⁵ while Rousseau pointed out that Judge Huber's statement was not in principle limited to territorial disputes.⁶ It was noteworthy that the part of that statement quoted in paragraph (1) of the commentary on article 56 had been preceded by the words "Both parties are also agreed that", which could be taken as evidence of State practice in support of the rule.

12. He had not been convinced by the argument that the inter-temporal law was something too general for

¹ Para. 7.

² *United Nations Reports of International Arbitral Awards*, Vol. II, p. 829.

³ *Op. cit.*, Vol. XI, p. 167.

⁴ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 23.

⁵ *Law of Treaties*, 1961, p. 468.

⁶ *Principes généraux de droit international public*, Vol. I, p. 498.

inclusion in a draft codifying the law of treaties. The Commission had, after all, framed a number of provisions deriving from general principles in their special application to the law of treaties and there was no reason why it should not follow the same course in the present instance.

13. With regard to the wording of the article, he understood the opening words of paragraph 1, "A treaty is to be interpreted", as referring essentially to the exegetical process of establishing the meaning of individual words and phrases rather than the meaning of the treaty as a whole. That was borne out by the case cited in paragraph (2) of the commentary, where the reference to the *Grisbadarna* case and to the fact that territorial waters, when mentioned in a seventeenth-century treaty, must be understood in the terms current at that time, indicated that such should be the common-sense rule. Accordingly, he did not consider that the text of paragraph 1 did violence to the fundamental rule of interpretation that the intention of the parties must prevail.

14. He questioned whether it was always correct to state that the point of time for the purposes of paragraph 1 of the article was the moment when the treaty was drawn up. His provisional conclusion on that point was that it was the date of the adoption of the text that was relevant.

15. Paragraphs 1 and 2 dealt with two separate principles of equal importance, neither of which was subordinate to the other, and he therefore hesitated over the words "subject to paragraph 1" in paragraph 2. He hoped it would prove possible to draft the substantive articles concerning application without actually using the word "application" itself.

16. Referring to the examples given by Mr. Verdross concerning the interpretation and application of the Covenant of the League of Nations and the Charter of the United Nations, he said that in due course the Commission would have to consider whether and to what extent the provisions of article 48 in Part II would have to be applied to the articles now being examined.

17. With regard to the position of the article, he wondered whether it should not be moved nearer to article 65. There was inevitably some overlapping between the articles in Part III, as there had been between the articles in Part II, but that was a matter which would have to be reviewed during the final reading.

18. Mr. ELIAS said he questioned whether the inter-temporal rule could be regarded as relevant only to the law of treaties. A study of the cases mentioned in the commentary had increased his misgivings about the juxtaposition of the two elements now contained in the article which, as the Special Rapporteur himself had pointed out in paragraph (5) of the commentary, were not always easy to reconcile.

19. He therefore suggested that further consideration of the article be deferred until the Commission discussed the provisions on the general principles of interpretation being prepared by the Special Rapporteur. It would then be easier to decide whether an article on the inter-temporal rule should be included at all.

20. Mr. BARTOŠ said he fully approved of the formulation proposed by the Special Rapporteur. A study of treaties showed that they could have two entirely different aspects, as was indicated, incidentally, in the Statute of the International Court of Justice. On the one hand a treaty was a legal act concluded between the parties, in which the will of the parties was dominant; in that case, it was the positive international law existing at the time when the treaty was drawn up that should be considered in interpreting the will of the parties and, hence, in applying the treaty (article 36, para. 2.a of the Statute of the Court). On the other hand, treaties were also sources of international law, in other words, normative rules of law (article 38, para. 1.a). Whereas the will of the parties remained fixed at the time at which it was expressed, normative rules were dynamic and evolved with time, as did the whole system of positive international law.

21. Consequently it was not only logical, but essential to distinguish between the two points of time mentioned in the article. It was necessary to understand what the parties had wished to do and to determine what legal relationships they had wished to establish (which might raise the question of the objective interpretation of the will of the parties, especially in collective treaties), but it was also necessary to consider the effects of treaties as legal norms. Both ideas had been present in Judge Huber's mind, although, like all jurists of his time, he had shown a preference for the unity of the act and the autonomy of the will.

22. He agreed with Mr. Reuter that the term "inter-temporal law" raised difficulties, but he hoped the Drafting Committee could settle that problem.

23. With regard to the time to be considered in determining the will expressed in a treaty, he approved of the wording proposed by the Special Rapporteur: it was the time when the treaty had been "drawn up", not the time when it had been concluded or accepted. However, when a treaty was not accepted until many years after it had been drawn up and was only accepted with reservations, that could be taken as equivalent to drawing it up anew, and consequently, in that exceptional case, the decisive time was the time of acceptance. But the text submitted by the Special Rapporteur certainly stated the fundamental principle.

24. Mr. TSURUOKA said that article 56 raised the problem of the relation between the autonomy of the will and the development of conventional and customary international law. It was necessary to reconcile, as far as possible, the stability of conventional international law and the flexibility of customary international law. After careful consideration he had reached the following conclusion: A treaty expressed the will of the parties. If that will was expressed rather vaguely, the treaty needed interpretation. In so far as it did not conflict with rules of *jus cogens*, the will expressed must be interpreted in the light of the international law prevailing when the treaty had been concluded. But there were also cases in which the will of the parties was not expressly stated: then the implied will of the parties had to be determined by interpretation. If the interpretation showed that the parties

had wished to follow the evolution of international law, it was international law at the time when the treaty was interpreted which prevailed. Otherwise, it was the implied will of the parties at the time when the treaty was concluded that should be applied.

25. It was also obvious that when a new rule of *jus cogens* supervened, that rule prevailed, bringing about the nullity of all or part of the previous treaty; there was then no longer any problem of application or of interpretation, apart from the interpretation required to determine the conflict with *jus cogens*.

26. If that interpretation of article 56 was not too strained, he approved of the Special Rapporteur's proposal.

27. Mr. de LUNA congratulated the Special Rapporteur on the scientific honesty he had shown once again in the drafting of article 56. He approved of what was said in paragraph (6) of the commentary, and saw no contradiction between the two principles stated. In proposing that solution, the Special Rapporteur had been aware, as he said in paragraph (3) of his commentary, that the "interpretation" and "application" of treaties were closely inter-linked; and in paragraph (5) of the commentary he had made it clear that he had seen the difficulties.

28. The interpretation with which the Commission was concerned in that context was normative interpretation, the purpose of which was to determine the legal rule that the legislator or the parties to a contract wished to be applied. Even though, logically, interpretation was distinct from application, from the practical point of view a treaty was interpreted so that it could be applied. Paragraphs 1 and 2 of the article dealt with two entirely different problems. What caused a shock at first sight was the fact that the two principles stated, both of which were correct, were placed in the same article.

29. Moreover, the examples quoted in the commentary did not throw much light on the question. The *Island of Palmas* case, and many others, were cases of *jus non scriptum*, or of what was sometimes called spontaneous law. Custom was essentially a sociological phenomenon; it arose spontaneously, independently of any previous form, and its action was diffuse and continuous. It was formed and reformed imperceptibly. Treaty law, on the other hand, was *jus positum*; it was discontinuous, and generally in written form. The impression of contradiction felt by some members might perhaps be due to the fact that the function of interpretation was not the same for treaty law as it was for customary law. The problem of the transformation and abrogation of rules of law raised by paragraph 2 also differed considerably according to whether customary rules or treaty rules were concerned.

30. As to what was called inter-temporal law, it was not so much a matter of distinguishing between the rules successively in force as between established rights and expectations of rights: in other words it was necessary to know the rule in force *medius tempore*. Most civil codes in continental Europe contained transitional provisions relating to situations of that kind.

31. Frontier treaties, which had been mentioned by Mr. Jiménez de Aréchaga, created a situation that entered into the subjective heritage of the State. A frontier treaty had a constitutive and definitive effect depending on agreed principles.

32. While he agreed with the Special Rapporteur on the principles proposed, he did not agree with him on where they should be stated. Paragraph 1 would be more appropriate in the section on the interpretation of treaties, and paragraph 2 should be linked to the whole problem of the transformation and duration of treaty rules.

33. Mr. Yasseen said that the article 56 dealt, not with problems of conflict of legal rules in time, as its title might suggest, but with a problem of the interpretation of treaties, namely, whether, in interpreting a rule, it was the time when the treaty was drawn up that should be considered or the time when it was applied. Needless to say, since the international legal order was an indivisible whole, each of its rules was influenced by the development of that order. On the other hand, a treaty rule was to some extent an act of will in the sense that, in order to understand the rule, it was necessary to refer to the intention of the parties, in the same way as the intention of the legislator was referred to in municipal law.

34. With regard to paragraph 1, it was clear that a legal rule in a treaty was formulated in the light of several factors: first, a state of law, but also a state of fact. It was fair to presume that when formulating the rule the parties had considered the state of the law at the time. But paragraph 2, concerning the application of the treaty, was drafted in too general terms, so that it appeared to contradict paragraph 1.

35. Yet in speaking of application it was necessary to speak of interpretation. And if, in interpreting a legal rule, the state of the law at the time of its application was considered, the effect attributed to it might differ from that which it would have had if only the law in force at the time of its drafting had been taken into account. Of course, all treaty rules were not of the same nature. A treaty was a source of law, but it involved a technical process which could also create individual situations. Where an objective rule had to be interpreted, however, it was not possible to defer in the same way to the intention of the parties, because rules affecting the international community were involved, and changed circumstances could have a greater effect on those normative rules than on the individual situations established by a convention. That was a first exception to be made to the principle stated in paragraph 1: in the case of normative rules, it was necessary to take account of changes in circumstances and the development of the international legal order.

36. Another exception of a general character which the Special Rapporteur had mentioned in his commentary, was the supervention of a rule of *jus cogens*. Where that occurred, it was not possible to interpret the treaty according to the law in force at the time when it had been drawn up; but it could also be presumed that the intention of the parties at that time had not been to rule out the possibility of some adap-

tation of the provisions of the treaty to the developing legal order.

37. Article 56 raised serious problems of interpretation, and for considerations of logic it was necessary to retain paragraph 2, in order to qualify the principle laid down in paragraph 1, and to determine the conditions under which that principle could be departed from and the treaty should be interpreted, and hence applied, according to the law in force at the time of its application.

38. Mr. BRIGGS said that the substance of the article was entirely acceptable, but some drafting changes would be needed. He was in broad agreement with what had been said by Mr. Rosenne.

39. In the *Island of Palmas* arbitration, when the onus had been laid on the United States to prove that in 1898 Spain possessed a valid title to cede the island, the United States had relied on the fact that in the fifteenth century discovery was sufficient to establish title even when not followed by occupation. In fact, Spain had withdrawn from the island, which had subsequently been occupied by the Dutch for over two centuries. Judge Huber had found that "a juridical fact must be appreciated in the light of the law contemporary with it", but he had also found that the continued existence of the right "must follow the conditions required by the evolution of the law".

40. There was no contradiction between those two principles—a fact which had been convincingly demonstrated by Mr. de Luna—and he believed that paragraphs 1 and 2 were complementary; they could be combined in a single paragraph by substituting the word "but" for the words "subject to paragraph 1". There was no reason why a principle of wider application than the law of treaties as such should not be incorporated in the draft. It was concerned not with changes in circumstances—the subject of article 44—but with changes in rules of international law.

41. Mr. TUNKIN said that the brief text of article 56 had many complex implications. Paragraph 1 related to interpretation and should be discussed in the context of that subject when the Commission came to deal with it. Hence he would not dwell on that paragraph, but would merely indicate his doubts both as to the meaning of the term "interpretation" and as to the actual rule proposed. For example, the question arose whether any new rules of interpretation that had emerged since the treaty had been drawn up should not also be applied.

42. With regard to paragraph 2, he agreed with Mr. Reuter that it involved the problem of the relation between the treaty and subsequent rules of international law, both conventional and customary. That problem had been dealt with in part in article 45 (Emergence of a new peremptory norm of general international law), but paragraph 2 of article 56 covered a much wider field since it referred to the emergence of any norm of international law that conflicted with the clauses of the treaty.

43. There was also the problem of the possible transformation of the clauses of a treaty by custom and tacit agreement of the parties. Since it was generally accepted that conventional and customary rules of international law were equally binding, it should also be recognized that the provisions of a treaty could be changed by tacit agreement of the parties; international practice provided many examples of that situation, which involved a problem not of interpretation, but of the modification of a treaty.

44. With regard to the procedure to be followed, his position was the same as that of Mr. Elias; in view of its close connexion with other articles which the Commission had already adopted during past sessions or would be considering during the present session, he suggested that further discussion of article 56 be postponed.

45. Mr. AMADO said that on reading article 56 he had been struck by the use of the word "interpreted", and, like other speakers, had inferred that the article was concerned with rules of interpretation. But paragraph 2 referred to the application of treaties. The article was a reformulation of the rule laid down in the *Island of Palmas* arbitration by Judge Huber, who had used the verb "appreciate" instead of "interpret". It seemed difficult to imagine that when two States jointly drew up a legal instrument expressing the agreement of their wills to the reciprocal granting of benefits, they would not take account of the legal order prevailing at the time. That being so, it was right to say that a juridical fact must be appreciated in the light of the law contemporary with it; that was the rule stated by the Special Rapporteur in paragraph 1, and it was clear that account must be taken of the legal order and even of the interest existing at the time when the legal instrument had been drawn up. Up to that point, the Special Rapporteur's text followed Judge Huber's dictum.

46. But Judge Huber had been referring to the time when a dispute in regard to a juridical fact arose or fell to be settled. He had been thinking of the problems to which performance of the treaty might give rise as a result of differences of opinion between the contracting States regarding that instrument. The Special Rapporteur's application of the dictum seemed to go beyond what Judge Huber had said.

47. He therefore concluded that if the rule stated in article 56 was regarded as a rule of interpretation, it ought not to be discussed until the Commission came to deal with the rules of interpretation as a whole. But if the article was concerned with the effects of the inter-temporal law, and if it was based on the definition given by Judge Huber, it should be retained. States could not conclude a treaty in disregard of the law contemporary with it; but neither could they ignore the development of law.

48. Mr. EL-ERIAN said that, as a general statement of rules of treaty law, the article was not difficult to accept, especially if the words "more particularly" were inserted in paragraph 1, as suggested by Mr. Reuter, so as to make its provisions less general

¹ *United Nations Reports of International Arbitral Awards*, Vol. II, p. 845.

in scope and less exclusive of other elements of interpretation.

49. With regard to the placing of the article, its relation to some of the provisions in Part II and its relation to the other sections of Part III, however, he had some misgivings, which the discussion had only strengthened. It was clear that the article needed further study and he supported Mr. Elias' suggestion that the Commission should postpone further consideration of it.

50. The CHAIRMAN, speaking as a member of the Commission, said he thought that some of the difficulties mentioned during the discussion arose from the juxtaposition of two quite distinct matters in the same article. In reality, paragraph 1 dealt with interpretation and paragraph 2 with a problem of application. In interpreting a treaty, it was impossible not to take into consideration the legal concepts which the parties had had in mind when they drew it up, and that applied even more strongly to the legal terms used in the treaty, which must necessarily be taken in the sense in which they had been used when it was drafted. But the rules of interpretation were numerous and then complemented one another. Although one rule was that in determining the will of the parties account must be taken of the conditions under which the treaty had been drawn up, there was no reason why that will should not have changed with the passage of time. In particular, there was a rule that the subsequent practice of the parties must be taken into account, for it might show that at a certain moment the parties had agreed to interpret the treaty in a manner different from that originally intended. He therefore thought it advisable to defer consideration of that question and take it up in conjunction with the rules of interpretation as a whole, which might complement it.

51. Paragraph 2 dealt with the rules that should govern the application of a treaty. A treaty contained a number of rules and obligations, the definition of which was bound to be affected by the development of international law. For example, if there was a change in the rules on the breadth of the territorial sea, a treaty granting special rights in that sea must necessarily be applied to the whole area provided for in the new rules. Moreover, apart from the extremely rare case in which a treaty conflicted with a new rule of *ius cogens*, a number of other rules had to be taken into account, such as those governing the grounds for termination of a treaty. A new ground for termination might make it impossible to apply the treaty even if it had been concluded at a time when that ground for termination had not been foreseen.

52. The ideas expressed in the article were correct, but it was difficult to accept them because they were placed together and paragraph 2 seemed to contradict paragraph 1. The rule laid down in paragraph 1 would be better placed among the set of rules to be drafted on interpretation. As to paragraph 2, the Special Rapporteur would have to decide whether it should be left in its present position or transferred to a more appropriate part of the draft.

53. Mr. LACHS said that article 56 dealt with one of the fundamental aspects of the law of treaties — one of the basic dimensions in which the law moved: the

dimension of time. In principle, he had little against the provisions in either of the paragraphs of the article, but he thought that they said either too little or too much on issues that called for a wider and clearer formulation of rules.

54. He agreed with Mr. Briggs that there was no real conflict between the provisions of paragraph 1 and those of paragraph 2, but, as formulated, they did appear to conflict. In the circumstances, the best course was perhaps that suggested by the Chairman — to separate the two distinct issues involved. Paragraph 2 could remain where the Special Rapporteur had placed it, but paragraph 1 should be with the articles on interpretation.

55. With regard to the wording of the article, he would deal with paragraph 1 when the Commission came to consider its substance; he hoped the suggestion to postpone further consideration would be adopted. On the wording of paragraph 2 he agreed with Mr. Reuter. Although the title of the article was not one of its essential features, he thought it should be amended, particularly if paragraph 1 were moved elsewhere.

56. Sir Humphrey WALDOCK, Special Rapporteur, replying to the observations of members, said that the fact that paragraph 1 expressly dealt with interpretation did not exclude the possibility of placing it in that part of the draft articles which dealt with the application of treaties. He understood that the majority of the Commission would prefer to have the provision in paragraph 1 placed among the rules on the interpretation of treaties, but he must point out that many other articles of the draft, such as article 57, also involved interpretation as a preliminary to application of a treaty, and he would not wish to see too many of the provisions transferred to the section on interpretation.

57. There was a definite advantage in including in one and the same article the provisions of paragraph 1, on interpretation, and those of paragraph 2, on the application of treaties. Paragraph 2 was important to an understanding of paragraph 1 and, as Mr. Yasseen had pointed out, served as a corrective to it. It should also be remembered that interpretation was often a necessary preliminary to application.

58. He attached no special importance to the title "The inter-temporal Law"; he had taken it from the award by Judge Huber in the *Island of Palmas* arbitration, but would not press for its retention.

59. It was possible to formulate the provision in paragraph 1 in the rules on interpretation, but it would not constitute a complete statement of the law on the matter unless it was accompanied by the provision in paragraph 2. Mr. Reuter had rightly pointed out the connexion between paragraph 2 and other articles of the draft, especially article 65, dealing with conflict between treaties. The provision in paragraph 2 should not be left in its present position without that in paragraph 1, and he therefore suggested that both be moved to a later section of the draft.

60. As to subsequent practice, that issue was nearly always presented as one of interpretation. Moreover,

a clear distinction should be made between subsequent practice in the application of a treaty and the practice of the contracting States in the development of customary international law generally. The States parties to a treaty which laid down particular rules for a given subject as between themselves, might well be prepared to accept, outside that context, some general rule of international law, whether it was established by multi-lateral treaty or by new practice. The issue was one of the relation between special and general rules of international law.

61. Article 56 would have to be reconsidered in the light of the discussion. Perhaps paragraph 1 should be placed among the provisions on the interpretation of treaties and the drafting of paragraph 2 postponed until the Commission came to deal with the question of conflicting treaty provisions. He believed, however, that both paragraph 1 and paragraph 2 stated broad truths and should find a place in any draft on the law of treaties.

62. The CHAIRMAN, summing up the discussion, said that the principles stated in paragraphs 1 and 2 of article 56 were considered correct to a large extent, but it was feared that their drafting and juxtaposition might lead to misunderstanding.

63. He explained that when he had referred to the subsequent practice of States, he had meant what was called the subsequent conduct of the parties in applying a treaty, not practice in a more general sense, which was quite a different matter. That conduct itself, however, could either have a purely interpretative aspect or, in certain cases, comprise tacit agreements which were more in the nature of a modification than an interpretation.

64. He suggested that the Commission should postpone further consideration of the article and request the Special Rapporteur to reconsider the matter.

It was so agreed.

Communication from Mr. Padilla Nervo

65. The CHAIRMAN invited Mr. Jiménez de Aréchaga to read to the Commission a communication received from Mr. Padilla Nervo.

66. Mr. JIMÉNEZ de ARÉCHAGA said that Mr. Padilla Nervo had addressed to him, in his former capacity as Chairman of the Commission, a communication dated 9 May 1964, in which he submitted, with regret, his resignation from the Commission following his election as a judge of the International Court of Justice, and assured members that he would follow their important work with the greatest interest. He had had the privilege of participating for eighteen years in the activities of various organs of the United Nations, but had a special predilection for the International Law Commission, on which he had served for nine years.

67. The CHAIRMAN asked Mr. Jiménez de Aréchaga to thank Mr. Padilla Nervo for his communication.

The meeting rose at 12.50 p.m.

730th MEETING

Monday, 25 May 1964, at 3 p.m.

Chairman : Mr. Roberto AGO

Law of Treaties (A/CN.4/167) (continued)

[Item 3 of the agenda]

ARTICLE 57 (Application of treaty provisions *ratione temporis*)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 57 in his third report (A/CN.4/167).
2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 57 dealt with the scope of the application of a treaty to facts or matters, from the point of view of the time factor. Paragraph 1 stated the substantive rule. The matter appeared comparatively simple, but on closer examination revealed great difficulties, mostly with respect to jurisdictional clauses. Explanations and a number of examples were given in the commentary.
3. Paragraph 2 stated a reservation which made it clear that acceptance of the rule in paragraph 1 did not mean a State was freed from responsibility for what it might have done during the currency of the treaty. That point had been in issue in the *Northern Cameroons* case,¹ in which the International Court of Justice had almost certainly assumed that normally a State remained responsible, after the termination of a treaty, for what might have happened while the treaty was in force. In other words, the United Kingdom could have been held responsible for any breach of the Trusteeship Agreement that might have occurred while the agreement was in force, but since no claim for reparation had actually been made, and because of the special circumstances of the case, the Court had refused to adjudicate.
4. Mr. YASSEEN said that article 57 was of great importance and dealt with problems that arose very frequently; for whenever one treaty succeeded another, the question of the succession of the effects of the treaties had to be settled.
5. The article embodied three principles. The first was that, in general, a treaty could not have retroactive effect; that was an accepted principle, so paragraph 1 raised no difficulty.
6. Paragraph 1 also showed that that principle did not have the force of *jus cogens*, since exceptions could be provided for in the treaty itself; that could not be contested either. Nevertheless, he would prefer to see the words "expressly or impliedly" deleted, for it

¹ *I.C.J. Reports*, 1963, p. 15.

was obvious that a treaty was valid in respect both of what it expressly stated and of what it implied.

7. The second principle was that a treaty must have immediate effect. Of course, when a new treaty came into force and was to be applied to a continuing situation, it took effect immediately, not retroactively. The new treaty governed the legal situation from the moment that situation came under the new rule; that principle was well explained in the commentary.

8. The third principle was that a treaty applied to facts of matters arising while it was in force, even after it had been terminated or suspended; that was an aspect of what might be called the survival of treaties. When a treaty was terminated or suspended, naturally it could not remain in force, but it nevertheless continued to apply to facts or matters which had arisen while it had been in force. That principle could be stated in clearer terms.

9. The expression "retroactive interpretation" should be avoided in the commentary; although it was borrowed from the International Court of Justice, which had used it in the *Ambatielos* case,² that expression was liable to be misunderstood. What was meant, of course, was an "interpretation permitting retroactive application"; interpretation itself, in the sense of understanding a rule, was generally retroactive.

10. The CHAIRMAN said that in order to facilitate discussion, he would like to ask the Special Rapporteur to clarify a few points. First, in paragraph 1, he appeared to be referring to certain types of treaty, in particular those which provided for the pacific settlement of disputes. But did the rule which was valid for that type of treaty extend to all treaties?

11. Secondly, in the case of treaties for the pacific settlement of disputes, should the procedure contemplated in those treaties be held to be automatically applicable only to disputes arising out of facts or matters subsequent to the treaty? The fact that the parties often thought it necessary to include in their treaty a clause specifying that the procedure laid down in it applied only to facts subsequent to the acceptance of the treaty surely seemed to suggest that the usual principle was, on the contrary, that when that precaution was not taken the procedure applied to all disputes, even those arising out of prior facts.

12. Thirdly, did paragraph 2 apply to certain types of treaty, such as the constituent instruments of international organizations, or to treaties in general? If it was meant to apply to treaties in general, was not the proposed rule rather too absolute in character, since there were treaties whose termination put an end to all the rights and obligations stipulated in them, even with respect to facts which had supervened while they had been in force?

13. Sir Humphrey WALDOCK, Special Rapporteur, replying to the Chairman's first question, said that he thought the rule in paragraph 1 was one of general application and was not limited to jurisdictional

treaties. It applied unless, as indicated in paragraph 1, a contrary intention appeared from the clauses of the treaty or from its very subject matter. A good example was the European Convention for the Protection of Human Rights and Fundamental Freedoms,³ which undoubtedly contained jurisdictional provisions, but also had very important substantive effects relating to the human rights of individuals. The European Commission on Human Rights had had no hesitation in saying that the provisions of that treaty applied only with respect to matters arising or subsisting after its entry into force.

14. In reply to the Chairman's second question, he said that the difficulties with regard to clauses of judicial settlement arose mainly over the meaning of the term "disputes" and the question whether that term should be construed narrowly as covering only disputes which had arisen after the entry into force of the jurisdictional clause in question. The case-law of the International Court of Justice supported the general principle that a jurisdictional treaty applied to all disputes unless the parties stipulated the exclusion of disputes having their genesis in events prior to the conclusion of the treaty.

15. In reply to the Chairman's third question, he said that paragraph 2 also stated a general rule. He would, however, accept the qualification suggested by Mr. Yasseen in order to safeguard the position regarding treaties which had been executed; the execution of those treaties was intended to have permanent effects. In general, however, when a treaty was terminated, the rights of the parties with respect to facts or matters which had arisen while the treaty was in force must be determined by reference to the treaty provisions. Even in the *Northern Cameroons* case it was clear, both from the language of the Court and from the individual opinions, that the assumption was that, in principle, the obligations were still obligations which could be invoked after the termination of the treaty for the purpose of claiming reparation. In fact any different conclusion might be disastrous, since it was common for the parties to a treaty to have the right to terminate their obligations by giving three or six months' notice, and unless the rule in paragraph 2 were accepted, there might be a temptation to terminate a treaty merely in order to escape the consequences of a breach of its provisions while the treaty was in force.

16. The CHAIRMAN said he still thought it was open to question whether article 57 stated a general rule applicable to all treaties or a rule relating only to certain kinds of treaty.

17. Mr. REUTER said that, since the Commission was thinking of redrafting article 56, it should consider whether the substance of article 57 should not be combined with the substance of the new article 56; both articles dealt with the same problem, and that would be quite evident if the expression "inter-temporal law" were used to describe article 56.

18. With regard to substance, it must be recognized that the subject-matter was very complicated. The

² *I.C.J. Reports*, 1952, p. 40.

³ *United Nations Treaty Series*, Vol. 213, p. 222.

Commission should proceed cautiously, for it was to be feared that it would not be able to provide for all cases and state all the rules. The various systems of municipal law contained many detailed rules relating to the matter dealt with in article 57; they drew very subtle distinctions between acquired rights and expectancies, and between the establishment of juridical situations and their effects. Where they laid down a principle, they immediately attached a number of exceptions to it. The Special Rapporteur had referred to the rules governing territorial jurisdiction; the text under study would also be certain to have major consequences in regard to the succession of States. The Commission might therefore find itself going much further than it had expected.

19. It seemed that two practical conclusions must be drawn. First, it was desirable to draft very general and rather vague provisions. Far from wishing to delete the words "expressly or impliedly" altogether, as Mr. Yasseen did, he would prefer wording similar to that used by the International Court of Justice, for example, "in the absence of special reasons inherent in the purpose of the treaty or in some other circumstance", which would leave room for all the exceptions. Secondly, the most difficult problem was probably that raised by the use of such words as "facts", "matters", "arising", and "subsisting". In articles 53 and 54⁴ adopted at the previous session, which related to similar problems, the Commission had used the words "act" and "situation"; it might be wise to make the wording uniform and leave article 57 as vague as possible.

20. Mr. BRIGGS said that while he sympathized with the intention of both paragraphs of article 57, although it was already expressed elsewhere in the draft, he had difficulty in accepting the manner in which the contents were expressed.

21. The purpose of paragraph 2 was, in a great measure, already served by paragraphs 1 (b) and 3 (c) of article 53, on the legal consequences of the termination of a treaty, and paragraph 1 (c) of article 54, on the legal consequences of the suspension of the operation of a treaty. Incidentally, the opening sentence of article 53 referred to the "lawful termination" of a treaty, an expression which was not used in article 57. He questioned the need to retain paragraph 2 at all.

22. The rule in paragraph 1 was very similar to that stated in paragraph 4 of article 23,⁵ which dealt with entry into force. Its purpose would seem to be largely to exclude prior facts or matters from the application of a treaty except where a treaty "expressly or impliedly provides otherwise". Unfortunately, the exact scope of the exclusion was not altogether clear, mainly because of the difficulty created by the words "facts or matters arising or subsisting", regarding which he shared many of the misgivings expressed by Mr. Reuter.

23. Much would depend on the nature of the treaty. It was clear, for example, that a treaty of alliance or

a commercial treaty could not be invoked with reference to past facts or situations. It was difficult, however, to decide whether the same would be entirely true of a treaty of extradition, for example. A person charged with a criminal offence might escape to a country with which the country where he had committed the offence had no extradition treaty. If that country subsequently entered into such a treaty with the country of refuge, the question would arise whether the person charged could claim that no extradition was possible because the acts alleged to have been committed by him had occurred before the treaty came into force. In order to get round the difficulty it might, of course, be possible to say that the charge was of a "continuing" character. A similar problem would arise if the person concerned, instead of being merely charged with an offence, was an escaped criminal under sentence; in that event it might perhaps be said that the sentence "subsisted".

24. Mr. ROSENNE said that both paragraphs of article 57 stated the law as he had always understood it and he believed that the rules laid down in those paragraphs applied in principle to all treaties.

25. The Special Rapporteur's quotations from the *Ambatielos* case and the *Mavrommatis Palestine Concessions* case and his oral reference to the *Northern Cameroons* case were convincing on that point. It was clear that in those cases the International Court of Justice had applied the rule not merely to the jurisdictional clauses, but to the substantive clauses of the treaty as a whole. In the final commentary too much emphasis should not be placed on the jurisdictional problem, which was largely one related to the definition of a "dispute", and a suitable reference to the *Northern Cameroons* case should be inserted.

26. He had been rather surprised to hear State succession mentioned during the discussion. As he read article 57, both paragraphs referred specifically to "parties" in the meaning given to that term in Part I of the draft,⁶ namely, States which became parties to a treaty by their own action; hence the question of State succession did not arise.

27. With regard to the expression "expressly or impliedly", he believed a more fundamental issue was involved and that the use of the word "impliedly" could give rise to difficulties. It might be better to refer instead to the circumstances of the conclusion of the treaty as in articles 12 and 39.

28. With regard to paragraph 2, he had some misgivings over the reference to "suspension of the operation of a treaty", which seemed to him to conflict with article 54. The term "termination" was appropriate for bilateral treaties, but consideration should also be given to the question of the withdrawal of a party from a multilateral treaty. Paragraph 2 should perhaps be linked more closely with articles 53 and 54. The question also arose whether the principle embodied in article 48, especially insofar as it concerned the constituent instruments of international organizations, should not also be applied to articles 53, 54 and 57.

⁴ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, pp. 28-29.

⁵ *Yearbook of the International Law Commission, 1962, Vol. II*, p. 182.

⁶ *Yearbook of the International Law Commission, 1962, Vol. II*, pp. 161 *et seq.*

29. He was puzzled by footnote 23 to paragraph (2) of the commentary. As he understood it, the Commission's general approach was to place the emphasis on the contractual aspect of a treaty and not to over-emphasize the concept of "*traité-loi*".

30. Mr. de LUNA said that the two paragraphs of article 57 dealt with two different problems. Paragraph 1 stated a general principle of international law, namely, that the provisions of a treaty applied only with respect to facts or matters which existed while the treaty was in force; that was the principle of non-retroactivity of the effects of a treaty. But that principle should not be made an absolute rule, for the parties were completely free to give retroactive effect to all or some of a treaty's provisions. Even if the treaty itself stipulated that it would not enter into force until a certain date, it could, if such was the intention of the parties, apply to matters existing before that date.

31. Moreover, it was certain that there could be no exceptions to the general principle of the non-retroactivity of effects unless the parties had unmistakably manifested their will to permit exceptions; that manifestation of will could be expressed or implied. Whether the Commission deleted the words "expressly or impliedly", as Mr. Yasseen had suggested, or adopted Mr. Reuter's suggestion, the consequences would be the same.

32. But paragraph 1 and the commentary on it could give rise to another difficulty, relating mainly to the word "subsisting". As the Chairman had rightly observed, paragraph 1 had been drafted having mainly in mind the jurisdictional clauses in treaties for the settlement of disputes. He (Mr. de Luna) supported the view of the Special Rapporteur, who had very well explained, in paragraph (5) of his commentary in particular, how the rule he had drafted should be understood. But in order to avoid any possibility of misunderstanding, it might perhaps be necessary to amend the wording of paragraph 1 so as to make it even more unambiguous.

33. Paragraph 2 raised the problem of acquired rights. It was a general principle of international law that when a treaty terminated, all the obligations under it, especially continuing obligations, ended with the treaty. But where acts performed under the treaty had created a certain situation, the rights so acquired were not affected by the termination of the treaty. Like Mr. Briggs and Mr. Rosenne, he thought it might be preferable to link paragraph 2 of article 57 with articles 52, 53 and 54, which related to the nullity, termination and suspension of treaties.

34. Mr. PAREDES said that the Special Rapporteur appeared to be maintaining two principles in article 57 of the draft: the principle that treaties had no retroactive effect unless the parties had agreed otherwise, and the principle that there was continuity in the life of nations which could not be suddenly broken without taking account of the consequences of acts lawfully performed. Both those principles were of great importance in law, but they were not fully applicable in every case: it was necessary to consider the nature of the treaty and the transaction concluded in it.

35. On that point, he agreed with the Chairman that the rule in paragraph 1 seemed to be too broad. There were many treaties whose main purpose was to settle a pre-existing problem; such treaties necessarily referred to matters that had arisen earlier and by their very nature had retroactive effects. The rule in paragraph 1 applied, therefore, to a treaty which created a new legal situation.

36. There were, of course, void, voidable and valid treaties, and treaties that were terminated or suspended for various reasons. A void treaty might have been in force for some time before its nullity was invoked. What happened then "with respect to facts or matters arising or subsisting while the treaty is in force"? A treaty which was absolutely void was treated as though it had never been concluded, and it could not have positive legal effects. There was a kind of restitution *in integrum*, intended to restore the former situation as far as possible. The same did not apply to treaties that were voidable, or could be denounced, or were terminated for any reason after having had legal existence: in such cases the rules of the article were applicable, with a few exceptions.

37. There were treaties whose termination or suspension required the immediate termination of their effects. For example, there might be an agreement for the supply of armaments which was subsequently held to be immoral or unjust or had been prohibited by the competent authority; no purchase or shipment could then be made on the pretext that it had been agreed on before the termination or suspension of the contract. There were voidable treaties which lost all their effects from the moment they became void: if they were voided because of non-fulfilment by one of the parties, the other could not be held to obligations prejudicial to it, and he did not see how it could be maintained that the injured party was still required to fulfil its obligations under the treaty.

38. Lastly, suspension of the operation of a treaty by reason of war between the parties must also entail suspension of all its effects.

39. Mr. BARTOŠ endorsed Mr. Reuter's comments. Article 57 brought into operation general principles which gave rise to a multiplicity of rules of application, and the Commission would therefore be well advised not to go into details. For the time being he would offer only a few comments to show that there were many kinds of situation requiring special rules. It was clear from the case-law and from treaties that there was a difference between the retroactive effect of a treaty and the retroactive application intended by the parties with respect to facts or matters already existing before the treaty had been concluded. It could hardly be said that such facts or matters were "arising or subsisting"; they might already have ceased to exist at the time when the treaty had been concluded.

40. The situation was particularly complicated in the case of a treaty containing a most-favoured-nation clause. Serious disputes had arisen because some States had considered themselves injured by amendments made by third States *inter se* and imposed on them by retroactive application, which did not give satisfaction

to the other States entitled to benefit under the clause. That applied not only to trade treaties, but to other kinds of treaty as well.

41. The rule stated in paragraph 1 could be interpreted in two ways: it could be regarded either as a rule establishing the validity of the treaty at the time of the occurrence of the facts or matters in question, or as a guarantee of respect for acquired rights. That question might be very serious in certain circumstances: for example, if the guarantee had to be maintained even after the proclamation of a State's independence, and required it to observe a former treaty concluded by the colonial Power.

42. The Commission should avoid going beyond general principles. At the most, it might add a third paragraph to the article stating that in certain special situations — which would not be specified — other rules designed to meet such situations might also apply.

43. The CHAIRMAN, speaking as a member of the Commission, said that as Mr. Rosenne had observed, the Special Rapporteur had perhaps given rather too much prominence to jurisdictional clauses, whereas the main subjects of the article should be fundamental obligations. But the first difficulty that arose was that the Commission wished to state a rule applicable to all treaties. There were treaties which imposed obligations without linking them to facts or matters that would arise in the future. A peace treaty or a treaty terminating a colonial regime, for example, settled former matters. The difficulty was, therefore, to find a way of stating the principles so that the rule would apply in the cases in which it was appropriate, but not to treaties which did not refer to facts or matters that might arise at some future time.

44. If the rule were formulated expressly in respect of fundamental obligations, he could agree that it was sound. But jurisdictional treaties must nevertheless be taken into account. The Special Rapporteur had spoken of existing disputes, which he understood to include even disputes about prior facts or matters. It was to be feared, however, that the words "facts or matters", which were so often used in treaty clauses for the pacific settlement of disputes, might be ambiguous and admit of an inference contrary to the Special Rapporteur's intention, namely, that what was meant in all cases was facts and matters arising after the date of concluding the treaty.

45. Mr. LACHS said that the general rule stated in paragraph 1 was clear, but greater latitude should be given to the parties to make known, either explicitly or by implication, their intention that the treaty should not only apply to the period during which it was in force. For that purpose, he doubted whether it would prove helpful to try to distinguish between different kinds of treaty, including those which confirmed existing principles or rules.

46. As far as paragraph 2 was concerned, he did not believe that suspension should be assimilated to termination; it would therefore be best to remove all reference to the suspension.

47. There were many kinds of treaty, and if too much emphasis was placed on treaties being applicable after their termination, serious legal and material difficulties might arise; for example, on the emergence of a new rule of *jus cogens*. Similarly, circumstances might change in such a way as to render the rights and obligations deriving from the treaty a dead letter and make execution impossible.

48. There was a close connexion between articles 56 and 57, and the time factor was of decisive importance in both cases. It seemed to him that paragraph 2 of article 57 would need to be radically recast.

49. Mr. TSURUOKA said that admittedly the rule stated in article 57 might not be of very much use, for as several members of the Commission had observed, there were so many special cases to which it did not apply; but it did have a place in the general structure of the draft. The idea on which it was based was correct in principle; the Commission might accordingly try to work out as general and flexible a formula as possible and, as it had often done before, deal with points of detail in the commentary.

50. Mr. CASTRÉN said that he had at first been prepared to accept article 57 without much change, but the comments he had heard during the discussion had made him rather hesitant. He thought that very flexible wording should be used, so as to cover both the general case and the exceptions to which several speakers had drawn attention. Paragraph 2 might be deleted and paragraph 1 redrafted to read: "Subject to articles 52 to 54 and unless a contrary intention can be inferred from the purpose or provisions of a treaty, from the circumstances of its conclusion or from the statements of the parties, the provisions of the treaty apply to each party only with respect to facts or matters arising or subsisting while the treaty is in force with respect to that party".

51. Mr. TUNKIN said that the Chairman's comments had strengthened some of his misgivings about paragraph 1, but the Drafting Committee might succeed in finding satisfactory wording.

52. He was inclined to support Mr. Castrén's proposal to delete paragraph 2, which dealt with a complex and delicate matter in a manner unlikely to be acceptable in the context of modern international law. As Mr. Lachs had pointed out, the reasons for the termination of certain treaties might be such as to preclude their remaining applicable, an obvious example being treaties concluded by colonial Powers which, again, might raise the problem of acquired rights.

53. Mr. YASSEEN observed that the rule stated in paragraph 2 was admittedly a general rule, but it could be overridden by the rule in paragraph 1. A new treaty could be retroactive in the sense that it prevented the effects of the application of a prior treaty from being recognized as valid in the past. Recognition of the effects of a prior treaty, even with respect to the past, might sometimes appear incompatible with international public order. Those comments might perhaps allay the misgivings expressed by Mr. Lachs and Mr. Tunkin.

54. Mr. ROSENNE said that Mr. Lachs had drawn attention to the relevance to article 57 of the reason for the termination of a treaty; the manner of its termination might also have an important bearing.
55. As he understood it, the Special Rapporteur had not sought to deal, in article 57, with conflicts between treaties — a problem which was treated elsewhere — but with cases in which a treaty was terminated without another coming into existence.
56. The CHAIRMAN, speaking as a member of the Commission, said that the difficulties raised by paragraph 2 seemed to be due to the fact that the rule might or might not be satisfactory, depending on the reason for which a treaty was terminated. For example, in the case contemplated in article 42 of the draft,⁷ concerning termination of a treaty as a consequence of its breach, could it be said that a State which had invoked a breach in order to terminate the treaty was still bound to comply with obligations created by the treaty? That would lead to paradoxical situations.
57. Mr. Castrén's conclusion that paragraph 2 should be deleted was perhaps too pessimistic, however.
58. Sir Humphrey WALDOCK, Special Rapporteur, said that on further reflection he thought Mr. Castrén was justified in proposing the deletion of paragraph 2, since article 53, paragraph 2, expressly covered the case of treaties terminating or becoming void on the emergence of a new rule of *jus cogens*. The question whether some cross-reference to article 53 should be made in article 57 could be left to the Drafting Committee.
59. He had originally included paragraph 2 in order to cover the possibility of a treaty remaining applicable after its termination and being invoked in a case brought before the International Court of Justice in support of a contention that a right or obligation existed by virtue of its provisions.
60. Mr. Rosenne's objection to the word "applicable" was convincing. When the Commission came to review article 53 on second reading it might wish to bear in mind some of the points raised during the discussion of article 57 and not previously considered, such as the manner of termination, or termination as the result of breach by a party in the example mentioned by the Chairman.
61. As far as paragraph 1 was concerned, he still thought it came close to expressing the existing rule. There were, of course, many different kinds of treaty and the nature of some of them showed that they were intended to apply retroactively, because they were concerned with a past situation; he would have thought that point was covered by the expression "impliedly", which he had used in paragraph 1, but in order to meet some of the objections raised during the discussion, perhaps the paragraph might be redrafted on the lines of article 39 and include a reference to the nature of the treaty. Possibly what was involved was essentially a drafting point.
62. The expression "with respect to facts or matters" had come under fire, but members would recognize that it was not easy to find an appropriate phrase to express the idea and emphasize what, in substance, he regarded as a correct statement of the rule. A similar difficulty must have confronted anyone responsible for drafting jurisdictional clauses.
63. The CHAIRMAN, speaking as a member of the Commission, asked the Special Rapporteur whether he was really convinced that the point dealt with in paragraph 2, which it was proposed to delete, was covered by article 53. He did not think so; for article 53 in fact merely released the parties from the obligation to continue to apply the treaty, and its provisions did not affect the lawfulness of an act performed in conformity with the provisions of the treaty. Paragraph 2, however, dealt with an obligation created by a fact which had existed before the treaty was terminated and which was still producing effects.
64. Sir Humphrey WALDOCK, Special Rapporteur, replying to the Chairman, said that he had included paragraph 2 because he had not been entirely sure that the point was fully covered in article 53. As to the example he had mentioned, namely, the invocation of an established right or obligation arising from a treaty, article 53 would cover that case except for the type of treaty which had executed effects or established a situation, when reliance would be placed not so much on the treaty as the historical source of the right or obligation, as on the situation it had created.
65. As he had already said, further reflection had led him to the conclusion that article 53 largely covered the point dealt with in paragraph 2.
66. Mr. ROSENNE said that after studying article 57 in the light of article 53, he had concluded that the substance of paragraph 2 was not covered by article 53, but ought to be. The best course would probably be to make the necessary change in article 53 on the second reading.
67. Sir Humphrey WALDOCK, Special Rapporteur, said he favoured that course. If it proved impossible to revise article 53 satisfactorily, the Commission could always reconsider whether article 57 ought to be amplified.
68. Mr. YASSEEN asked whether the deletion of paragraph 2 would mean that the Commission did not accept the provisions proposed in it, or whether they would be included in some other article.
69. The CHAIRMAN said that the idea expressed in paragraph 2 went beyond the provisions of article 53, but could be inserted there. For the time being, the Commission had not decided either for or against the deletion of paragraph 2.
70. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Bartoš had mentioned some interesting examples of the most-favoured-nation clause, but that was a complex and rather special problem and he had decided not to deal with it in his draft.

⁷ Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, pp. 16-17.

71. Mr. BARTOŠ explained that in taking the most-favoured-nation clause as an example, he had meant to show that various clauses might affect the rights of third States, not only the most-favoured-nation clause.

72. The CHAIRMAN suggested that article 57 be referred to the Drafting Committee.

It was so agreed.

Financial Implications of Decisions taken by the Commission

73. Mr. LIANG, Secretary to the Commission, said that under Rule 155 of the Rules of Procedure of the General Assembly, the Secretary-General was required to inform the Commission of the financial implications of two decisions which he understood were to be incorporated in its report, namely, the decision to extend the present session by one week and the decision to hold two sessions annually as from 1966.

74. The estimated cost of implementing the first decision would be \$9,000, made up of \$4,300 in subsistence allowances for members, \$4,000 for temporary assistance and \$700 *per diem* for staff. Detailed estimates of the cost of holding two sessions a year from 1966 onwards would be submitted in due course.

The meeting rose at 5.45 p.m.

731st MEETING

Tuesday, 26 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties (A/CN.4/167)

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 58 (Application of a treaty to the Territories of a Contracting State)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 58 in his third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the real problem was that of the territory with regard to which the treaty was binding, rather than the territory in which it was to be performed. In paragraph 1 of his commentary he had given the example of Antarctica; the parties to the Antarctic treaty¹ were numerous and the treaty was binding with

respect to all their territories; in other words, all their nationals would be bound to observe the treaty, the performance of which, of course, related to matters connected with the territory of Antarctica.

3. The rule embodied in article 58 was a residuary rule, as indicated by the proviso in sub-paragraph (a): "unless a contrary intention is expressed in the treaty".

4. The purpose of sub-paragraph (b) was to cover the case in which a contrary intention had been tacitly indicated by the circumstances of the conclusion of the treaty or the statements of the parties thereto.

5. Sub-paragraph (c) dealt with the case in which a contrary intention was indicated by means of a reservation which became effective either because it was accepted by the other parties or because they had not made any objection to it.

6. Mr. PAL said that he was in full agreement with the principle of article 58, which had been well explained in the excellent commentary. As he understood it, the assumption was that the territorial position would remain the same as at the time when the treaty had been concluded. Any changes in the territorial position were outside the scope of the article.

7. In sub-paragraph (c), it seemed unnecessary to refer to articles 18 and 19; those articles dealt with procedural aspects of reservations and a reference to article 20,² which contained the substantive rule on the effect of reservations would serve the purpose intended.

8. Sub-paragraphs (a) and (c) rather overlapped: as soon as a reservation became effective, it became expressed in the treaty and was therefore covered by sub-paragraph (a). Perhaps that point could be clarified in the commentary.

9. Mr. EL-ERIAN said it was a well-established rule that a treaty could apply either to the territory of a State as a whole or to a part of that territory. One of the earliest historical examples was the Treaty of Peace of 14 December 1528, between King Henry VIII of England and King James V of Scotland,³ from which the Island of Lundy in England and the Lordship of Lorne in Scotland had been expressly excluded. A more recent example was the setting up of the United Arab Republic in 1958, by the union between Syria and Egypt. A UAR Foreign Ministry communication addressed to the Secretary-General of the United Nations had stated that the United Arab Republic would be bound by all treaties, agreements and commitments to which Syria and Egypt were parties, but that the treaties would apply each in its own territorial sphere. In working out the pattern of the treaty relations of the UAR, it had been found that whenever a treaty was of a general character, both the Syrian and the Egyptian regions were covered, except where only one of them had signed the treaty. While serving with the UAR delegation at United Nations Headquarters, he

² *Yearbook of the International Law Commission, 1962, Vol. II, pp. 175-176.*

³ Schwarzenberger G., "International law in early English practice", in the *British Yearbook of International Law, 1948, p. 63, footnote 3.*

¹ *United Nations Treaty Series, Vol. 402, p. 72.*

had had occasion to deal with the problem of an instrument of accession, to be deposited on behalf of the Syrian region, to a multilateral convention to which Egypt was already a party. Since the UAR was already a party to the treaty, it had been agreed with the Legal Office of the United Nations not to use the term "accession", but to refer instead to the "extension" of the treaty to the Syrian region.

10. In so far as article 58 was intended to express that rule it did not cause him any difficulty. But unfortunately the text involved a discussion of the so-called "colonial clause", which the Special Rapporteur had wished to avoid. That clause had already been the subject of intense controversy and sharp criticism in the United Nations. At its fourth session, the General Assembly had decided against including it in the Convention on the Traffic in Persons. There was a widespread feeling that treaties, especially those drafted and adopted by the United Nations with social and humanitarian objectives, should be universal in their application. That feeling could not be reconciled with the colonial application clause, which appeared to be a means of perpetuating colonial dependence by keeping large areas of the world outside the province of international regulation.

11. Article 58 should be confined to stating the general rule in normal situations. That approach would be in keeping with the articles already adopted by the Commission on other branches of the law of treaties. For example, in its discussion on article 3 (Capacity to conclude treaties)⁴ the Commission had decided not to deal with the question of the limitations on a State's capacity to conclude treaties; and in paragraph 14 of the report on its fifteenth session⁵ it had explained that it would not consider the effect of the outbreak of hostilities upon treaties, which could not conveniently be dealt with in the context of its present work on the law of treaties. Equally relevant was the remark at the end of paragraph (3) of its commentary on article 37, that "if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles".⁶ A similar approach should be adopted to article 58 so as to avoid involvement in matters outside the law of treaties.

12. With regard to the wording of the article, it was difficult to define the expression "territory or territories for which the parties are internationally responsible". That formula had recently gained currency in international practice, having first been used in the General Agreement on Tariffs and Trade.⁷ In earlier conventions, such as the ILO Conventions, different language had been used. For example, article 16 of the Hours of Work (Industry) Convention, 1919, stated that "Each

member of the International Labour Organisation which ratifies this Convention engages to apply it to its colonies, protectorates and possessions which are not fully self-governing".⁸ The Charter of the United Nations used the expressions "trust territory" and "non-self-governing territory". In the Secretariat memorandum on Succession of States the expression "dependent territories" was used.⁹ With such a diversity of language, it would be difficult for the Commission to decide what territories were to be considered as "territories for which the parties are internationally responsible".

13. His objection to that formula was based not only on technical grounds, but also on considerations of principle. The Commission should regulate normal rather than exceptional situations. The colonial system was fast disappearing. Article 73 of the Charter placed Members of the United Nations under an obligation to develop the self-government and promote the independence of "territories whose peoples have not yet attained a full measure of self-government" and for the administration of which they were responsible. It was expressly stated that that obligation was to be performed "within the system of international peace and security established by the present Charter", in other words within the international system and not within the constitutional systems of the States concerned. Some countries might have constitutional problems, but they should find means of solving them in order to perform their international obligations under the Charter.

14. Since the Charter thus laid down the principle of the liquidation of the colonial system, and since machinery for that purpose had been set up by the General Assembly on 14 December 1960 when it had adopted resolution 1514 (XV), its "Declaration on the granting of independence to colonial countries and peoples",¹⁰ it was clear that the colonial system would be a thing of the past before the Commission's draft on the law of treaties had completed the various stages necessary to make it a binding international instrument.

15. He therefore suggested that in the title of the article the words "Territories of a Contracting State" should be replaced by the words "territory of a Contracting State", since although the territory could consist of different parts, it would still constitute one territory. In the article itself, the words "the territory or territories for which the parties are internationally responsible" should be replaced by a reference to the "territory under the jurisdiction of the State concerned"; that would be consistent with the wording used by the Commission in the Draft Declaration on Rights and Duties of States, adopted at its first session.¹¹

16. Sir Humphrey WALDOCK, Special Rapporteur, said that nothing could have been further from his intention than to involve the Commission in a contra-

⁴ *Yearbook of the International Law Commission, 1962*, Vol. II, p. 164.

⁵ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 2.

⁶ *Ibid.*, p. 12.

⁷ *United Nations Treaty Series*, Vol. 55, p. 274, article XXVI, para. 4.

⁸ *ILO Conventions and Recommendations 1919-1949*, Geneva, 1949, p. 7.

⁹ A/CN.4/150, para. 138.

¹⁰ *Official Records of the General Assembly, Fifteenth Session, Supplement No. 16*, pp. 66-67.

¹¹ *Yearbook of the International Law Commission, 1949*, para. 287-288.

versial discussion on the colonial clause. He had used the expression "territory or territories for which the parties are internationally responsible" because it had been introduced into certain recently concluded multi-lateral treaties at the insistence of the opponents of the colonial clause, who had objected to other formulas. The question of the territorial application clause was, in any given case, a matter for the contracting States. He was prepared to accept any form of words the Commission might agree on for the purpose of stating the general rule which avoided connotations that might be objectionable to some of its members.

17. It must be remembered, however, that the problem dealt with in article 58 was a real one and that it was necessary to state the general rule that a treaty applied to the whole territory of a State unless some provision of the treaty, or the circumstances of its conclusion or the statements of the parties, indicated a contrary intention.

18. Mr. de LUNA said that he supported the principle of article 58 as explained in the commentary. In the case of a protectorate, for example, the protecting Power was responsible for the international relations of the State protected, but the latter was nonetheless a State. If such situations still existed in future, they would be covered by the present wording of article 58, but would also come within the scope of article 60. He agreed with Mr. El-Erian, however, that that kind of problem was disappearing. The wording of the opening sentence should perhaps be amended so as to dispel any misunderstanding.

19. Another question, to which Mr. Pal had drawn attention, was that of the mobility of contractual frontiers. The opening words of the article did not deny such mobility, but neither the article nor the commentary were very explicit on the point. It was a fact that the territory of a State was not fixed; it could expand or contract and its frontiers could be rectified without affecting the political reality of the State, except in the case of dissolution or union of States. It would be well to affirm the principle of the unity of the State and the mobility of contractual frontiers, either in the commentary or by adding the words "at that time", or any other expression the Commission might prefer, in the opening sentence of the article after the phrase "for which the parties are internationally responsible".

20. Mr. ROSENNE said that, as a general and residual rule, he was prepared to accept a provision along the lines of article 58. Apart from the questions already raised by other speakers, however, he thought that a number of points needed clarification.

21. First, the article could have a direct bearing on the question of State succession, even though that had not been the intention of the Special Rapporteur; the wording should therefore be amended to state clearly that the term "parties" was to be construed in the sense in which it was used in the provisions of Part I.

22. He agreed with Mr. Pal's remarks concerning changes in the territorial position.

23. The use of the word "all" in the first line of the article was correct in principle, within the context of

the article as applied to "parties" in the sense of Part I; but it did not necessarily apply in the case of a State which regarded itself, or was regarded, as a successor State, assuming that there existed a rule of international law on succession to treaties. The Secretariat memorandum on succession of States with its references to the cases of the United Arab Republic, already mentioned (para. 48), the Federal Republic of Cameroon (para. 59), and Somalia (para. 102), showed that in those circumstances a treaty might not be applicable to "all" the territory of a State.

24. The expression "for which the parties are internationally responsible" established a connexion with article 55, paragraph 4, concerning the international responsibility arising from the failure of a State to comply with its obligations. He was prepared to accept the suggested alternative of referring to territories "under the jurisdiction of the parties". But both expressions involved the temporal problem mentioned by Mr. de Luna; the point was that the rule would apply while a territory was under the jurisdiction of a State, so that that State was internationally responsible for it.

25. There was a certain amount of State practice in the matter, which was illustrated by the United Kingdom note of 2 July 1962 concerning Tanganyika, quoted in the Secretariat memorandum (para. 128); the formula employed there had also been used on a number of other occasions. But none of those expressions had the same meaning as the expression "territories under the sovereignty of the contracting parties", used in paragraph 4 of the commentary. It was hardly possible for a territory over which a State exercised jurisdiction, and for which it was therefore internationally responsible, to be bound by a treaty under the provisions of article 58, unless that territory became a party to the treaty, either in accordance with the provisions of Part I of the draft or by succession.

26. With regard to sub-paragraph (c), he wondered whether that concept of a reservation was compatible with the definition of a "reservation" in article 1, paragraph 1 (f).¹² As he understood that definition, reservations related to the substantive provisions of a treaty; a reservation dealing with the territorial application of a treaty would be of a different character, unless the treaty expressly provided for that type of reservation. He would have no objection to the concept of a reservation being broadened so as to cover that type of quasi-reservation, but the wording of the definition would have to be adjusted.

27. The rule stated in article 58 was valuable as a residual rule, which did not itself make a State a party to a treaty when it would not otherwise be a party; but it should be drafted so as not to prejudice any developments regarding the different types of clause on the territorial application of treaties or other formulas devised to meet the practical needs of States.

28. Mr. CASTRÉN thought that the rule stated in article 58 was correct. It was based on the practice of

¹² *Yearbook of the International Law Commission, 1962, Vol. II, p. 161.*

States, as the Special Rapporteur showed in his commentary, and there were several reasons why that practice should be confirmed in a general convention. He was not sure that the proposed wording meant acceptance of the so-called colonial clause, but if it did, the text should be amended, perhaps as suggested by Mr. El-Erian and Mr. Rosenne.

29. He would suggest combining sub-paragraphs (a) and (b); sub-paragraph (a) could be deleted and sub-paragraph (b) amended to read: "appears from the subject-matter or the terms of the treaty, the circumstances etc.". Paragraph 2 of the commentary showed clearly enough that what sub-paragraph (a) dealt with was precisely the subject-matter of the treaty.

30. Mr. LACHS, after praising the able manner in which the Special Rapporteur had dealt with an important and controversial issue in his commentary, said that the so-called colonial clause should be considered in the light of its history. It had appeared in two forms: affirmative and negative. The 1928 Convention on Economic Statistics concluded under the auspices of the League of Nations contained a colonial clause of the affirmative type,¹³ but the 1948 Protocol amending that Convention¹⁴ contained a negative formula. Examples of both types of clause were to be found in the various multilateral agreements signed in 1947 and 1948, but the more recent tendency had been to drop the clause altogether.

31. The first step in that process had been the adoption of a colonial clause coupled with a recommendation to States parties to the treaty to take the necessary measures to extend the benefits of the Convention to all the territories under their administration; the existing legal position was noted, but the contracting States were requested to overcome any constitutional obstacles to the extension of the treaty to other dependent territories. The next step had been the omission of the clause altogether, and in the light of that situation he suggested that article 58 be limited to the contents of sub-paragraph (c). The Commission would thus avoid all reference to an obsolete institution and any suggestion of perpetuating a colonial practice.

32. Mr. TUNKIN said that a distinction should be drawn between two problems that were often confused because they usually arose together: the territorial application of a treaty and participation in a treaty. The Special Rapporteur had shown that the distinction existed, but he had not wholly succeeded in dispelling the mists of doctrine in which it was enveloped. Some treaties brought out clearly that territorial application and participation were quite separate matters. For example, the Antarctic Treaty did not raise the question of application to the territory of the parties; in the case of the Treaty concerning Spitsbergen,¹⁵ on the other hand, Norway was a party as a sovereign State, and the territorial application of the treaty was restricted to a part of its territory. A party to a treaty was

always a subject of international law; a State bound itself as a single entity. Mr. El-Erian had been right in saying that a State's territory was a legal entity, although it might be divided geographically into several parts.

33. The problem dealt with in article 58 could be raised only with respect to the territory of federal States. The Special Rapporteur had mentioned the USSR as an example. If the USSR alone signed a treaty, the position was perfectly clear; if the USSR and, say, the Ukrainian SSR both signed a treaty, then there were two subjects of international law which were parties to the treaty, though that did not mean that the USSR was acting for only part of the Union; if the Ukrainian SSR alone signed a treaty, it bound only itself, not the USSR.

34. Article 58 was inspired by colonial practice; that was shown by the fact that most of the examples quoted in the commentary and in the literature were drawn from that practice, and by the words "territories for which the parties are internationally responsible".

35. The colonial system was contrary to modern international law, was fast disappearing and would soon have disappeared entirely. Modern international law imposed the duty to respect the right of peoples to self-determination. The General Assembly of the United Nations had confirmed that principle in 1960 in its "Declaration on the granting of independence to colonial countries and peoples", embodied in resolution 1514 (XV). Non-self-governing territories and protectorates still existed, but was it appropriate for the Commission to act as if the world had stood still and give its approval to colonial institutions? Manifestly, it was not.

36. The next question, then, was whether article 58 was necessary. He doubted whether it was advisable to formulate a special rule by which a State might become a party to a treaty only in part. A State must become a party as a single entity. If the Commission insisted on formulating a rule, it would have to draw a clear distinction between territorial application and participation.

37. Mr. ELIAS said that he shared the misgivings of many members about the way in which article 58 had been formulated; indeed, the Special Rapporteur had failed to avoid the very pitfalls he had mentioned in his commentary. The text would need to be considerably simplified to render it acceptable, particularly to newly independent States Members of the United Nations; it must be shorn of any implication that its purpose was to perpetuate something which had become obsolete.

38. If the rule was to apply to territories that were not contiguous to the metropolitan territory, account must be taken of the tendency for third parties to insist on some evidence of consent by the non-metropolitan territory to be bound.

39. The expression "or territories for which the parties are internationally responsible" might give rise to difficulties of interpretation and should be omitted. The

¹³ League of Nations *Treaty Series*, Vol. CX, p. 189, article 11.

¹⁴ United Nations *Treaty Series*, Vol. 20, p. 242.

¹⁵ League of Nations *Treaty Series*, Vol. II, p. 8.

article should be strictly limited to territorial application and should not be extended to cover participation.

40. The subject matter of the article could not be divorced from the topic of State succession. An illustration of that point was provided by the occasion in 1961 when the Nigerian Government had broken off diplomatic relations with France, after France had ignored representations against its nuclear tests in the Sahara. The Netherlands, which had acted as protecting Power, had brought to the attention of the Nigerian Government a treaty concluded between France and the United Kingdom in 1923, under which the United Kingdom had assumed certain obligations on behalf of itself and all its overseas dependencies, without specifying them by name. When it had prohibited French planes from landing on Nigerian territory or French ships from putting into Nigerian ports, the Nigerian Government had not considered itself bound by that treaty.

41. Sub-paragraph (b) seemed unnecessary since its substance was adequately covered by sub-paragraph (c).

42. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the rule in article 58 did not affect the fact that, on reaching independence, a territory would pass out of the system of treaty relations of the State formerly responsible for its international relations.

43. As the Commission had decided to appoint a Special Rapporteur on State succession, it should be mentioned in the commentary that the whole question of succession in the matter of treaties was being reserved.

44. Mr. BRIGGS said that he entirely agreed with the fundamental principle underlying article 58; the only problem was how to express the rule, based on State practice, that a treaty applied to the whole territory of a State apart from the exceptions provided for. As he read article 58, it had nothing to do with State succession or with participation in a treaty.

45. As far as the drafting of the article was concerned, he was in favour of dropping the reference to "territories for which the parties are internationally responsible".

46. The exceptions set out in sub-paragraphs (a) and (b) overlapped and sub-paragraph (a) could be eliminated. It would also be advisable to abandon the reference to "the statements of the parties", which might be a source of confusion and could be regarded as covered by the phrase "the circumstances of its conclusion" or by the provision in sub-paragraph (c), which itself could be simplified, as there was no need for a cross reference to all the complex provisions contained in articles 18-20.

47. The article and its title could accordingly be redrafted to read:

"Territorial Scope of a Treaty in Relation to a Party

"A treaty extends to all the territory of a party unless the contrary intention

"(a) appears from the terms of the treaty or the circumstances of its conclusion; or

"(b) is contained in a reservation accepted by other parties."

48. Mr. YASSEEN said that the unity of the territory of a State, considered as a subject of international law, was a recognized principle. Article 58 could be accepted in so far as it related to the territory of a State and made it possible to restrict the application of the treaty to part of that territory; but in so far as it mentioned the territories for which a State was internationally responsible or which were subject to its rule—without, of course, forming a legitimately integral part of that State—it was difficult to accept. Colonialism was at the root of such situations; but colonialism stood internationally condemned and was about to disappear. The Commission would therefore be well advised to leave that question aside; in drafting a general convention intended to apply to the future, it should be guided by the realities of international life.

49. With regard to the wording of the article, the reference in sub-paragraph (b) to the circumstances of the treaty's conclusion and the statements of the parties touched on the question of interpretation. The statements of the parties, even if they were perfectly clear and even if they agreed, could not restrict or enlarge the scope of the treaty if their substance was not incorporated in the treaty itself. Subsequent statements of intention could constitute an oral agreement which, in certain circumstances, might modify an existing treaty, but they could not be taken into account in interpreting the treaty unless they had a basis in its actual text. That seemed to have been the finding of the Permanent Court of International Justice, which had stated in its advisory opinion on the matter of *Access to, or anchorage in, the port of Danzig, of Polish war vessels*¹⁶ that:

"The Court is not prepared to adopt the view that the text of the Treaty of Versailles can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself."

50. Mr. AMADO said that previous speakers had already very well expressed what he might have wished to say on the article. True, it might be regretted that the proposed text did not sufficiently reflect the decolonization trend that was so characteristic of the present era; but could the Special Rapporteur have done otherwise? Fortunately, the detestable system of colonialism was disappearing, but it had left traces, residual effects, which could not be left unmentioned.

51. He supported the opinion that the application of a treaty should be restricted to the territory of States parties to the treaty, without any mention of dependent territories.

52. Furthermore, as the Commission had decided to devote a section of its draft to the interpretation of treaties, he was opposed to the tendency to include detailed references to problems of interpretation in many articles of the draft. Although it was essential

¹⁶ P.C.I.J. (1931), Series A/B, No. 43, p. 144.

to provide for the exception indicated by the words "unless a contrary intention is expressed in the treaty", what followed those words introduced explanations concerning interpretation which should not appear in the article. Once again the Special Rapporteur had tried to put everything into his draft, so that the Commission could prune it.

53. He therefore agreed with the suggestion made by Mr. Elias and approved by Mr. Briggs, which in turn would entail adopting Mr. Pal's suggestion concerning the reference to reservations.

54. Mr. TSURUOKA said he approved of the principle stated in article 58 in so far as it meant that a treaty was applicable to the whole of the territory over which a party to the treaty effectively exercised its sovereignty, subject to certain exceptions provided for in sub-paragraphs (a), (b) and (c), which made sufficient allowance for the autonomy of the will of the parties.

55. Like other members of the Commission, he thought the words "or territories for which the parties are internationally responsible" should be omitted, for several reasons. First, since the Commission was to formulate general rules, it was entitled to anticipate the changes that might have occurred in the world in ten or more years' time, when the convention it was drafting would enter into force. Secondly, it appeared from the researches carried out by Rousseau, that the practice of some countries, such as France, was to regard treaties concluded by a colonial Power as not applicable to that Power's colonial territories unless the treaty expressly provided otherwise, although the case-law of the French courts was rather indecisive on that point. However, the question was controversial from the point of view of positive law, and it could be accepted that it was not necessary to state a rule applicable to situations of that kind, whether they were related to colonialism or not, since they were very rare.

56. It would be advisable to mention in the commentary the separability of the territorial application of treaties; that would make it easier to regulate certain situations, such as the application by a federated State of a convention signed by the federal government.

57. With regard to the reservation mentioned in sub-paragraph (c), in deciding on the admissibility of a reservation concerning the territorial application of a treaty, the object of the treaty must be taken into consideration. No such reservation could be accepted, for example, in the case of a humanitarian convention like the European Convention for the Protection of Human Rights.¹⁷

58. With regard to the question of State succession, it would be useful to mention the time factor in the text, in order to dispel certain doubts.

59. The CHAIRMAN, speaking as a member of the Commission, said he feared that intentions had sometimes been ascribed to the Special Rapporteur which were in no way reflected in the text he had proposed to the Commission.

60. First of all, article 58 should be regarded as dealing with the territorial scope of the application of a treaty, not with participation in a treaty. The question was whether a treaty concluded by a State was applicable to all its territories or whether, in some cases at least, it must be taken to apply to only part of those territories. It was a twofold problem, both aspects of which should be considered.

61. Some treaties were intended to be applicable to only part of a State's territory; for instance, the frontier treaties between Italy and Yugoslavia, which applied to certain areas with a mixed population and regulated such matters as the official use of two languages. Thus there were still cases in which treaties were concluded in respect of a specific part of a territory, and rules providing for such cases were given in sub-paragraphs (a), (b) and (c).

62. But the converse problem arose where the treaty was silent on the subject; it was essential to establish a rule applicable to such cases. However desirable it might be that colonialism should disappear completely as soon as possible, the fact remained that such a rule would be useful in cases which had no connexion with colonialism. There were many examples of territories which were not geographically part of the main territory of a State and enjoyed varying degrees of autonomy, such as the Faroe Islands and Eastern Greenland in relation to Denmark. Was it possible, for instance, for a State which had acceded to the European Convention for the Protection of Human Rights to claim that that Convention did not extend to such territories? That example showed how necessary it was to draft a provision clearly establishing that where a treaty did not specify the territories to which it applied, it must be presumed to apply to the whole territory of the State, and if there were more than one, to all its territories. Then a State would not be able to claim that a part of its territory was excluded from the application of the treaty because it was self-governing or separate from the main territory.

63. He did not think that the rule, as it stood, related to State succession which was a different matter and should clearly be dealt with separately. The only question to be settled was whether, in the absence of any reservation, explicit or implicit, a treaty applied to the whole of a State's territory or to only part of it.

64. Mr. BARTOŠ said he wished to associate himself with the comments made by Mr. Tunkin and Mr. El-Erian, among others, on the danger that the proposed text might be regarded as in some way sanctioning the colonial clause, which he had opposed ever since the United Nations had been established.

65. With regard to the question of reservations, it was necessary to consider the provisions of territorial clauses dealing with practical matters; not clauses demarcating a frontier, for example, but those applicable to certain territories for practical reasons, such as the provisions of treaties on hydro-electric power, which dealt only with a particular river basin, or of treaties which settled certain frontier problems or

¹⁷ United Nations *Treaty Series*, Vol. 213, p. 222.

questions relating to the territorial sea, which were normally applicable to only part of a State's territory. Even if they applied to only part of its territory, such treaties were in force in the whole territory of the State. In its desire to delete certain provisions reminiscent of the colonial clause, the Commission should therefore beware of omitting what was necessary for the normal application of treaties. He accordingly asked the Special Rapporteur to emphasize in his commentary that the proposed text in no way sanctioned the colonial clause.

66. There was also the problem of classifying treaties. Although it was true that certain treaties dealing with practical matters should not be regarded as applying to all the territories of a State, that was not true of treaties of general interest, such as those concerning humanitarian questions which, at the present stage of development of international law, necessarily applied to all parts of a territory. For instance, during the discussion of the Exploitation of the Prostitution of Others,¹⁸ when France had objected that it could not enter into obligations on behalf of its North African protectorates because they enjoyed some degree of legislative autonomy, certain members of the Sixth Committee had protested against that attitude, arguing that the rules of the Convention should be applied first and foremost to the protectorates and afterwards to the metropolitan country.

67. Mr. JIMÉNEZ de ARÉCHAGA said that while the Commission realized that the Special Rapporteur had not intended to perpetuate the colonial clause in his draft of article 58, it was desirable to remove the possibility of any such misunderstanding by adopting the suggestions put forward by Mr. El-Erian and Mr. Rosenne. Accordingly, the words "or territories for which the parties are internationally responsible" should be dropped, and reference should be made to the time element in some such introductory wording as "While a territory is or remains within the jurisdiction of a State party to a treaty...". That would also eliminate any connexion with the question of State succession or succession to treaties.

68. Recast in that manner, article 58 would constitute a useful and indeed a necessary rule, particularly for certain types of treaty, where it was essential to establish precisely the part of its territory in respect of which a State assumed responsibility for compliance with the treaty provisions. That applied, for example, to extradition treaties, and to the Havana Convention¹⁹ which bound States not to allow expeditions to leave their territory for that of other States for the purpose of fomenting civil war.

69. The rule was that, unless there was express provision to the contrary or the circumstances surrounding its conclusion indicated otherwise, a treaty applied to the whole territory of the State. Any party wishing to restrict the territorial application of a treaty was bound to insert a proviso to that effect or to bear the onus of proving the existence of such an intention

at the time when the treaty was drawn up. If that onus was to be placed on the State concerned, it was necessary to be liberal as to ways and means of proving the intention. The provision suggested in sub-paragraph (b) seemed sufficient for the purpose and in line with article 39 concerning the implied right of denunciation.

70. Sub-paragraph (c) was acceptable and he did not support the change proposed by Mr. Briggs, because it seemed unnecessary to stipulate that the reservation must be accepted by the other parties. If a statement by one of the Parties was enough in the case of intention to restrict the territorial application of a treaty, it should certainly be enough for a reservation.

71. Mr. TABIBI said that neither the article in its present form nor the commentary was likely to find favour with the General Assembly, where feeling against the colonial clause was very strong. Moreover, the article might be interpreted as prejudging the question whether there was a rule of succession to treaties. He suggested that the principle could be formulated quite briefly by saying that a treaty applied to the whole territory of a State unless a contrary intention was apparent.

72. Mr. TUNKIN said it should be made clear that not all the obligations deriving from a treaty had any direct connexion with the territory of a State; any formulation that might encourage a false presumption to the contrary should be avoided. For example, what would be the position under the Antarctic Treaty if, say, a United Kingdom national went to the antarctic to collect information and then stayed in some city outside his own country? Would the United Kingdom Government, as a party to the treaty, be responsible for ensuring that, in compliance with its provisions, the information obtained was passed on to the other parties?

73. Sir Humphrey WALDOCK, Special Rapporteur, said his commentary made it clear that he had in no way intended to ask the Commission to sanction the colonial clause in article 58; but the Commission would have found him less than candid if he had glossed over the matter altogether, particularly as the question of the territorial application of multilateral treaties had come up during international discussions in recent years.

74. The article stated the general rule that a treaty applied to all the territory of a State unless otherwise provided. He was willing to abandon the phrase "or territories for which the parties are internationally responsible", despite the fact that it was frequently used by opponents of colonialism, on the understanding that the words "all the territory" meant the whole area subject to the jurisdiction of the State, including any territory that might be geographically separate. There were many cases of geographically separate territories: for example, Spitsbergen, the Channel Islands and the Isle of Man, and territories such as Indonesia.

75. He agreed with the Chairman that the article should not be concerned with the problem of State

¹⁸ United Nations *Treaty Series*, Vol. 96, p. 272.

¹⁹ League of Nations *Treaty Series*, Vol. CXXXIV, p. 47.

succession: indeed, he had deliberately framed it in the present tense with that consideration in mind. Some explanation on that point should be included in the commentary.

76. The Drafting Committee might consider whether reference to the temporal element should be made in the article itself.

77. As to the question of the exceptions, the wording used in sub-paragraphs (a) and (b) did appear in other articles already approved, but it might need general review during the second reading.

78. As to sub-paragraph (c), he agreed that it was unnecessary to refer to article 18-20: the provision could be re-drafted on more general lines.

79. With regard to Mr. Tunkin's last point, as the commentary showed, territorial application could be understood in different ways. It did not necessarily mean performance of treaty obligations in the territory. In the example given by Mr. Tunkin, the obligation to transmit the information to other Parties would remain by virtue of the fact that the information had been obtained by a national of the United Kingdom, a State all of whose territory was bound by the treaty. Article 58 was concerned with the general rule of the binding effect of a treaty in respect of all the territory of a State. Of course, there were many treaties which had a special importance for particular parts of a territory and there were others regarding which exceptions had to be made in respect of their territorial application, such as economic treaties which would not apply to free zones.

80. The CHAIRMAN suggested that article 58 be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

732nd MEETING

Wednesday, 27 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167)

(continued)

[Item 3 of the agenda]

ARTICLE 59 (Extension of a treaty to the territory of a State with its authorization) and

ARTICLE 60 (Application of a treaty concluded by one State on behalf of another)

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 59 and 60 in his third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 59 and 60 were, in a sense, linked, though they dealt with somewhat different principles. There might be some doubt as to whether article 59 should be retained at all, since it was concerned with a rather special case and would perhaps have little application outside the well-known example of the Treaty between Switzerland and Liechtenstein,¹ by virtue of which Switzerland was authorized to conclude commercial and customs treaties having territorial application to Liechtenstein, without there being any question of the latter becoming a party to those treaties.

3. As he had pointed out in paragraph (3) of the commentary, a similar situation might arise in the law of international organizations. For example, there was an article in the Treaty establishing the European Economic Community which provided for the conclusion of certain types of agreement by the Community that would be binding on Member States.² There, the question would arise whether the organization, in concluding such agreements, was acting in a representative capacity.

4. Article 60 dealt with the case in which, with the full knowledge of the other parties, on State concluded a treaty on behalf of another, which thereby became a party. If it were decided to retain the provision, the Commission might wish to include it among those relating to the effects of treaties on third States or, alternatively, to transfer it to Part I of the draft,³ which dealt with the conclusion of treaties.

5. The CHAIRMAN, speaking as a member of the Commission, said he did not think the Commission need concern itself with the position of article 60 at that stage; it could settle that point after considering the article, if necessary even on the second reading.

6. With regard to article 59, which related to a very special case, he asked the Special Rapporteur whether, even in that special case, it was correct to say that it was the territory of the State that was bound rather than the State itself; if it was the State itself that was bound, the case could be treated in much the same way as that contemplated in article 60.

7. In the case of Liechtenstein and Switzerland, the wording of the treaty concluded in 1923 left room for doubt on that point, but his own opinion was that, since Liechtenstein was an autonomous subject of international law, it was the State of Liechtenstein that was bound by a treaty of that kind and not its territory.

8. Sir Humphrey WALDOCK, Special Rapporteur, said he would like further clarification of the Chairman's point. As he understood it, a State wishing to bring a complaint of violation of a treaty concluded by Switzerland and having territorial application to Liechtenstein, would not be able to bring that com-

¹ League of Nations *Treaty Series*, Vol. XXI, p. 243.

² United Nations *Treaty Series*, Vol. 298, p. 90, article 228.

³ *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 161 *et seq.*

plaint directly against Liechtenstein, but would have to lodge it through Switzerland.

9. The CHAIRMAN, speaking as a member of the Commission, said that although Switzerland was authorized to represent Liechtenstein in concluding a treaty, if Liechtenstein failed to observe the treaty, it was still Liechtenstein that was failing to meet its obligations; consequently, Liechtenstein as a State and as a subject of international law must be regarded as a party to the treaty.

10. Mr. CASTRÉN said that article 59 was closely connected with article 60, as was made clear by the Special Rapporteur's commentary on the two articles. In both cases a duly authorized State concluded a treaty on behalf of another State which, in consequence, was bound by the treaty and required to apply it in its territory. The difference which the Special Rapporteur had tried to establish between the two cases was apparently that, in the second case, the State which had authorized another State to act on its behalf became a party to the treaty on the same terms as the other States which had given their assent directly, whereas in the first case the State which had acted through another State in the conclusion of a treaty must continue to act in the same way with regard to all questions relating to the treaty's application.

11. His impression was that the Special Rapporteur had over-emphasized the territorial element in article 59. While it was possible to speak of the extension of a treaty to the territory of a State, as the Special Rapporteur had done in the title and in the opening words of the article, the expression "to bind its territory", and "to bind the territory of that State", used in subparagraphs (a) and (c), were somewhat equivocal. In reality, it was the State that was bound, the consequence of that juridical fact being that the treaty applied to its territory. Articles 7 and 8 of the treaty between Switzerland and Liechtenstein, quoted in paragraph (2) of the Special Rapporteur's commentary, stated that the commercial and Customs treaties concluded by Switzerland with third States would apply in the Principality, and that Liechtenstein authorized the Swiss Confederation to conclude such treaties and make them applicable to the Principality.

12. With regard to the form of article 59, he thought that in subparagraphs (a) and (c) all reference to territory should be deleted, and that only the authorization given by the State and the intention to bind it should be mentioned. Sub-paragraph (c) should follow immediately after subparagraph (a) and be supplemented by the words: "and intended to bind that State".

13. Perhaps it could also be provided that the other parties must give their consent to the extension of the treaty's application, though it could legitimately be assumed that they agreed to it implicitly if they entered no reservations on the subject.

14. With regard to article 60, he doubted whether the second sentence of paragraph 1 was necessary, since it stated an obvious corollary of the first.

15. Mr. TSURUOKA said that the case dealt with in article 59 was not very common and was unlikely to occur more frequently in the future. If the majority of the Commission wished to retain the article it should be drafted in terms that brought out the exceptional character of the situation more clearly. One way of doing so might perhaps be to invert the proposition and say, for example: "The application of a treaty does not extend to the territory of a State which is not itself a contracting party, unless...".

16. Articles 59 to 62 seemed to him to be closely interconnected, even though articles 59 and 60 related to the application of treaties and articles 61 and 62 to the rights and obligations created by treaties. That being so, it might be preferable first to discuss article 61, concerning the principle that treaties created neither obligations nor rights for third States; after discussing that article and reaching conclusions on it, the Commission would be in a better position to judge whether article 59 should or should not be deleted.

17. With regard to the point raised by the Chairman, he said that articles 59 and 60 dealt with two different kinds of treaty. Article 59 referred to the conclusion of an agreement, orally or in writing, between a State A and a State B, under which State B delegated in advance to State A general authority to conclude on its behalf treaties relating to specific matters (for instance finance and Customs), which would automatically apply to the territories of State B without that State's being a party to the treaty. In practice, if a dispute arose between State B and a State C, State B could not make representations concerning its settlement otherwise than through State A. In the case covered by article 60, on the other hand, the State did not itself participate in the conclusion of the treaty, and delegated to another State the authority to do so on its behalf; but it nevertheless became a party to the treaty. That, in his view, was the essential difference between the two articles, and it appeared to be confirmed by practice.

18. Mr. LACHS said that he would confine his remarks to article 59, which dealt with a very special case. He shared the Chairman's doubts about the wording of the article and believed that, even under the Treaty between Switzerland and Liechtenstein the binding effect extended beyond the territory of the latter, and involved its organs of State; that was particularly true of commercial treaties.

19. The extension of the application of treaties in the manner provided for in the article might also involve constitutional issues. One example was the occasion when the signature of the representative of Andorra to the Convention for the Protection of Cultural Property in the Event of Armed Conflict had been repudiated as void by the President of the French Republic on the ground that it had been appended without his consent.

20. To the general question of whether or not article 59 should be included, his answer was in the negative, because the practice it provided for was anomalous and caused the State to which the application of the treaty

was extended to lose its international identity, as it were. In the interests of the progressive development of international law it would be unwise for the Commission to sanction such an exceptional practice; it would suffice to mention the matter in the commentary.

21. Mr. BRIGGS said that he was in some perplexity over the concept of a territory being bound; in his opinion it was the State that was bound, even if it was not a party to the treaty in the strict sense of the term. As was clear from the provisions of the Treaty between Switzerland and Liechtenstein quoted in paragraph (2) of the commentary, the extension provided for would result in something wider than territorial application. Moreover, if the State was not bound by the treaty, in the event of non-performance of the treaty obligations, the question would arise which State could be held internationally responsible, the party to the treaty or the other State which had authorized it to enter into the treaty on its behalf.

22. He had tried to overcome some of the difficulties by recasting the article to read: "A State which is not itself a contracting party to a treaty becomes bound by that treaty when it has duly authorized another State to bind it by concluding the treaty". But on further reflection it seemed to him that the substance of such a provision was already covered by articles 60 and 62, which led him to the conclusion that perhaps article 59 was not necessary at all. At all events, the Commission needed more information on the scope and meaning of the Treaty between Switzerland and Liechtenstein.

23. Mr. ROSENNE said that he had some difficulty in accepting the assumption underlying article 59 that a State which was not a contracting party to a treaty, or its territory, could nevertheless be bound by it; he wondered whether, by authorizing another State to bind its territory by concluding the treaty, the first State did not thereby become a party in law. Indeed, it was not easy to see where the difference between articles 59 and 60 lay.

24. He was largely in agreement with the Chairman concerning the concept of consent to be bound by a treaty. In 1962, the Special Rapporteur had proposed a definition of a "party" as being a State or other subject of international law which had executed acts by which it had definitively given its consent to be bound by a treaty in force.⁴ Although that definition had not been adopted by the Commission, it was reflected in the draft articles themselves and was referred to in paragraph 1 of the commentary on article 16.⁵ Thus the concept of being bound by a treaty was an integral part of the concept of being a party to a treaty. Consequently, where treaties concluded by Switzerland had application to Liechtenstein, the latter should be regarded as a party in the sense that it enjoyed rights conferred by the treaties directly, and could be held internationally responsible for any breach of those instru-

ments. It was, of course, important to make clear that the Commission was referring to those treaties only by way of illustration and had no wish to prejudice the position in fact which might exist between Switzerland, Liechtenstein and any other parties to the treaties between them.

25. Article 59 should not be kept as a separate article; its subject matter should be incorporated in article 60 for the reasons given in the last two sentences of paragraph (2) of the commentary on that article. Nor should the provision be restricted to treaties the parties to which were necessarily States: it could also apply to treaties to which international organizations were parties.

26. The Commission should be careful not to press too far any analogy with concepts of agency drawn from municipal law, because those concepts varied widely from one system to another. Footnote 59 to the commentary on article 60 was controversial and could be omitted.

27. It would be a progressive step to make it possible for one State to authorize another or, if it so desired, an international organization to conclude treaties on its behalf on the conditions specified in article 59. It was essential that those conditions should be fulfilled so that the other contracting parties should know with which State they were concluding the treaty. Such a provision would be an application of what Rousseau had called *une substitution préalable de compétence*. Sir Gerald Fitzmaurice, in his fifth report, had considered that States on behalf of which treaties had been concluded in that manner should be regarded as contracting parties,⁶ and the Secretariat, in its Summary of the Practice of the Secretary-General as Depository of Multilateral Agreements, had given examples from the practice of governments of sovereign States, which it described as "representation".⁷ Nor should a similar practice by international organizations be excluded, if their constitutions so permitted, and he wondered why article 60, paragraph 2, should be confined to treaties concluded between them and non-member States.

28. He had been interested to note from the report of the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space⁸ that some proposals before it seemed to envisage something along the lines he had suggested, though in another realm of law.

29. Mr. ELIAS said he seriously doubted whether article 59 should be included at all, because its substance was already covered by articles 60 and 62; the special case of Liechtenstein could be mentioned in the commentary. One of the main difficulties was that of distinguishing between territorial application and participation through an agent, a point which the Special Rapporteur had brought out in paragraph (4) of the commentary. Ultimately, of course, subject to the

⁴ *Yearbook of the International Law Commission, 1962, Vol. II, p. 31.*

⁵ *Ibid.*, p. 175.

⁶ *Yearbook of the International Law Commission, 1960, Vol. II, p. 94, para. 56.*

⁷ ST/LEG/7, paras. 142-143.

⁸ A/AC.105/9.

condition laid down in sub-paragraph (b), the State to whose territory application of the treaty was extended must be regarded as a party and hence as being internationally responsible for any breach.

30. As there seemed to be fairly general agreement that article 59 could be dropped, perhaps the Commission could now pass on to article 60.

31. Mr. PAREDES said that when the text of article 59 was examined in isolation, it gave the impression that the case contemplated was that of one State delegating authority to another to represent it in a particular transaction. Accordingly, the agent acted on behalf of the principal, establishing rights and obligations for it and representing its interests. In the case contemplated in the article, the negotiator combined two capacities: the personality of his own State and that of the State which had entrusted him with the negotiations. That being so, both States must be regarded as parties to the transaction. But the Special Rapporteur observed in his commentary that that would be going too far, and that it was rather a kind of indirect participation whereby the third State obtained certain advantages and assumed certain obligations, but did so through the signatory to the treaty, which alone could demand fulfilment.

32. That was really a situation of dependence prejudicial to the freedom of the State and incompatible with the concept of its full capacity, which was assumed by the Commission in its work on the law of treaties. He could not accept such dependence, which would impair the autonomy of countries and threaten them with a kind of continuous subordination. It would be a disguised resurgence of colonialism which had been so vehemently condemned by the speakers at the previous meeting.

33. A provision on the lines of article 59 might be included in the draft if the Commission were obliged to make a detailed compilation of the older principles of international law, however inadequate they might be under modern conditions; but not when the Commission was required not only to codify, but also to take account of the progressive development of law. The inclusion of such a provision in the draft might cause misunderstanding, owing to the reference to conditions of dependence. In contemporary international society, it was unthinkable that one independent State should be under the tutelage of another; every country must accept its own responsibilities and make its own mistakes. The conquest of the freedom of nations must be based on their own experience, even at the risk of errors they committed themselves, but not of the errors of others.

34. The CHAIRMAN, speaking as a member of the Commission, warned the Commission against the danger of confusing the issue. Articles 59 and 60 had nothing to do with cases of colonialism, or even with cases on which the Commission should express a favourable or unfavourable opinion. It really dealt with the case in which one of two States, such as Switzerland and Liechtenstein, or Belgium and Luxembourg, saw fit to empower the other to represent it and to con-

clude treaties on its behalf. It was on that basis that the commercial and customs treaties concluded by Belgium automatically applied to Luxembourg as well. There was no question of colonialism, or protectorates, or generally speaking of any system which must be regarded as obsolete and incompatible with the independence of States. It was not a question of encouraging certain forms of relationship but, as several speakers had clearly seen, of determining whether there was really any difference between the case dealt with in article 59 and that dealt with in article 60.

35. His own view was that there was no difference. By article 8 of the Treaty between Switzerland and Liechtenstein, for example, Liechtenstein empowered Switzerland to represent it, which meant that Liechtenstein continued to be a sovereign State having rights and obligations; consequently the rights and obligations deriving from a treaty concluded by Switzerland also became rights and obligations of Liechtenstein. As to which party the rights and obligations deriving from the treaty were vested in, it was Liechtenstein as much as Switzerland; consequently, it was Liechtenstein as a State that was bound, and not its territory. Thus the case dealt with in article 59 was similar to that dealt with in article 60, and could be considered with that article.

36. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with those members who had suggested the deletion of article 59; its contents should be transferred to the commentary on article 60.

37. The 1923 Treaty between Switzerland and Liechtenstein, which was mentioned in the commentary as an example of the situation covered by article 59, seemed to constitute a case of agency, in which one State entrusted another with the power to represent it not only for the purpose of concluding certain treaties, but also for the purpose of claiming rights under those treaties. Thus the matter clearly came within the scope of article 60.

38. The three conditions laid down in article 59 were not sufficient. In particular, in sub-paragraph (b) it was not enough to say that the other parties to the treaty must be aware of the authorization; it was also necessary for the other parties to agree to have the treaty extended to a State which had not signed it.

39. Mr. de LUNA said he was convinced that article 59 should be dropped, on the principle that a treaty did not apply to third parties. A territory could not be bound if the State had not bound itself. A State could bind itself either directly, as normally occurred, or by authorizing as its representative another State, which then acted on its behalf. The example given in the Special Rapporteur's commentary was rather misleading, because article 8 of the 1923 Treaty created a mere agency: it authorized Switzerland to negotiate on behalf of Liechtenstein.

40. Article 59 really dealt with a case of quasi-servitude, in which one State had acquired the right to act in lieu of another. For instance, a State which became a party to the General Agreement on Tariffs and Trade (GATT) had to give particulars of all its customs

territories; that was not a case of agency, but of a right acquired by virtue of a prior treaty and the State which had acquired the right exercised it. It remained to be decided whether the Commission should devote an article to such a special and infrequent case; he thought it should not.

41. Mr. BARTOŠ said that in article 59 the Special Rapporteur had adopted too narrow an approach, for the problem was not confined to very small States. At one time France had contested the right of some of its former colonies in Africa, which had become independent, to enter into treaties with other countries on certain matters covered by a monetary union agreement with France. Some had gone so far as to consider that monetary union a form of neo-colonialism. Consequently, if the Commission drafted an article on the matter, it should be worded in such a way that it not only applied to the cases covered by the present article, but also established a general rule. It was therefore necessary to consider how far a treaty which gave a power of agency to a third State was compatible with the principle of independence stated in the United Nations Charter.

42. True, it was quite normal for a State to be represented by another State, and the Vienna Convention on Diplomatic Relations made provision for missions common to several States. Nothing in such an arrangement was contrary to the principle of independence, provided that the representation was *ad hoc*, or in the case of a continuing agency, that it was always revocable. But in the case of representation for a fixed period there was always an element of abdication by the State represented, which created a condition of dependence, even if it was accepted voluntarily. So if the principle of the independence of States was held to be rule of *jus cogens*, it seemed that the conclusion of agreements of that sort was not admissible.

43. With regard to the application of treaties concluded through a third State, to which the State represented became a party, complex problems arose in regard to breach of the treaty by the representing State and to claims brought by the represented State concerning the application of the treaty. Could it be said that the represented State would be deprived of freedom to assert its rights *ex contractu* against the contracting parties and could that State itself appeal to the International Court of Justice? Furthermore, in the practice of the United Nations, some States could sign certain treaties on behalf of other States, but for ratification, the commitment had to be entered into by each State individually.

44. He therefore considered that certain factors for which the Special Rapporteur had made no provision should be taken into account in the article. If a treaty containing an agency clause specified that the agency was revocable at any time, the clause did not infringe the principle of independence of States; but if the agency was a lasting one he thought it jeopardized the principle of independence, and he would have to make reservations on that point.

45. The CHAIRMAN, speaking as a member of the Commission, agreed that article 59 could apply to

countries other than very small ones, but as the agency relationship was freely established between two States, the Commission should not express a favourable or an unfavourable opinion on that practice. Such relationships could be formed between any countries, not only in Europe, for reasons of mutual assistance. They might even be the adumbration of a federal system.

46. Mr. YASSEEN said it was the State as a subject of international law that would be bound by a treaty, not its territory, which was only one of the constituent elements of the State. The reason why article 59 gave the impression that the territory of the State was to be bound was that it was possible to envisage a legal situation in which a certain State was authorized not only to conclude a treaty on behalf of another State, but also to perform all the acts relating to the application of a treaty on behalf of that State. In so far as independent States were concerned, article 59 dealt only with a question of representation, or more precisely, with the scope of that representation. Thus understood, article 59 seemed to him to be one of the applications of article 60.

47. With regard to the underlying principle of article 60, the first question was whether it was possible for a State to delegate authority for the conclusion of a treaty or for all purposes concerning its application, and the second was whether provisions on that point should be included in the draft. It was, in principle, legally possible for a State to authorize another State to act on its behalf in such matters, unless the practice went so far as to deprive the State of its international personality. Hence that form of agency should only be provided for in respect of acts concerned with making a State a party to a treaty. Such provisions would meet a practical need where the agency was *ad hoc*, individual and revocable. Since it should be made easier for States to become parties to international treaties, a rule of that kind might be in the interest of the international order, especially where codifying treaties or general treaties were concerned. But it did not seem necessary to provide for agency in respect of the application of treaties; the duration of such an agency and the nature of the acts performed by virtue of it might impair at least the configuration of a State's sovereignty. A State might freely consent to such an arrangement, but the case should not be expressly provided for in the draft.

48. Mr. PESSOU thought that perhaps Mr. Lachs had best defined the problems raised by article 59. The Special Rapporteur never failed to call attention to every possible case, even if that made it harder for him to formulate a rule. Article 59 was based on an existing situation: the special case of Liechtenstein. But was it really appropriate to devote an article to such a case? He was inclined to think it might perhaps be better to drop the article altogether, or to transfer its substance either to the commentary or to some other article dealing with a situation of the same kind.

49. Replying to Mr. Bartoš, he said that some French-speaking African States had indeed concluded a monetary and financial convention with France. Any con-

vention or treaty entailed compliance with certain rules and a balance between the rights and duties of the parties. Any sacrifice made must have its compensation. In the case of Dahomey, the convention did not involve any contradiction and was not in any way a form of neo-colonialism. The Dahomey franc was equivalent to two French francs, and that brought Dahomey great advantages. The rules of a convention were made to be respected, even if their application involved certain difficulties; for example, if one of the parties wished to go beyond the limitations imposed by a treaty with one State in order to conclude other treaties with other States. When two parties were bound by a convention, it was not possible for one of them to fulfil its obligations, while the other evaded them. The difficulties to which Mr. Bartoš had referred were solely due to the fact that the parties were bound to fulfil the obligations laid down in a convention.

50. Mr. TUNKIN said that, like a number of other articles drafted by the Special Rapporteur, articles 59 and 60 had been submitted for the purpose of putting to the Commission problems which merited discussion. He understood that the Special Rapporteur was prepared to drop article 59 and thought that he would not press very strongly for the retention of article 60 either. In that article, all reference to international organizations should be omitted, since the Commission had already decided not to deal with them in its study of the law of treaties.

51. Articles 59 and 60 dealt with situations in which one State was subordinated to another. Quite apart from any doubts he might have about the application of a treaty being extended to the territory of a State which was not a party to it, article 59 obviously contemplated such a position of subordination — the case in which a State concluded a treaty that would automatically apply to the territory of another State. The same applied to article 60, which dealt with the case in which one State concluded a treaty on behalf of another, with its authorization; the latter State would thereby disappear from the international arena and the former would, in effect, take its place as a subject of international law.

52. The Commission should bear in mind certain basic principles of contemporary international law. In view of resolution 1505 (XV) on future work on the codification and progressive development of international law, adopted by the General Assembly in 1960, the Commission should approach its task in the light of the new trends in international relations which had an impact on the development of international law; it should take into account recent changes in international law and the new rules that were being developed. The well-established principles of contemporary international law included that of the equality of States, by virtue of which all States were equal as sovereign entities and subjects of international law, and that of respect for the sovereignty of States. An examination of the rules stated in articles 59 and 60 showed that they were incompatible with those two basic principles of international law.

53. In order to understand a legal rule properly, it

was necessary to consider its social content. The rules stated in articles 59 and 60 had in fact been used mainly in colonial practice, in connexion with protectorates. Outside colonial practice, cases covered by those rules were extremely rare.

54. It was also important not to confuse the cases dealt with in articles 59 and 60 with certain other situations, which were completely different. One example was the signing of a treaty by the diplomatic representatives of one State on behalf of another State. In 1963, the Moscow Treaty banning nuclear weapon tests⁹ had been signed by the Ambassador of Brazil on behalf not only of Brazil, but also of certain other countries; in signing for those other countries, however, he had been acting not for Brazil, but for the countries concerned.

55. Another example was provided by the 1961 Vienna Convention on Diplomatic Relations, article 6 of which read: "Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State."¹⁰ If, therefore, States A and B appointed the same person as ambassador to receiving State C, and the ambassador called at the Foreign Ministry of State C to deal with a matter relating to State A, it would be State A that would be acting through him. If the ambassador called on behalf of State B, then it would be State B that would be acting through him. Both States, A and B, were on the same level internationally; there was no question of either of them replacing the other in the international sphere.

56. Several speakers had pointed out, and the Special Rapporteur himself had recognized, that cases covered by article 59 were extremely rare. As to article 60, the Special Rapporteur had stated in paragraph (2) of his commentary that "the expanding diplomatic activity of States and the variety of their associations with one another may lead more frequently to cases where one State acts for another in the conclusion of a treaty". Personally, he very much doubted that. In fact, the tendency was precisely the opposite: every State tended to act for itself and none was prepared to allow another State to represent it.

57. With very few exceptions, the cases coming within the scope of the articles under discussion were a heritage of colonialism; the few exceptions should not be generalized. Or course, nothing in the draft articles prohibited such exceptions.

58. Article 59 should be dropped altogether and he doubted whether article 60 should be retained in any form.

59. Mr. AMADO said that once again, the Special Rapporteur, in his concern for accuracy, had tried to omit nothing. Article 59 was based on a fact, namely that, when any State negotiated with Switzerland on matters affecting Liechtenstein, it negotiated with Switzerland alone. Liechtenstein existed as a State, but it

⁹ ENDC/100/Rev.1.

¹⁰ United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, Vol. II, p. 83.

had delegated all its sovereign power of negotiation to Switzerland. The special relations between Switzerland and Liechtenstein constituted the only instance of such fusion of one State with another. The relationship between Belgium and Luxembourg was entirely different.

60. He did not agree at all with the view that article 59 was a residue of colonialism ; it dealt only with the case of Liechtenstein and Switzerland, in other words, with the authority conferred on Switzerland by Liechtenstein to represent it. The delegation of authority was clearly established by article 8 of the 1923 Treaty. The Commission should obviously not base an article on that particular case, and he was therefore opposed to article 59.

61. Mr. REUTER said he was in favour of deleting article 59, but retaining article 60.

62. The difficulty experienced by members of the Commission in reaching agreement on purely technical points was partly due to differences in legal terminology and training. For jurists from Continental Europe, the whole problem of article 59 was illustrated by the terms "*représentation*" and "*personnalité juridique*". He did not claim that those expressions were satisfactory but he noted that for anglo-saxon jurists the first did not seem to have the same meaning or the same use, while the second was regarded as too abstract. The Commission's work would certainly be much easier if it could get over difficulties of that kind.

63. He could not help being surprised at the strongly anti-federal views he had heard expressed. The number of States in the international community was not fixed by any rule of international law, by any new principle, or by any article of the Charter. A State was in no way prohibited from permanently surrendering its independence by merging with a larger unit of its own free will.

64. The Commission should, of course, avoid any suggestion of endorsing colonialism, or even of not condemning it explicitly enough. What differentiated the federal system from the colonial system was equality, and Mr. Tunkin had rightly stressed that the basic problem was not strictly legal, but sociological. There was some reason to fear that colonialism was not just a thing of the past, but still had some future before it. Its manifestations were mainly economic ; the only true equality, which was social equality, was not easy to attain. It was true that some structures, though federal in form, were in fact colonial ; but conversely, some structures which were colonial in appearance were federal in reality. In European communities the voting rights of certain States were in many cases reduced to nothing, but it could not be said that that was colonialism. Other systems, under which States retained formal equality without being able to make any effective use of it, were really closer to colonialism. To distinguish between what was federal and what was colonial involved a political judgment. He did not think the Commission was required to assume responsibility for such a judgment, and he would therefore prefer article 60 to stand ; but it should be in general terms and be accompanied by a cautious commentary omit-

ting any examples which might give the impression that the Commission was looking to the past for guidance.

65. Mr. de LUNA agreed with Mr. Reuter that article 60 should be retained. A distinction should be drawn between two cases : that in which a State was represented by an organ of another State acting in a dual capacity, as was permitted by the Vienna Convention on Diplomatic Relations, and that in which one State negotiated on behalf of another.

66. But there was another problem. As the Commission had not dealt with the question of agency in Part I of the draft, it might seem strange that it should do so only in the part dealing with the application of treaties. Although the representation of one State by an organ of another raised no particular problems, the other kind of representation to which he had referred ought to be studied ; but the substance of article 60 should be transferred to Part I, section II of the draft.

67. The CHAIRMAN, speaking as a member of the Commission, pointed out that Liechtenstein was only represented by Switzerland in the negotiation and conclusion of customs and commercial treaties ; other treaties were concluded by Liechtenstein independently.

68. At first sight he agreed with Mr. Tunkin that it would be possible to drop paragraph 2 of article 60, since it dealt with a problem relating to international organizations and such problems had so far been left aside.

69. But he could not agree with Mr. Tunkin on paragraph 1 ; the Commission's draft would be incomplete if the idea expressed in that paragraph was omitted. It would seem strange if the Commission decided to rule out the possibility of concluding a treaty by agency. Agency could be a stable and permanent arrangement, as in the case of the Belgium-Luxembourg Economic Union ; indeed, that was an example that could well be followed as an intermediate solution between independence and federation. Agency could also be occasional, and that was the case contemplated in paragraph 1 of article 60. Agency of that kind had always existed and had always been regarded as legitimate ; the Commission could not overlook it.

70. With regard to the position of the provision in the draft, he agreed with Mr. de Luna ; but the Special Rapporteur had said at the beginning of the discussion that that secondary question could be settled later.

71. Mr. YASSEEN said that in view of the Chairman's opinion he had not intended to speak about the placing of article 60, but he thought that if it was to be confined to agency in the conclusion of treaties, it should be in some other part of the draft.

72. Mr. EL-ERIAN said he shared the general feeling that article 59 should be dropped because it dealt with a particular case that did not justify special treatment. He would revert to article 60 at the next meeting and for the time being would confine himself to general comments.

73. The Commission had agreed that its work on the law of treaties should take the form of a draft convention, not of a code. Certain situations in international relations, which were not contrary to international law, but were nevertheless of a particular character, should not be generalized in a draft convention on the law of treaties.

74. He appreciated the efforts of the Special Rapporteur to submit draft articles that were as complete as possible to the Commission, so that it could decide which provisions should be retained for the purposes of a draft convention; he had, for example, done well to provide the Commission with an opportunity of discussing the question of the colonial clause in connexion with article 58. But the special situations dealt with in articles 59 and 60 belonged rather to the commentary than to the text of the articles. The Commission should avoid any suggestion that it approved of situations which were not consistent with contemporary international law, and should not derive general rules from special situations. His position was rather similar to that taken by the Commission on article 3, concerning the capacity to conclude treaties; for although there were exceptional cases, such as neutrality, in which the capacity of a State to conclude certain treaties was restricted, the Commission, as stated in paragraph (1) of its commentary on article 3¹¹ had held that it would not be appropriate to enter into all the detailed problems of capacity which might arise and had decided to set out, in that article, broad provisions concerning capacity to conclude treaties.

The meeting rose at 1 p.m.

733rd MEETING

Thursday, 28 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167)

(continued)

[Item 3 of the agenda]

ARTICLE 59 (Extension of a treaty to the territory of a State with its authorization) and

ARTICLE 60 (Application of a treaty concluded by one State on behalf of another) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 59 and 60, in the Special Rapporteur's third report (A/CN.4/167).

¹¹ Yearbook of the International Law Commission, 1962, Vol. II, p. 164.

2. Mr. TSURUOKA said that he considered article 60 useful, if not absolutely essential. The substance of it might perhaps be included in the commentary on the part of the draft concerning the conclusion of treaties, or it might be made into a separate article for inclusion in that part. With the development of international relations, the method described in the article was likely to be used more often; besides, its use might mitigate the inconveniences caused by the rupture of diplomatic relations between two States.

3. With regard to the substance of the article, it would be well to stress in the commentary that the consent of the party with which the agent State concluded the treaty was indispensable. In the interests of the stability of international relations, the Commission might also mention the question of the evidence of authority. That was an important point where a relationship between two independent States was concerned.

4. Mr. JIMÉNEZ de ARÉCHAGA suggested that the idea, if not the actual wording, of paragraph 1 of article 60 should be retained, namely, that a State could confer upon another State authority to represent it in concluding a treaty, as Luxembourg had done with Belgium, and in demanding compliance with its terms, as Liechtenstein had done with Switzerland. He agreed with the Special Rapporteur that that kind of situation might well occur more frequently in the future. It was significant that both the cases quoted were cases of small countries having a customs or other economic union with a larger neighbouring country. In view of the new widespread tendency to organize economic associations, such as the Free Trade Association being formed in Latin America, with the aim of broadening production areas and markets, the Commission should not ignore, much less condemn, a practice whereby a small economically developing State could secure a better bargaining position by allowing another State to act on its behalf. Another possibility was that a State which was protecting the interests of another State following its severance of diplomatic relations with a third State, might quite legitimately have occasion to conclude a treaty on its behalf.

5. The Commission should not adopt a negative attitude to the legitimate institution of agency merely because it might have been used in the past to set up protectorates. Many other legitimate institutions had been used for objectionable purposes, but the Commission had not decided that it should not deal with them. It should be remembered that representation by the operation of law did not exist in international law; the only form of representation was by virtue of a treaty. Any agency relationship which might be established would therefore be subject to the rules in Parts I and II of the draft articles. Such rules as those relating to free consent, nullity on grounds of coercion, *ius cogens*, the power of denunciation in certain circumstances, and determination for change of circumstances would apply in all cases. There would thus be ample safeguards to ensure that no State would in future, as had happened in the past, use the method of agency by treaty to set up a protectorate regime against the free will of the State represented.

6. Mr. TABIBI said that he had no objection to the principle of paragraph 1 of article 60, since representation was well established in the practice of States and did not necessarily have a colonial connotation. However, the conclusion of a treaty by one State on behalf of another was a rare practice which was tending to become even rarer.

7. He doubted the wisdom of retaining paragraph 2 in its present position because of the connexion with the topic or relations between States and intergovernmental organizations. Moreover, the whole question of treaties between international organizations and States needed careful study. While acting as Chairman of the Technical Assistance Board and of the Technical Assistance Committee he had been able to note a diversity of practice amounting to unequal treatment of the various States having treaty relations with the United Nations in the matter of technical assistance. In particular, the manner in which the question of local costs was treated differed from one technical assistance agreement to another. It was clear that the whole subject needed separate study and its place was not in article 60.

8. Since it was generally agreed that article 59 should be dropped, the opening sentence of paragraph 1 of the commentary to article 60 should also be deleted.

9. Mr. CASTRÉN said he agreed with Mr. Reuter and Mr. Jiménez de Aréchaga that paragraph 1 of article 60 stated a correct and practical rule of a general nature, which should be retained without any restriction.

10. But like other members of the Commission he thought that the proper place for that rule was the part of the draft dealing with the conclusion of treaties. If a State authorized another State to conclude a treaty on its behalf, that treaty clearly applied to the authorizing State just as it did to a party to the treaty. The second sentence of paragraph 1 seemed to be an unnecessary repetition of that rule.

11. Paragraph 2 should be deleted.

12. Mr. ROSENNE said the discussion had shown that the matter dealt with in paragraph 1 of article 60 called for a simple formulation to the effect that a State could become a party to a treaty through the action of another State in conformity with the provisions of Part I, provided the co-contracting States were aware of the situation and consented to it. A provision along those lines could be included in Part III on the understanding that its position would be decided later.

13. It was not easy to dismiss the problem dealt with in paragraph 2. The essential idea behind the provision was that, in the case of a treaty to which an international organization was a party, there was nothing in principle to prevent individual States which were members of the organization from becoming subjects of rights and obligations under the treaty directly, if so agreed in the treaty itself. That situation constituted a new form of treaty-making which had nothing to do with agency. The judgments of the International

Court of Justice in the *South-West Africa* cases¹ and the *Northern Cameroons* case² provided limited authority for the general proposition that the process constituted a possible development of treaty law. The Commission should, therefore, without getting involved in detail, include in its draft on the law of treaties a general statement of principle regarding that development.

14. The examples given in paragraph (3) of the commentary on article 59 showed that the matter was one of increasing importance in regard to economic agreements. He was well aware that at its fourteenth session the Commission had "reaffirmed its decisions of 1951 and 1959 to defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States".³ He did not suggest that the Commission should reverse that decision or enter into the question in detail, but merely that it should reserve the point, and should do so explicitly.

15. Mr. PAL said that Part III dealt, among other things, with the application of treaties, meaning treaties the making of which had already been dealt with. The questions of a treaty concluded by one State on behalf of another and of a treaty concluded by an international organization in the circumstances specified in paragraph 2 of article 60, were not dealt with elsewhere in the draft and had hitherto been kept clearly outside its scope.

16. The present position was, therefore, that Part I dealt only with the conclusion, entry into force and registration of treaties concluded by States on their own behalf, and excluded treaties concluded by international organizations. Part III, purporting to deal with the application, effects, revision and interpretation of treaties must be taken as referring to treaties concluded in accordance with Part I. There was thus no place for the provisions of articles 59 and 60 in the present arrangement. Consequently, if the Commission decided that treaties of the kind contemplated in articles 59 and 60 were possible, it should insert in Part I provisions on the conditions to which the making of such treaties would be subject and on the requirements they must fulfil in order to exist. Once that was done, it would be possible to deal with the problem of the application of such treaties.

17. The CHAIRMAN, speaking as a member of the Commission, said he wished to correct what he had said about paragraph 2 of article 60 at the previous meeting.⁴ It was true that the Commission had decided earlier to leave aside treaties concluded by international organizations, in other words, treaties to which they were parties. But article 60 dealt with the case in which a State was a party to a treaty by virtue of an agency relationship. Paragraph 1 dealt with the case in which the State was represented by another State,

¹ *I.C.J. Reports*, 1962, p. 319.

² *Op. cit.* 1963, p. 15.

³ *Yearbook of the International Law Commission*, 1962, Vol. II, p. 161, para. 21.

⁴ Para. 68.

so the case in which the State was itself represented by an organization remained to be dealt with in paragraph 2. In that case only States were parties to the treaty.

18. When an international organization concluded a treaty there were three possible cases. First, it could conclude the treaty for itself, in which case it was the organization which assumed obligations and acquired rights. Secondly, it could act not truly as an organization, but rather as the joint organ of States; that case raised no difficulties. Thirdly, it could act as agent for certain States; that kind of relationship might perhaps be fairly common in the future. Provided the Commission definitely restricted paragraph 2 of article 60 to the third case, it could retain the provision without going back on its former decision.

19. Mr. TUNKIN said that he doubted very much whether representation of one State by another in the conclusion of treaties was a normal practice. Apart from colonial practice, instances of such representation were very much the exception. The only example given was that of the Belgium-Luxembourg Economic Union, and even that was open to some doubt. There appeared to be a tendency to discuss representation on the analogy of private law, but the situation in international relations was completely different from that obtaining under municipal law.

20. It had been suggested that the practice of representation in treaty-making was gaining favour. The cases mentioned, however, were not cases of one State acting on behalf of another, but of an international organization acting for its member States. With regard to paragraph 1, he still believed that a general rule should not be derived from the generalization of a special case, particularly since the formulation of such a rule would have undesirable connotations.

21. He could not agree with the Chairman regarding paragraph 2. Where an international organization entered into a treaty, there would always be the problem of responsibility for the treaty with regard to both the organization and the member States. There had been a good deal of discussion on that problem in the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space,⁵ which had recently discussed the question of liability for damage caused by objects launched into outer space, where the launching was part of a project carried out by an international organization. It had been generally agreed that at least in those cases the liability of the international organization did not exclude that of the member States; international responsibility arose in respect both of the organization and of the member States. The Commission should not take a decision on a problem the examination of which it had already wisely decided to defer.

22. Mr. PAL said he must emphasize that, if the Commission intended to deal with treaties concluded by one State on behalf of another, it should first formulate a text on the requirements for making such treaties.

23. Mr. ELIAS said he agreed with the speakers who had urged that paragraph 2 of article 60 should be deleted. Even if it was decided to retain its contents, they should be placed elsewhere, because they were in a completely different category from those of paragraph 1.

24. He agreed with Mr. Pal that the contents of paragraph 1 should be transferred to Part I of the draft. Perhaps the Commission could decide at once whether the idea expressed in that paragraph should be included; if so, a decision on where to place it could be left till later. The second sentence of paragraph 1 should be deleted in any case, because it added nothing to the provision in the first sentence.

25. It was true that only one special case had been adduced in support of paragraph 1, but that paragraph covered a subject which had not been dealt with elsewhere and it should be included in the draft. He had been impressed by Mr. Jiménez de Aréchaga's remarks about the safeguards provided by the provisions of Part I against the subjection of one State by another. After considering the matter in that light, he agreed that the Commission should not restrict the freedom of States to make the type of arrangement referred to in paragraph 1 if they wished.

26. Mr. de LUNA said that he agreed with Mr. Rosenne and Mr. Ago about the substance of paragraph 2 of article 60. The capacity of organizations to conclude treaties was not directly at issue.

27. As to the form, he would have preferred the Commission also to consider treaties concluded by international organizations, but the fact remained that it had decided not to do so until later. Paragraph 2 as it stood, however, assumed that the capacity of organizations to conclude treaties was recognized. Unlike some members of the Commission, he acknowledged that capacity. Article 5 of the Treaty of 16 February 1933 establishing the Little Entente provided for the possibility of collective representation in relations with other States.⁶ The phenomenon was not perhaps very common, but it was not exceptional either.

28. Mr. BRIGGS said that there would be a serious gap in the draft articles if the Commission omitted all reference to the situation envisaged in paragraph 1 of article 60. The practice dealt with there was likely to become increasingly important for economic agreements and perhaps in other fields as well. He saw no reason why the Commission should omit to deal with an important problem merely because of certain connotations which were irrelevant to the problem itself. On that point, he associated himself with the observations made by Mr. Jiménez de Aréchaga.

29. Both the Chairman and Mr. Rosenne had made a convincing case for retaining the idea expressed in paragraph 2.

30. Mr. BARTOŠ said that in substance he agreed with the ideas put forward by Mr. Rosenne and the Chairman about paragraph 2 of article 60. On careful

⁵ A/AC.105/C.2/SR 31-35 and A/AC.105/19, Annex II.

⁶ League of Nations *Treaty Series*, Vol. CXXXIX, p. 237.

consideration, however, it would be found that the paragraph referred to two kinds of relations: those between States through the organization and those between the organization itself and States. The Commission had in fact decided that the second kind of relations should be studied in connexion with another draft, to be prepared by Mr. El-Erian. The question was whether organizations had the capacity to represent States and, if so, what were the effects of their exercising that capacity.

31. Mr. EL-ERIAN said he had been impressed by the remarks of Mr. Jiménez de Aréchaga and Mr. Elias. Although he still believed that there was no need for it, if the majority of the Commission wished to make provision for the special case contemplated in paragraph 1 of article 60, he would not resist, provided that other parts of the draft contained guarantees against imposed representation, and that a clear distinction was made between legitimate representation and representation imposed by force. A distinction must be drawn, as was done by leading authorities, between colonial protectorates and the legitimate practice whereby a small State freely agreed to entrust another State with its representation for the purposes of concluding a treaty. On that point valuable criteria had been suggested by Mr. Bartoš, concerning the limited and revocable character of the agency agreement.

32. Paragraph 2 raised a difficult problem. Although the Commission had decided not to deal with treaties entered into by international organizations, references to such treaties had been included in earlier articles, in particular, article 3, paragraph 3,⁷ dealing with the capacity of international organizations to conclude treaties. Provisions of that kind had been adopted for the sake of completeness. In the present context, the position was perhaps different, but he did not wish to take a definite stand at that early stage.

33. The CHAIRMAN, speaking as a member of the Commission, said he had two comments to make. First, with regard to paragraph 1 of article 60, it was quite true that the institution of agency was not so common in international as it was in private law. Still, it existed in international law and its use was more widespread than was generally recognized. It was not the Commission's practice to consider only matters of common occurrence. At its last session it had even adopted an article on fraud, and cases of fraud in international practice were certainly much rarer than cases of agency. The Commission should therefore deal with the case of one State acting as agent for another, taking care, of course, to draft the article and the commentary in such a way as to avoid giving the impression that it approved of obsolete institutions.

34. Mr. Tunkin maintained that what paragraph 2 really dealt with was the capacity of international organizations to conclude treaties and to bind their member States. If the Commission preferred to postpone the examination of all cases in which an international organization took part in the conclusion of a treaty,

he would bow to its wishes; but he was afraid that the question was not as simple as that. There were cases in which a State was committed, not as a member of an organization, but as a State represented by that organization. Sooner or later the question would have to be considered.

35. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that there seemed to be general agreement not to retain article 59, on the ground that it dealt with a very special case that need not be generalized into a rule. He still thought, however, that as he had indicated in the commentary the position of Liechtenstein was an example of something very close to territorial application, though in a special field — that of economics.

36. Perhaps he should mention in passing that the example of the agreement between the United States and EURATOM⁸ would probably be one that Mr. El-Erian would need to consider in his report on relations between States and inter-governmental organizations, since it would clearly be binding territorially on the individual member States of that organization.

37. For much the same reasons as those put forward by the Chairman, he believed that article 60 should be retained. Perhaps he had made the article a little more difficult for members of the Commission by framing it in too absolute a manner and in terms of "application". A possible solution would be to redraft it in permissive form, opening with some such words as "A State may become a party to a treaty through the action of another State... etc.". As a safeguard, it would probably be necessary to include the conditions laid down article 59.

38. As the Commission had already included a provision in article 3, paragraph 3, concerning the capacity of international organizations to conclude treaties, it would be appropriate to include in article 60 a provision covering the possibility of a State becoming a party to a treaty by being represented by an international organization for the purposes of concluding the treaty. That was particularly important, as the practice was becoming more frequent. But, of course, he would not consider it necessary to go too closely into the relations between an international organization and its member States, which would have to be dealt with in Mr. El-Erian's report.

39. The Commission would also have to consider later whether article 60 should remain in its present position or not.

40. In view of the agreement reached on articles 59 and 60 he would, of course, have to re-write the commentary.

41. The CHAIRMAN suggested that article 60 be referred to the Drafting Committee.

It was so agreed.

42. The CHAIRMAN invited the Special Rapporteur to introduce article 61.

⁷ *Yearbook of the International Law Commission, 1962, Vol. II, p. 164.*

⁸ *United Nations Treaty Series, Vol. 338, p. 136.*

ARTICLE 61 (Treaties create neither obligations nor rights for third States)

43. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 61, 62 and 63 dealt with thorny problems and their drafting had given him considerable trouble. In the interest of orderly discussion, it would be better for the Commission first to take up article 61, which enunciated the general principle, leaving aside its opening phrase, which referred to exceptions provided for in the other two articles.

44. The general principle was well-known and he had set out the evidence and the jurisprudence in support of it in the commentary, so that no further detailed observations from him were called for. Paragraph 2 was a saving clause designed to avoid any apparent inconsistency with the provisions laid down in Part I.

45. Mr. de LUNA said that the principle stated in article 61 raised no difficulties and conflicted neither with doctrine nor with case law.

46. With regard to drafting, he thought that in paragraph 1 (a), the words "nor modify in any way their legal rights" should be deleted, because to impose an obligation always meant modifying a right.

47. Mr. LACHS said that there was some contradiction between two statements in paragraph 1 of the commentary. The first statement was that the justification for the rule did not rest simply on the general concept of the law of contract that agreements neither imposed obligations nor conferred benefits upon third parties, but on the sovereignty and independence of States; the second statement was that treaties has special characteristics which distinguished them from civil law agreements, and that it seemed more correct to regard the rule that a treaty applied only between the parties as an independent rule of customary international law. As the rule enunciated in article 61 derived from the sovereignty and independence of States, it must be based on a principle of international law, not on custom.

48. The case of the *German Interests in Polish Upper Silesia*,⁹ discussed in paragraph 4 of the commentary, was one in which Poland, recognized by the Allied and Associated Powers as well as by Germany in 1918, had claimed benefits under the Armistice Convention and the Protocol of Spa, though it had not been a party to those agreements. It had based its claims on the ground of having acceded to them by implication and tacitly; it had not claimed rights as a third State. However, the Permanent Court of International Justice had construed the Armistice Convention and the Protocol of Spa in such a way as to exclude the presumption of those treaties being open. That decision did not correspond to the situation under discussion.

49. Mr. YASSEEN said that the principle enunciated in article 61 was very clear. It was based on an international rule deriving from the principle of State sovereignty, by virtue of which an obligation to which a State had not subscribed could not be asserted against

it, and a right which it had not accepted in advance could not be conferred on it. An article on that question was thus perfectly appropriate in a general draft on the law of treaties, and did not appear to raise any difficulties. He only wished to make a few comments on the form of the article.

50. Like Mr. de Luna, he thought it would be better not to use the word "modify" in paragraph 1 (a), for to modify a right against the will of a State was, in a sense, to impose an obligation on it. In addition, he suggested that the article should begin with the provisions of paragraph 2, and read, approximately: "Without prejudice to any obligations and rights which may attach to a State with respect to a treaty under Part I of these articles prior to its having become a party, and except as provided in articles 62 and 63, a treaty applies only between the parties".

51. The CHAIRMAN, speaking as a member of the Commission, said that it might be preferable not to refer, in the commentary on article 61, to the origin of the principle stated, unless it was absolutely essential. He himself did not think that the principle was a typical consequence of State sovereignty. Its origin lay rather in the very nature of the contractual relationship; that was why it had been applied in all systems of municipal law long before it had been applied in international law. It should not be forgotten that, even in municipal law, if rights or obligations for others were sometimes deemed to derive from an agreement, it was always by virtue of a law. The consent or agreement in itself was only the source of rights and obligations for the parties to the agreement.

52. With regard to the deletion proposed by Mr. de Luna in paragraph 1 (a) it was not certain that the modification of a right was always equivalent to imposing an obligation; for example, a State might enjoy a right of a certain scope and the purpose of the treaty might be to maintain that right in being, but to reduce its scope.

53. Mr. YASSEEN said the rule that treaty obligations could not be asserted against third States was certainly a consequence of State sovereignty. It was possible to regard that rule as a general principle within the meaning of article 36 of the Statute of the Court. It was indeed generally recognized, but it could be regarded as a rule of international law taken from the international order itself — as a consequence following from the principle of State sovereignty and confirmed by custom. As the Chairman had suggested, however, it might perhaps be preferable not to discuss the juridical basis of the rule.

54. Mr. ELIAS said that the principle laid down in article 61 would be regarded as generally recognized and there was no need to dwell on the origin of the rule or to state whether it derived from the law of contract in municipal systems or from the sovereignty of States. The principle was a corollary of the broader principle that only the parties were bound by a treaty.

55. With regard to drafting, he suggested that the exceptions should be brought together in paragraph 2,

⁹ P.C.I.J., 1926, Series A, No. 7.

leaving paragraph 1 to state the rule. The more neutral word "affect" should be substituted for the word "modify" in sub-paragraph (a),

56. Mr. ROSENNE said that article 61 was acceptable, but the content of paragraph 2 could be relegated to the commentary. The qualification at the beginning of paragraph 1, if re-worded to read "Except as provided for in these articles", would cover all the exceptions. He hoped it would not be thought necessary to go into theoretical considerations concerning the very difficult problem of the precise legal status of final clauses.

57. There was perhaps some degree of overlapping between the latter part of sub-paragraph (a) and sub-paragraph (b), but that was a matter which could be dealt with by the Drafting Committee.

58. The Commission was unlikely to reach agreement on the theoretical basis of the rule, but it should be stressed in the commentary that the maxim *pacta tertiis nec nocent nec prosunt* was an autonomous and independent principle of international law, without drawing any analogies with the law of contract.

59. Mr. CASTRÉN said he was prepared to accept the rule laid down in article 61. But as the maxim *pacta tertiis nec nocent nec prosunt* was also subject to exceptions in international law, it seemed necessary to mention some of those exceptions in the body of the article. But even the title of the article suggested that it stated an absolute rule; he therefore suggested adding the word "normally" before the word "create".

60. The reference to articles 62 and 63 in paragraph 1 was not sufficient; it might be well also to mention articles 59 and 64, or, as Mr. Rosenne had proposed, to make a general reference. In addition, it might be advisable to refer in the commentary to the United Nations Charter, several provisions of which, being of very general scope, applied to all States, even those which were not Members of the United Nations. It was generally acknowledged that, strictly speaking, those provisions did not bind non-Member States, but in practice those States could not entirely ignore the principles which the United Nations was endeavouring to uphold. Perhaps State succession could also be mentioned in the commentary.

61. Mr. de LUNA said it was only for the sake of elegance that he had suggested deleting the last phrase in paragraph 1 (a). Rights could be modified either by being restricted or by being enlarged. Restricting a right was equivalent to imposing an obligation, and enlarging a right was equivalent to conferring a right. Accordingly, the idea expressed by the phrase in question was already embodied, partly in sub-paragraph (a) itself and partly in sub-paragraph (b). To overcome that purely drafting difficulty, it might be best to combine sub-paragraphs (a) and (b) of paragraph 1.

62. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Castrén that some reference should be made in the commentary at least to article 2, paragraph 6, of the United Nations Charter, which was an example

of a treaty provision extending to States that had not been among the original parties to the instrument.

63. The latter part of paragraph 1 (a) of the article under discussion, reading: "nor modify in any way their legal rights" should be dropped, as should the whole of paragraph 2, the purport of which would be clear from the context of the articles.

64. In order that the article should enunciate first and foremost the fundamental principle, he proposed that it be re-drafted to read: "A treaty does not impose any legal obligations or confer any legal rights upon States not parties to the treaty, except as provided for in the following articles".

65. Mr. BRIGGS said he agreed that the principle stated in the article was correct. No attempt should be made to discuss its legal basis.

66. Mr. BARTOŠ shared the view that the rule that treaty obligations could not be asserted against third States should be based on the principle of State sovereignty. But it was recognized that the two principles *res inter alios acta* and *pacta tertiis nec nocent nec prosunt* were general principles constituting sources of positive international law which were observed in practice. Hence the position was different when international relations had reached a stage at which there was also some degree of interdependence of States.

67. It was perhaps not sufficient to refer to the provisions of articles 62 and 63 and it would be advisable also to mention the subsequent articles, particularly article 64, which was very closely connected with the subject-matter of article 61. The question was whether it was the treaties, or the customs arising out of them which produced legal effects. Both theories were tenable, but in practice States often invoked treaties which had given rise to customary rules, and for practical reasons were inclined to consider the customary rule identical with what the treaty or treaties provided. During the Nuremberg trials, for example, reference had been made to conventions of a humanitarian nature which had created general, in other words customary, rules. Moreover, a treaty establishing the status of a territory might confer rights on a certain State; for example, if a State was recognized by a treaty which might be said to have the force of a source of general law, taking the form of a collective declaration. He would revert to the situation of the beneficiary under the treaty when the Commission took up articles 62 and 63; he considered that the legal status of the beneficiary should be settled more precisely. Generally speaking, he accepted the rule stated in article 61, though he had reservations regarding the form of the article.

68. Mr. TUNKIN said that article 61 set out in very clear language a principle he was prepared to accept; he was opposed to any proposals which might give rise to misunderstandings. He did not consider it necessary to refer to the provisions of article 62 and 63 as a whole, since special situations called for special rules.

69. The obligations referred to in paragraph 2 did not derive from the treaty, but from situations which

arose while the treaty was being framed. That was a different question and, for the sake of greater clarity, it would be better to delete the paragraph as Mr. Rosenne had suggested.

70. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that article 61 seemed generally acceptable and he would have no objection to its being re-drafted more or less on the lines suggested by Mr. Jiménez de Aréchaga.

71. The only divergence of opinion seemed to have arisen over the word "modify", and he agreed with Mr. de Luna that, even without the words "nor modify in any way their legal rights", sub-paragraphs (a) and (b) would be sufficient. He had incorporated that phrase in order to stress a particular element which had often come up in practice — in the *Island of Palmas* arbitration,¹⁰ for example — but he had been conscious that it was, strictly speaking, superfluous. The words could be omitted without affecting the substance of the rule.

72. He had no strong feelings about paragraph 2, which could be dropped. Its purpose had been to serve as a reminder that States might, in a limited sense, acquire certain obligations, even before becoming parties to a treaty.

73. Mr. Elias's suggestion that the word "modify" should be replaced by the word "affect" was not acceptable, because that word was too loose. A treaty did in fact sometimes "affect" the rights of third parties, even when legally it did not "modify" them.

74. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the Latin maxim *pacta tertiis nec nocent nec prosunt* fully expressed all the elements of the rule, since it covered everything that might be to the advantage or disadvantage of third States. But if the intention was to define the scope of the rule by referring to obligations and rights, it would still have to be decided whether the restriction of a right was equivalent to the imposition of an obligation, which might not always be the case. No doubt the Drafting Committee would be able to find a solution.

75. Sir Humphrey WALDOCK, Special Rapporteur, said that if the maxim *pacta tertiis nec nocent nec prosunt* was to be mentioned in the title of the article it should be placed in brackets. Generally speaking, the Commission should exercise restraint in using Latin maxims borrowed from Civil Law.

76. The CHAIRMAN suggested that article 61 be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 12.50 p.m.

734th MEETING

Friday, 29 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167)

(continued)

[Item 3 of the agenda]

ARTICLE 62 (Treaties providing for obligations or rights of third States)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 62 in his third report (A/CN.4/167).
2. Sir Humphrey WALDOCK, Special Rapporteur, said that during the discussion on article 61 it had been pointed out that that article and the two succeeding ones at some points touched on the topic of State succession; in that connexion he wished to draw attention to the statement in paragraph 6 of the introduction to his third report, that "to examine how far successor States may constitute exceptions to the *pacta tertiis nec nocent nec prosunt* rule would be to deal with a major point of principle which is of the very essence of the topic of State succession." It might be desirable to make some further allusion to that point in the commentary on article 61 or 62.
3. Sir Gerald Fitzmaurice, in his fifth report, had devoted twenty-one articles to rules concerning the legal effects of treaties on third States.¹ Some of those rules were covered in other parts of the draft articles adopted by the Commission, but the substance of the remainder had been put into articles 62-64 and he asked members to call attention to anything omitted which they considered it essential to include.
4. Perhaps, in the interests of orderly discussion, the Commission should first deal separately with paragraph 1 of article 62, discussing the question of obligations before tackling the question of rights.
5. As stated in paragraph 1, the principle was that a treaty did not create obligations for third States unless the parties intended it to provide a means of accepting such an obligation, which the third State must accept or tacitly assent to, thus creating a kind of collateral obligation between itself and the parties to the treaty. The language used in paragraph 1 had been carefully chosen so as to avoid any possible implication that there could be any imposition of an obligation. What was involved was an invitation to a third State or States to participate in a provision or set of provisions without becoming a party to the whole treaty.
6. One aspect of the *Free Zones* case² was an illustration of the principle stated in paragraph 1. Article

¹ *Yearbook of the International Law Commission, 1960, Vol. II, pp. 75 et seq.*

² *P.C.I.J.*, 1929, Series A, No. 22; *P.C.I.J.*, 1932, Series A/B, No. 46.

¹⁰ *United Nations Reports of International Arbitral Awards, Vol. II, p. 829.*

35, paragraph 2, of the Charter might be regarded as having relevance to the rule, but he would hesitate to accept the view put forward by Mr. Jiménez de Aréchaga at the previous meeting³ that Article 2, paragraph 6, of the Charter was also an instance of its application. In his own opinion, Article 2, paragraph 6, was somewhat differently conceived and placed an obligation not on third States, but upon Members of the United Nations, requiring them to co-operate in ensuring that third States acted in a particular way. If the Charter obligations affected third States, it was because those obligations were an expression of general rules of international law.

7. The CHAIRMAN suggested that the Commission should first consider the question of *pacta in odium*, dealt with in paragraph 1, and then that of *pacta in favorem*; that order of discussion should be entirely without prejudice to the final form of the article, for in the examples most frequently quoted, including some of those chosen by the Special Rapporteur himself, the acquiescence of the party concerned constituted consent to both rights and obligations.

8. Mr. PESSOU said he had been rather surprised that some speakers at the previous meeting had objected to references to Latin maxims. It seemed to him that that attitude was not scientific, for whether one liked it or not modern international law was the heir to Roman law. Even though most of the maxims formulated by the great Roman jurists applied in municipal law, the rules with which the Commission was trying to cover all the new situations had already been formulated by those Roman thinkers.

9. As to the problem raised in paragraph 1, the principle was, of course, contrary to that developed in the preceding articles. Nevertheless, the way in which the paragraph was drafted might suggest that it covered two different matters. There were several classes of treaty that created obligations for third States; for example, treaties on maritime and river communications or even treaties defining territorial status of frontiers. A second class comprised treaties whose effects were economic — Mr. Bartoš had given the example of the most-favoured-nation clause — or political, as in the case of the Principality of Liechtenstein. A third class binding on third States consisted of treaties which established an objective situation, such as those creating a political status, which could be asserted against States other than the parties to the treaty. He was accordingly rather concerned over the wording of paragraph 1, in which sub-paragraphs (a) and (b) covered two quite different matters.

10. The CHAIRMAN, speaking as a member of the Commission, said that he greatly appreciated Mr. Pessou's tribute to Roman law; the reason why some of the rules devised by Roman jurists were still valid and useful was mainly that, in formulating those rules, they had expressed not only their own thought, but also that of all the peoples with which they were in contact, both in the West and in the East.

11. Mr. BARTOŠ said that from the technical point of view he could only congratulate the Special Rapporteur on the conciseness with which he had presented certain principles and practices followed by the great Powers before the Second World War in concluding treaties creating obligations for third States. For his part, he was convinced that the *pacta tertiis* principle had become obsolete, not only in practice, but also in theory. He doubted whether the Commission should consider the case, even though from the practical point of view vestiges of that procedure for concluding treaties still subsisted.

12. In article 62 he saw a contradiction between the idea expressed in paragraph 1 (b) and the exception provided for in paragraph 3 (a). On the one hand it was laid down that a treaty provision created an obligation for a third State if that State had expressly or impliedly consented to the provision; on the other hand it was provided that the parties to the treaty were free to amend the provision at any time without the consent of the third State if they had not entered into a specific agreement with that State, which was a contradiction.

13. Another point was that even in the case contemplated in paragraph 3, an obligation might be involved, for an obligation could derive not only from a duty, but also from a right. In its judgment in the *Corfu Channel* case,⁴ the International Court of Justice had laid down that a State was obliged to discharge the duties arising from the possession of its rights. From that point of view the provision in paragraph 3 was also a vestige of the past — of the time when the great Powers claimed the right to draw up treaties and later amend them, subjecting small States to the regime thus established. He was opposed to that system from both the legal and the political point of view, but technically he did not see any objection to the text proposed by the Special Rapporteur, which only reflected international practice up to the present, in particular the practice of the great Powers. He thought the Special Rapporteur had stated that practice in the form of a strict, but correct rule.

14. Mr. PAREDES said he would begin with an explanation he thought necessary, which he would give as briefly as possible. He might be mistaken, but he was firmly convinced that the United Nations guaranteed the members of the Commission full freedom of opinion and expression; such a guarantee was even provided by the Commission's own Statute, which called for representation of the different legal systems of the world, in which the elements of fact and law had distinguishing characteristics that created differences in the evaluation of human relations and slightly different legal and political approaches. The representatives of Africa, in the midst of the fight to consolidate their freedom, had special interests to protect; America, in the vigorous march of its civilization, was assailed by other cares; and Europe was nobly defending its glorious tradition. Consequently, each of them had its own particular variants in the legal order, which it wished

³ Para. 62.

⁴ *I.C.J. Reports*, 1949, p. 4.

to support. With regard to his own statements, however, in dealing with any problem in the Commission he had always adopted a purely theoretical approach without referring to concrete cases, so that no desire to criticize or censure certain actions should be ascribed to him. The views he had maintained might appear to show a critical attitude, but that was an inevitable consequence of contrary opinions.

15. The four paragraphs of article 62 of the draft dealt with four exceptions to the rule stated in article 61, namely, that treaties applied only between the parties and did not affect third States. That principle was unanimously recognized as the basis of contractual relations. He proposed to consider the scope and effectiveness of the exceptions provided for in article 62.

16. The contracting parties could impose obligations on States that were not parties under the following conditions: (a) if they intended to do so and (b) if the third State expressly or impliedly consented to the provision in question. When the third State expressly consented, in the free exercise of its powers, there was no objection. But the consent should be express, precise and definite; he could not agree that mere implied consent was valid. It was a very general rule of law that exceptions could not be presumed, but must be expressly stated. It was even worse to use such a vague term as the Spanish word "*implicito*", which meant something that could be presumed to be included or could be deduced from the context or from an attitude.

17. The Commission had bravely defended the full knowledge and consent of the parties as a condition for the validity of an agreement; could it allow others to impose obligations on a State with full capacity, by virtue of a presumed acceptance? The powerful States, the great Powers, would always be able to presume consent, with true or false logic, in order to impose some conduct on the weak. Rather than facilitate such coercion, he was in favour of laying down stricter conditions for binding a third State.

18. The CHAIRMAN, speaking as a member of the Commission, said that the problem under discussion should not be confused with a political problem — that of the traditional struggle of the small States against the great Powers and the position which the great Powers adopted when they drew up a treaty to put an end to a conflict, for example. It was obvious that in such a case the will of the great Powers carried much more weight, both politically and materially, than that of the small States. But from the legal point of view, the small States which had acceded to the Treaty of Versailles, for example, had become parties to that Treaty in just the same way as the great Powers, and their accession had been voluntary; they had been free not to sign the Treaty of Versailles and to conclude a separate treaty — as some of them had in fact done.

19. Article 62 dealt with quite a different problem; the question was whether a treaty concluded between two parties could create an obligation for a third State which would not become a party to the treaty. It seemed that the Special Rapporteur's proposal was in fact intended to respect the freedom of the third State as much as possible, for if the obligation established

by the States parties to the treaty was to apply to the third State, it must be accepted by that State. The obligation existed only if there was agreement between the parties to the treaty and the third State. It would therefore be well to isolate that problem from any political considerations which might confuse the discussion.

20. Mr. BARTOŠ observed that the freedom of small States to give or withhold their consent to be bound by a provision of a treaty to which they were not parties was very often illusory in practice. Even if it was established by a theoretical rule that their consent was necessary, it could be obtained by direct or indirect constraint, in particular by economic pressure, and history offered many examples of such situations. Legal rules always had a political or economic basis, and it would be vain to formulate even rules of international law without taking account of their basis, in other words the historical and sociological facts underlying them.

21. The CHAIRMAN, speaking as a member of the Commission, explained that he had every sympathy with the view put forward by Mr. Bartoš concerning the position in which small States were placed. What he had meant was that the case referred to by Mr. Bartoš was different from that contemplated by the Special Rapporteur in article 62.

22. Sir Humphrey WALDOCK, Special Rapporteur, said that, as Mr. Jiménez de Aréchaga had pointed out at the previous meeting,⁵ there were many safeguards in draft against the kind of practice described by Mr. Bartoš, where a State was compelled to do something under a treaty to which it was not a party. There were also cases of States being forced against their will to do something under treaties to which they had been compelled to be parties; and, of course, there were instances in which principles of law had been violated. But the Commission was concerned with the fundamental techniques of treaty-making and the consequences of the conclusion of treaties.

23. The rule he had attempted to set out in article 62 came closer to the provisions of Article 35, paragraph 2, of the Charter, which conferred a certain right on non-member States of the United Nations, but only on condition of their accepting in advance a very specific obligation — though that, perhaps, fell rather under paragraph 4 of article 62.

24. Paragraph 1 must be so drafted as to make it clear that there could be no question of imposing obligations on third States, but only of their freely consenting to accept them. It dealt with a very real problem, as there were many cases in which States had no particular desire to become parties to a treaty, but found some of its provisions of particular interest.

25. Mr. JIMÉNEZ de ARÉCHAGA said he fully approved of article 62 and admired the way in which the Special Rapporteur had managed to reduce to relatively simple terms a very complex element in the law of treaties.

⁵ Para. 5.

26. Paragraph 1 dealt with a genuinely live issue in the modern world, as there were a number of general multilateral treaties, such as the United Nations Charter and the Peace Treaties concluded after the Second World War, which contained provisions of concern to third States. Possibly paragraph 1, in view of its reference to consent by a third State, was not really an exception to article 61, and perhaps it did not go far enough in covering all the possibilities.

27. One omission from the article and the commentary which might cause surprise in some quarters was that of any reference to the principle laid down in Article 2, paragraph 6, of the United Nations Charter which had now become part of accepted legal doctrine and was regarded as imposing obligations on, or at least modifying the legal rights of, non-member States, in particular by requiring them to refrain from the threat or use of force. Kelsen had gone so far as to assert that all States had, as it were, become passive Members of the United Nations, even though only actual Members could exercise the rights conferred under the Charter.⁶ Mr. Verdross in an important study had said that Article 2, paragraph 6, of the Charter was a revolutionary provision,⁷ while the Danish jurist Ross had argued that the basis of the obligation for non-member States lay in the fact that the rules enunciated in the Charter represented the wish of the great majority of States; his actual words were "... there is nothing strange in the fact that his pretension is regarded as legitimate and is actually able to take binding form. What happens here is not different from what happens in the creation of all customary law. In both cases the legal attitude rests on the fundamental norm for international legislation, that the manifest legal conviction, which is held by the great majority of States, is also binding for the remaining minority".⁸

28. The documents of the San Francisco Conference and the text of the Charter itself substantiated the view that the legitimacy of imposing such an obligation, or of modifying the rights of non-member States, by prohibiting the use of force and creating a duty to settle all international disputes by peaceful means alone, was grounded on the will of the vast majority of the international community, speaking in the name of the principle of indivisibility of peace and thereby establishing a fundamental rule of law for all States. Such an important development could not be passed over in silence.

29. Mr. VERDROSS said that the principle stated in article 62 seemed to him to be correct; the only problem was whether there were any exceptions to it. The question of freedom of will went beyond article 62 and arose in all cases of consent by States; but the problem to be solved in connexion with article 62 was

that of the possibility of implied consent. It was a difficult question, for the word "implied" might be used to cover acceptances which were not real acceptances. There was no denying that there were treaties whose purpose was to bind a third State; the two best known instances were the creation of the Free City of Danzig⁹ and the creation of the Free Territory of Trieste.¹⁰ In both cases the treaty had determined the basis of the constitution of the State. Consequently, it could hardly be said that the States concerned had impliedly accepted the obligation, for to do so they would have had to have a choice between consent and refusal. The Commission should not dwell too long on that point, however, for those were exceptional cases which had only been possible because the territories in which the new States were created had been under the jurisdiction of one of the contracting parties.

30. The point raised by Mr. Jiménez de Aréchaga concerning the United Nations Charter seemed more important. At first sight, it might be said that the obligations deriving from the principle prohibiting resort to force and the obligations to settle all disputes by peaceful means had already existed under the Briand-Kellogg Pact;¹¹ but that Pact prohibited only war, whereas the Charter condemned the use and even the threat of force in all cases except self-defence. In creating a world Organization the Charter had provided that those obligations should also bind non-member States. It was true that Article 2, paragraph 6, of the Charter only imposed direct obligations on Member States. But indirectly it also bound non-members. That was shown by Article 39 under which the Security Council could order measures of constraint against non-members if they violated the fundamental principles of the Charter.

31. Sir Humphrey WALDOCK, Special Rapporteur, said there had been general agreement at the previous session that certain provisions of the Charter were the latest and most authoritative exposition of general principles of international law that were applicable to all States. Nevertheless, he would hesitate to accept the interpretation placed on Article 2, paragraph 6, by Mr. Jiménez de Aréchaga, or to subscribe to the proposition that the Charter, as a treaty, was binding on third States.

32. Mr. YASSEEN said he largely agreed that the principles whose application the United Nations Charter appeared to extend to non-member States were fundamental principles of the international order, which had been embodied in the Charter or had become mandatory as international custom since the foundation of the United Nations.

33. Technically, he had no objection to the rule stated in article 62, paragraph 1. With regard to its drafting, however, he thought that sub-paragraph (a) did not make it sufficiently clear that the obligation only came into being through the consent of the third State and

⁶ Kelsen, H., *The Law of the United Nations*, London, 1950, Stevens, pp. 106-110.

⁷ Académie de droit international, *Recueil des Cours*, 1953, II, Vol. 83, p. 16.

⁸ Ross, A., *Constitution of the United Nations*, Copenhagen, 1950, p. 32.

⁹ Treaty of Versailles, Part III, Section XI.

¹⁰ United Nations *Treaty Series*, Vol. 235, p. 100.

¹¹ League of Nations *Treaty Series*, Vol. XCIV, p. 57.

only from the moment when that consent was given. The parties to a treaty could not create an obligation which was legally binding on a third State; they could only propose an obligation. Moreover, in order to avoid difficulties and misunderstandings, it would be preferable to require express consent in sub-paragraph (b).

34. Mr. AMADO commended the Special Rapporteur for saying in this commentary that the Commission should take State practice as a basis for dealing with the subject, rather than Roman law or analogies with national systems of law. The Commission's task was to codify rules of customary law or rules which were already recognized by the conscience of the nations and were worthy of being codified in order to produce their effects as rules of international law; and it was true that the rule stated in article 61 was one of the bulwarks of the independence and equality of States, as was stated in paragraph (3) of the commentary.

35. However, although article 62 was perfectly clear about the creation of rights for third States, it was much less clear about the creation of obligations which could be asserted against them. The entire article was overshadowed by the ghostly presence of that agreement which the Special Rapporteur called "collateral", whereby quasi-parties to a treaty accepted the obligations which the real parties had written into it. Moreover, as Mr. Yasseen had rightly said, such obligations could only be proposed to the third States. It was noteworthy that in his commentary the Special Rapporteur did not give any example of a treaty which had created obligations for third States; the examples given related only to the creation of rights. Consequently, he found it difficult to accept the provision as drafted.

36. Article 62 was certainly necessary. The will of a State might be manifest, but it might also be veiled or even entirely mute, as was suggested by the word "impliedly". The article could be improved by some amendments and redrafting in more concise terms. On the other hand, the Commission should indicate what kind of treaty could create obligations for third States, and it should make some reference to the United Nations Charter.

37. Mr. de LUNA said that he would go even further than Mr. Amado; the reason why the Special Rapporteur had not given any example of a *pactum in obligandum tertii* was that there were no treaties of that kind. He did not know of any treaty which had created real obligations for a third State without its will being taken into account. Even the Treaty of Versailles was not really a treaty of that kind, for although the Central Powers had been bound to comply with certain of its provisions, it was not by virtue of the Treaty itself, but by virtue of the peace treaties which they had signed subsequently and individually. No doubt there were treaties whose effects were harmful to third States, but it could not be said that they created obligations for third States. Treaties which created obligations for the nationals of third States, such as extradition treaties, were a different matter.

38. The Special Rapporteur emphasized in paragraph (3) of his commentary that the consent of the third

State was always necessary if it was to be bound by a provision in a treaty to which it was not a party; that condition was laid down in paragraph 1 (b) of the article. But then, if the third State consented, it either had acceded to the treaty or a new treaty had been concluded, and it was to that new treaty that the Special Rapporteur was alluding when he spoke of a "collateral agreement". That was the heart of the matter. If the third State consented, it ceased to be a third State, and the real basis of its obligation was not the first treaty, but its subsequent consent. Consequently, the penultimate sentence in paragraph (3) of the commentary was open to question.

39. There was another important problem to which Mr. Bartoš had referred: that of revocability, which arose in regard to obligations as well as to rights. If he was right in thinking that the obligation of a third State derived not from the initial treaty, but from the "collateral agreement", then the obligation was not revocable; the question of revocability arose in connexion with the rules concerning the termination of treaties and was linked with the rule on the unilateral denunciation of an agreement or treaty.

40. He did not think the Commission need concern itself with Article 2, paragraph 6, of the Charter in connexion with article 62 of its draft. The Charter was an exceptional case, and the provision in question was not really related to article 62.

41. The substance of paragraph 1 was correct. It would be better to delete the words "or impliedly", however, since the consent must be express. Moreover, that provision should not appear under the title given to article 62, for it did not really deal with treaties "creating" obligations for third States.

42. Sir Humphrey WALDOCK, Special Rapporteur, said that the title of article 62 in the French text — "Traité *créant* des obligations, etc." — might give rise to misunderstanding, because it did not faithfully render the meaning of the phrase "treaties *providing for* obligations". It had never been his intention to suggest that a treaty in itself might *create* obligations for third States.

43. Mr. LACHS said he had been glad to read the Special Rapporteur's statement in the commentary that while pertinent analogies undoubtedly existed in national systems of contract law, the Commission should base its conclusions on State practice and the jurisprudence of international tribunals. Personally, he would go even further and say that the subject of article 62 constituted a special phenomenon of international relations.

44. The Commission should clearly state the principle that international conferences and negotiations leading up to the preparation of international instruments should include all States interested or concerned. If that principle were fully implemented, the need for stipulations in favour of third parties would be avoided. Under present conditions, however, for purely subjective reasons based on the will of the negotiating parties, an interested party might not be invited to attend the discussions leading up to a treaty, even if the treaty

actually concerned it. Instances could be given from recent history, of negotiating States wishing to confront an interested State with a *fait accompli* and to impose the provisions of a treaty upon it. It would therefore be a progressive development of international law, to which reference should be made in the commentary, to require that the State or States concerned should be consulted prior to the formulation of any provision which would place an obligation upon them. Should consent be given by the State or States concerned, the obligation thus accepted would not rest on a "collateral agreement", but on the original instrument.

45. The provisions of paragraph 1 made it clear that the third State must give its consent. But the use of the term "impliedly" in sub-paragraph (a) raised the question whether silence could be construed as consent. In the light of the award by Judge Huber in the *Island of Palmas* case,¹² the answer to that question must be in the negative. In support of that view, he could quote from Polish practice the case of *Feldman v. the Polish Treasury*, of 1921, relating to the Berne Convention of 1890, and the ruling by the Permanent Court of International Justice on the applicability of the Barcelona Convention of 20 April 1921 relating to the Regime of Navigable Waterways of International Concern,¹³ to which Poland was not a party.

46. The cases envisaged in paragraph 1 constituted an exception to a general rule. But that exception was itself subject to exceptions. In the first place, objective conditions and circumstances could create a situation in which the consent of the State concerned could not, and even need not, be sought. The interests of international peace and security could require certain measures against an aggressor State in order to prevent aggression or the violation of vital rights of peace-loving States. That result could be achieved by imposing certain obligations upon a State guilty of aggressive war and by drawing up principles to safeguard peace in the future. At the end of the Second World War, for instance, certain measures had been imposed upon the aggressor States and their consent had not been required.

47. Another example was provided by certain provisions of the United Nations Charter, in particular, Article 2, paragraph 6, and Article 35, paragraph 2. There was, however, a difference between those two provisions: Article 2, paragraph 6, dealt with a substantive matter and related to the principles of the Charter, which should be regarded as reflecting international law binding all States, whereas Article 35, paragraph 2, dealt with the machinery of the Charter, that was to say procedural matters. That was why Article 35 gave non-Member States a choice: if they did not agree to be bound by the obligations specified, they could not have access to the Security Council. The provisions of Article 2, paragraph 6, on the other hand, gave non-Member States no choice, and it would be appropriate

to mention that the case contemplated in that paragraph was an exception to the provisions of Article 62.

48. He suggested that the reference to implied consent should be deleted from paragraph 1; that provision should be made for exceptional cases in which the consent of the third State could be dispensed with; and that the commentary should mention the desirability of all States concerned participating in the negotiation of a treaty.

49. Mr. CASTRÉN, referring to paragraph 1, said it was difficult to presume that a State could be bound by a provision of a treaty made by other States, and it would therefore be wiser to require the third State's express consent. If the Commission considered that implied consent was sufficient, it should emphasize, at least in the commentary, that the consent must be so clearly implied that there could be no doubt as to the State's intention.

50. Mr. TUNKIN said he doubted whether the case envisaged in article 62, paragraph 1, really constituted an exception to the rule *pacta tertiis nec nocent nec prosunt*. It was a case of extending the sphere of application of a treaty to a State which was not a party.

51. The basis of all rules of international law — whether conventional or customary — was the agreement of States. Hence it was not strictly correct to say that obligations of a State could have their origin in a treaty to which it was not a party. A treaty as such was never a source of obligations for a third party; the agreement of that party was essential.

52. The problem which arose was that of determining, in each particular case, whether the agreement of the third party existed. The Special Rapporteur had very properly specified the two essential conditions: first, that there should be an offer to the third State to accept the obligations, and second, that the third State should give its consent. That consent could be given by means of a more or less formal agreement, and on that point, he shared the misgivings of previous speakers with regard to the term "impliedly". He suggested the words "expressly or impliedly" should be deleted; the question whether consent had been given would then be a matter of interpretation in each particular case.

53. He agreed with Mr. Lachs that certain treaties could be binding upon third States. For instance, the agreements regarding Germany made by the Allied Powers at the end of the Second World War were undoubtedly binding on the two successor States now existing in Germany. The basis of that obligation was State responsibility: the treaties relating to Germany were binding because of the international responsibility of Germany for waging aggressive war. Those treaties had been imposed as a sanction against aggression.

54. There had, of course, been cases, in which the States participating in the conclusion of a treaty had not invited certain other States to the negotiations, but had imposed the treaty on them. On that aspect of the question he shared Mr. Bartoš's views; it was a point that should be mentioned in the commentary.

¹² United Nations *Reports of International Arbitral Awards*, Vol. II, pp. 866-871.

¹³ *P.C.I.J.*, 1929, Series A, No. 23, Judgment No. 16, pp. 18 *et seq.*

55. With regard to Article 2, paragraph 6, of the Charter, it was clear that it did not impose any obligations on third States. It was based on the assumption that the principles of the Charter had already been binding on all States before the Charter had been concluded, as principles of general international law, and that all States were required to act in accordance with those principles "so far as may be necessary for the maintenance of international peace and security". What the Charter did was to impose on States Members of the United Nations the obligation to take action when a non-Member State acted in a manner contrary to the principles of the Charter.

56. Mr. BRIGGS said he found paragraph 1 acceptable, except for the term "impliedly"; he supported Mr. Tunkin's suggestion that the words "expressly or impliedly" be deleted.

57. It had been pointed out by Mr. Jiménez de Aréchaga that article 62 was not in a real sense an exception, because it made provision for the element of consent. The draft articles dealt with consent to be bound by a treaty and article 62 envisaged a situation in which a State accepted the obligations arising from certain provisions of a treaty without actually becoming a party to the treaty. In order to allay some of the misgivings expressed and to stress appropriately the need for the consent of the third State, he suggested that the order of the contents of sub-paragraphs (a) and (b) be reversed. The present order was logical, but perhaps a departure from logic would make it possible to lay greater emphasis on the element of consent. Paragraph 1 could then be redrafted to read, approximately:

"A State which is not itself a contracting party to a treaty is bound by a provision of that treaty if it has consented to any such provision, when the parties to the treaty intended that the provision in question should be the means of creating a legal obligation binding upon that particular State or a class of States to which it belongs."

58. Mr. REUTER said that in paragraph 1 of article 62, as in several other articles in the draft, a genuine attempt had been made to base the obligations of States solely on their own will. In the course of the discussion, members had inevitably found it necessary to draw attention to exceptions to that principle. Reference had been made, for instance, to the obligations imposed on a State which had been brought into existence by treaty; that was a special problem which would have to be considered later. Mr. Tunkin had referred to the major peace treaties concluded by a group of Powers representing the whole international community; whether such treaties were regarded as being based on the concept of responsibility or on that of a sanction, the essential point was that they entailed recognition of the existence of some kind of *de facto* international government.

59. Article 2, paragraph 6, of the Charter, might well refer to previously existing rules, but it nevertheless conferred rights on an Organization which had not existed previously and thus constituted an excep-

tion to the principle on which article 62 was based. Other speakers had mentioned the general principles of international law as a further exception, because they were claimed to have greater force than treaties. Although he shared that view, he must remind the Commission that, in paragraph (4) of the commentary on article 37, adopted at the previous session,¹⁴ it had recognized that it was possible to establish new rules of *jus cogens*.

60. In the definitions included in Part I of the draft, adopted at its fourteenth session, the Commission had specified that it was concerned only with treaties and agreements in written form.¹⁵ The question therefore arose whether, in article 62, the Commission intended to include manifestations of will which did not constitute agreements because they were not in written form. The word "agreement" was used in paragraph 3 (a); should it be deduced from that that the rule in paragraph 1 would apply when there was no "agreement"? Like Mr. Tunkin, he thought it would be better to use some such expression as "formal or informal consent", for consent could be informal and still be perfectly explicit.

61. The CHAIRMAN said that, although the Commission had indeed decided to confine its study to agreements in written form, it had not thereby denied the existence of other forms of agreement. In the articles adopted at its last two sessions, it had several times provided that consent could be given in other than written form; for instance, in article 19, paragraph 1, it had stipulated that acceptance of a reservation might be "expressed or implied".¹⁶ The Commission recognized that consent could take several forms and considered that the essential point was that it should be genuine.

62. Speaking as a member of the Commission, he said that he could agree to the deletion of the words "expressly or impliedly" in paragraph 1; the question whether a State had given its consent would then be a matter of interpretation, as Mr. Tunkin had observed. But if the Commission retained only the word "expressly", it would be denying forms of consent which were perfectly genuine and acceptable. For example, if the neutralization of a third State was proposed in a treaty and that State established its neutrality by a national law, it clearly gave its consent, even if that consent was not expressed in an official reply to the parties to the treaty.

63. His view was that paragraph 1 referred to cases in which two States concluded a treaty in which they proposed to an already existing third State that it accept an obligation; if the third State consented, the effect would be that a separate agreement came into being. But it was possible to envisage a case in which the obligations provided for were connected with the establishment of a new State. That State could not

¹⁴ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 12.

¹⁵ *Yearbook of the International Law Commission, 1962, Vol. II*, p. 161.

¹⁶ *Ibid.*, p. 176.

give its consent because it did not yet exist. Did the Special Rapporteur consider that case to be within the scope of article 62?

64. Sir Humphrey WALDOCK, Special Rapporteur, replied that such cases would probably fall under article 63, but he must reserve his position on that point, since he did not know in what form article 63 would emerge from the Commission's discussion, if indeed it survived as an article distinct from article 62.

65. Mr. ELIAS said that paragraph 1 would be acceptable to him with a few amendments.

66. Some confusion appeared to have arisen both with regard to the requirement of consent in sub-paragraph (b) and, possibly, to the formulation of sub-paragraph (a), partly because paragraph 1 had failed to draw a distinction between general multilateral treaties and other treaties. The commentary should contain some reference to such general multilateral treaties as the United Nations Charter itself, which constituted exceptions to the rule that the third State's consent was necessary.

67. Article 2, paragraph 6, of the Charter specified two obligations; the first was the obligation of Member States to ensure that non-Member States abided by the principles of the Charter, and the second was the obligation of non-Member States not to endanger peace.

68. Bilateral treaties, and multilateral treaties that were not general in character, could not impose upon a third State obligations which that State did not wish to accept. The problem could be reduced to determining whether consent had been genuinely given by the third State. That was a delicate matter, and the Commission should consider the suggestion that all interested States should be invited to participate in the negotiations leading up to the treaty, so that the third State's consent could be given in the treaty itself.

69. In paragraph 1 (a), the expression "a class of States to which it belongs" could give rise to difficulty; the commentary did not contain any explanation or give any authority for that expression.

70. He suggested that paragraph 1 be redrafted to read:

"A State is bound by a provision of a treaty to which it is not a party if the treaty expresses the parties' intention to create a legal obligation binding upon that State and if the latter has consented to the provision in question."

The meeting rose at 12.55 p.m.

735th MEETING

Monday, 1 June 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Welcome to Mr. Ruda

1. The CHAIRMAN welcomed Mr. Ruda, who was attending the Commission's deliberations for the first time, after being elected to replace Mr. Padilla Nervo.
2. Mr. RUDA thanked the Commission for the honour it had done Argentina and the South American continent by electing him a member.

Law of Treaties

(A/CN.4/167)

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 62 (Treaties providing for obligations or rights of third States) (continued)

3. The CHAIRMAN invited the Commission to continue consideration of article 62 in the Special Rapporteur's third report (A/CN.4/167).

4. Mr. PAL said he would confine himself to the obligation contemplated in paragraph 1, which spoke of a third State being bound, under certain circumstances, by a provision of a treaty to which it was not a party. His remarks would not apply to third party obligations arising out of the situation contemplated in paragraph 4. If paragraph 1 was to be retained, he agreed with Mr. Verdross that the words "or impliedly" should be dropped. He could not agree with Mr. Tunkin that the consent of the third State should not be qualified at all, because the requirement that it must be expressly given went some way towards minimizing the mischievous propensity of the proposed provision. Since one of the law's most vigorous impulses was to be definite, he urged that the requirement of express consent should be retained.

5. In spite of what had been said by other members, he still doubted whether it was at all advisable to introduce a principle of such dubious value in international life. Specific legal norms were the instruments of the conscience of the community seeking to subdue potentially anarchical forces and interests to a tolerable harmony. He could not find anything in international community life that gave occasion for apprehending any tension or disturbance of equilibria on that count which would justify introducing such a new principle. It could not be claimed to be progressive. Neither usage nor practice warranted its being treated as a customary rule. Moreover, a norm of that kind would

operate as an impenetrable blind closing out all perception of the circumstances of a case.

6. Admittedly, certain types of multilateral treaty might impose standards of conduct on third States, as in the case of Article 2, paragraph 6, of the United Nations Charter, but such obligations were not created by Member States as parties to a treaty: they resulted from a generally accepted principle of international law being incorporated in the Charter and thus by their nature were unlike the kind of obligation contemplated in article 62. The principle laid down in article 2, paragraph 6, of the Charter could not be relied on to justify the rule proposed. It would be a wrong projection of that principle if, as in the proposed article, any two States could impose obligations on a third State, even to the limited extent contemplated in the article. Article 62 was not in any way limited in scope to multilateral treaties or to a situation in which the obligation could be said to be of the same character as that imposed by article 2 of the Charter. Even bilateral treaties such as those modifying territorial boundaries, effecting the unification of States or incorporating a State into the political system of another State or group of States, might create situations which third States would be compelled to reckon with; those too might eventually lead to some kind of obligation coming into existence, but again, not of the kind covered by article 62. The special position of newly independent States mentioned by some speakers would not justify the inclusion of the proposed rule.

7. One serious objection to the rule was that it might open the way to interference in the affairs of third States. States invited to participate in drawing up a multilateral treaty, but which were not represented at the Conference, or for some reason failed to sign the treaty or avoided signing it, could participate later, through accession, acceptance or approval, under the provisions already adopted by the Commission. If they were unable to take such action, that was no reason for enabling other States to do so on their behalf without being asked. It was true that international treaties taken together created a complex system of interdependence between, perhaps, all the States of the international community; but that was a matter outside the framework of article 62.

8. He agreed that the requirement of express consent would render the provision fairly innocuous. But that was not the pertinent consideration. The question was whether there was any real demand for that novel principle in the existing circumstances of international life. The rule, with all its qualifying limitations, would still not breathe any healthy new life into the international legal order. He was unable to accept paragraph 1 and thought that for its acceptance some sort of willing suspension of disbelief would be needed.

9. Mr. TABIBI said that, although the fundamental rule was that a treaty could neither impose obligations nor confer rights on third States, exceptions had occurred in practice. They were, of course, becoming rarer because the trend towards more general participation in multilateral treaties was gaining momentum; more and more States were taking a direct part in the con-

clusion of treaties and defending their own interests. He accordingly suggested that paragraph 1 (b) be amended to read:

“(b) that State has expressly consented to the provision of the treaty and was kept fully informed during its negotiation and conclusion.”

10. A provision allowing implied consent was not acceptable, for the reasons he had given during the discussion on reservations at the fourteenth session.¹

11. The analogy with Article 2, paragraph 6, of the Charter was not relevant, because that provision was concerned with the maintenance of peace and security, which would benefit the whole international community and not merely one group of States. The same argument held good for the provisions contained in Articles 32 and 35 of the Charter, which were also applicable to non-Member States.

12. In considering article 62, the Commission must take into account the primary rule of international law that the parties to a treaty were not entitled either to impose an obligation on, or to modify the legal rights of, a third State, since that would be violating its independence and sovereignty. There had certainly been instances of that practice in the past, notably by European countries in the conclusion of treaties between themselves which affected third States without their consent. Examples were the agreements between the United Kingdom and Czarist Russia establishing the frontiers of Afghanistan, and the arrangements by the United Kingdom Government in 1840 transferring a large section of Afghan territory to the Punjab.

13. If the provision in paragraph 1 was not to violate the principle of the equality of States, it was essential to ensure that the third State was informed of the content of the treaty being drawn up, as had been the case with Article 435 of the Treaty of Versailles, the text of which had been submitted to Switzerland. Another essential requirement was that consent to the obligation must be given expressly.

14. Sir Humphrey WALDOCK, Special Rapporteur, said that there was probably no great disagreement between himself and Mr. Tabibi on paragraph 1. Some of the difficulties to which it had given rise might be due to the fact that it had been drafted in the form of an exception to the rule *pacta tertiis nec nocent nec prosunt*. That had seemed a convenient method, but as he had explained in the commentary, he did not regard the provision as a real exception to the rule, because there could be no question of the treaty itself imposing an obligation on third States. There were cases, though they were not common, of a treaty being instrumental in establishing a relationship between the parties and a third State or States, but no obligation came into existence for the latter until consent had been clearly manifested. The *Free Zones* case² was a good example because, although Switzerland might have

¹ *Yearbook of the International Law Commission*, 1962, Vol. I, p. 144.

² *P.C.I.J.*, 1929, Series A, No. 22; *P.C.I.J.*, 1932, Series A/B, No. 46.

been regarded in a sense as being in an inferior position to the Great Powers which were drawing up the Treaty of Versailles, nothing had been imposed on it. Indeed, its assent to certain arrangements had only been given subject to various conditions, as a result of which France had not been able to win its case before the Permanent Court of International Justice.

15. What in fact happened in the situation which article 62 was intended to cover was that a collateral agreement came into existence as the result of the acceptance by a third State or States of certain obligations provided for in the treaty.

16. Mr. EL-ERIAN said that if the subject-matter of article 62 was to be placed in its right context, it must be dissociated from obsolete analogies and practice. As the Special Rapporteur had said in paragraph 1 of his commentary, caution seemed necessary in applying to treaties principles taken from national systems of contract law. Undeniably there was a historic relationship between private and international law; the founding fathers of the latter had relied to a considerable extent on the former in framing certain rules and concepts — those pertaining to sovereignty and the territory of States, for example — and during the formative period the authorities had drawn many analogies between private law and international law. But during the second half of the nineteenth century a new development had begun to appear: international legislation which, along with international custom, had helped to create an independent science of international law — independent not only as to methodology, but also as to its subjects and subject-matter. One of the special features of international law was that its subjects were at the same time law-makers.

17. On the question of analogy, the Special Rapporteur had pertinently pointed out in paragraph (1) of his commentary on article 61 that in international law the justification for the rule *pacta tertiis nec nocent nec prosunt* did not rest simply on a general concept of the law of contract, but on the sovereignty and independence of States, and that treaties had special characteristics which distinguished them in important respects from civil law agreements.

18. With regard to the need to dissociate article 62 from obsolete practices and view it in the context of modern international life, it seemed that instances of States not participating in the conclusion of treaties affecting them would become much rarer; with the principle of equality established and the disappearance of guardianship by some States over others, whether to their advantage or their detriment, the rule in the article must be regarded as an exception to the normal and regular procedures of treaty-making.

19. Some reference had been made to differing interpretations of the United Nations Charter, but that was an issue which should be left aside; the Commission ought not to enter into the philosophical realm of the basis of the legal force of certain rules of customary law. Article 62 should be viewed as a provision extending the application of a treaty with the free consent of a third State, for as the Special Rapporteur had

pointed out in his commentary, the requirement of that consent was one of the bulwarks of the independence and equality of States. The Chairman had rightly emphasized that consent must be real. If, for drafting reasons, it proved difficult to qualify the reference to consent in paragraph 3, the nature of the consent required should be mentioned in the commentary.

20. He shared the doubts expressed with regard to the precise meaning of the expression “class of States” and suggested that some examples should be included in the commentary to make its meaning clear.

21. He supported Mr. Elias’s suggestion that sub-paragraphs (a) and (b) of paragraph 1 should be combined.³

22. Mr. ROSENNE said that the provision proposed in paragraph 1 caused him no serious difficulties. The Special Rapporteur’s introductory remarks had confirmed that there was no question of an obligation being imposed and that the free consent of the third State must be given in appropriate form. The validity and duration of that consent would be governed by the provisions already approved by the Commission, more especially in Part II of the draft. That being so, paragraph 1 of article 62 did not really constitute, in the proper sense of the term, an exception to the major statement of principle in article 61. There would be some advantage in framing the provision in rather more permissive form, for example, by modifying the opening words to read “A state would become bound” and by making it clear that it would be bound *vis-à-vis* the original parties. The words “is bound” by themselves were not free from ambiguity and might give rise to misunderstanding.

23. The meaning of consent was clear and it would probably be better to omit the qualification of its being given expressly or impliedly.

24. He agreed with Mr. Lachs that all interested States should, as a matter of principle, be given the opportunity of participating in negotiations on matters of interest to them, but even if that desirable state of affairs were achieved, a provision of the kind set out in paragraph 1 would still be needed because, without wishing to become parties to an instrument, States might nonetheless wish to assume certain obligations in regard to it.

25. As to the scope of the article, it would normally apply to the ordinary bilateral or multilateral treaty, but there might be some difficulty in determining its bearing on three particular classes of treaty. First, general multilateral treaties in the sense defined by the Commission; second, the constituent instruments of international organizations, in particular the United Nations Charter; and third, treaties providing for the devolution of international agreements in the event of new States coming into being — examples of the latter class could be found in the Secretariat’s memorandum on succession of States (A/CN.4/150).

26. With regard to the second class, he was not convinced that the constituent instruments of international

³ Previous meeting, para. 70.

organizations, and more particularly the United Nations Charter, were necessarily treaties from the standpoint of the general law of treaties; with special reference to the Charter, he considered that particular provisions of that instrument should not be singled out for mention lest that prejudice the interpretation or application of the Charter as a whole. Since the same might apply to the Covenant of the League of Nations, he had some misgivings about the prominence given to the *Pablo Najera* arbitration⁴ in paragraph (5) of the commentary on article 61.

27. As to the third class of treaties he had mentioned, perhaps the general reservation concerning State succession in the introduction to the Special Rapporteur's third report⁵ would not suffice and some specific mention of that topic would be needed in the commentary.

28. As the Commission had decided to drop the reference to article 62 in article 55, it was important to state in the commentary on article 62 that the rule *pacta sunt servanda* applied to third States coming within the scope of the provision in article 62, paragraph 1.

29. He reserved his position on the non-applicability of paragraphs 3 and 4 of article 62 to the obligations of third States. Of course, the decision to discuss obligations separately from rights had been dictated by the requirements of systematic debate, but they were not always clearly distinguished in practice and it was therefore essential that the formulation adopted in article 62 should not preclude third party stipulations of an interlocking character.

30. One point which had been omitted from the commentary and ought perhaps to be mentioned was dealt with by the previous Special Rapporteur, Sir Gerald Fitzmaurice, in articles 6 and 7 of his fifth report,⁶ namely, that in the event of the third State not taking advantage of the rights or obligations conferred upon it, the rights *inter se* of the principal parties remained as provided by the terms of the treaty.

31. It should also be stressed that if a third State consented to accept obligations, it was fully entitled to all the rights specified in the provisions of Part II, more particularly those relating to termination.

32. Mr. TSURUOKA said he had always had the impression that paragraph 1 was less important for practical purposes than it was for the balance of the article. In the first place, actual cases to which the provision would apply were rather rare, and they would be still rarer if treaties providing for objective regimes — which came under article 63 — were excluded from the scope of the paragraph. Secondly, as the Special Rapporteur had explained, the paragraph should be interpreted as referring to a special case of the circumstances contemplated in article 61, rather than as an exception to the rule stated in that article. If, for

example, it was said that a third State was bound by an obligation deriving from a treaty concluded between States A and B to which it was not a party, it was not bound by virtue of the provisions of the treaty, but by virtue of its freely given consent. That being so, the source of the obligation was always consent, whether it was given in the form of an international commitment — the normal case of the operation of a treaty — or in the form of a unilateral declaration which could be recognized in international law — perhaps a rather exceptional case, but one which should not cause any difficulty. He hesitated to propose the deletion of paragraph 1, however, as it could serve as an introduction and thus help to systematize the articles on the effects of treaties as a whole. All that was needed was a very simple formulation bringing out more clearly that the situation was a rather rare one, which came within the general case dealt with in article 61.

33. Some members of the Commission had raised the question of the formulation of rules of *jus cogens* in a general multilateral treaty. That was a very delicate question, and some rather difficult situations would have to be taken into account. For instance, a conference of 110 countries might be convened to prepare a draft treaty establishing a new rule of *jus cogens*, the treaty to come into force on being ratified by at least twenty-five States. Once that condition had been fulfilled, the treaty would come into force, and with it the new rule of *jus cogens*; but there would still be some 85 countries which had not ratified the treaty and it would not be known whether they would eventually do so. That was a problem which the Commission might consider later when it reverted to article 37 on second reading.

34. He agreed with those members who thought that the words "or impliedly" in paragraph 1 should be deleted; they were of no practical value, since the obligation of the third State derived from its consent and was not an immediate effect of the treaty concluded between the other two States. Moreover, they might create uncertainty and thus be a cause of disputes as to the consent of the third State.

35. Mr. BARTOŠ said he had already expressed this opinion, which was that all such questions should be settled in accordance with the fundamental principles of the United Nations Charter, namely, the sovereign equality and independence of States, which required that the free consent of the third State should be expressed in every case. He was inclined to take a less rigid position, however, having regard to the principle of the interdependence of States, which had become a real factor in international relations.

36. With regard to the point raised by Mr. Yasseen,⁷ he was prepared to accept the text proposed by the Special Rapporteur if it was intended to refer to a form of open contract. As to the deletion of the words "or impliedly", he was inclined to agree with Mr. Pal that it would further reduce the possibility of clearly establishing the consent of the third State.

⁴ United Nations Reports of International Arbitral Awards, Vol. V, p. 466.

⁵ Para. 6.

⁶ Yearbook of the International Law Commission, 1960, Vol. II, p. 77.

⁷ Previous meeting, para. 33.

37. His main object in speaking was to explain his position regarding two new ideas which had been put forward during the debate. As to the first — the obligations created for new States coming into being — he was not sure that contractual obligations could be imposed on new States in the treaty granting them independence. If States were entitled to independence, they should be granted it without any such conditions. It was another matter, of course, if a rule of *jus cogens* was involved, for in that event the new members of the international community would have to submit to the rules already accepted by the community. But that question was not covered by paragraph 1, and a separate rule should be drafted on it, so that the Commission could study means of legally binding new States at the time when they were created by a treaty.

38. With regard to the Commission's idea that general multilateral treaties could introduce new rules of *jus cogens* into international law, he inclined to the view that States were interdependent, not absolutely independent in that respect. He recognized that law-making treaties could exist if they were ratified by virtually the whole of the international community, and that it was even possible to impose certain obligations or confer certain rights on third States; but paragraph 1, as it stood, did not cover the case of a rule of *jus cogens* which States must respect and by which they were not even called upon to give their consent. That was an entirely different matter from the case contemplated in paragraph 1, and it should not be confused with the subject-matter of article 62.

39. He would give his views later on the question of newly created States, which he thought should be dealt with in a separate article, since it was more closely related to State succession than to the law of treaties. As to the question of *jus cogens* rules, it would be better to amend the articles proposed by the Special Rapporteur than those on the validity of treaties drafted and adopted at the previous session, but in any case those two questions were not adequately dealt with in article 62.

40. The CHAIRMAN, speaking as a member of the Commission, agreed that the two questions mentioned by Mr. Bartoš were not dealt with in article 62. But with regard to the problem of new States, a clear distinction should be drawn between the case of a treaty concluded between an already existing country and a country coming into being — the normal case of a treaty between two parties, with which the Commission was not concerned at that point — and the case in which the creation of a new State was provided for in a treaty concluded between two other States which agreed, for example, to surrender part of their respective territories in order to create the new independent State, as might occur in the settlement of some former dispute between them. The special feature of that case was that the third State, for which rights and obligations were being established, had not yet come into existence when the treaty was being negotiated. That situation, as the Special Rapporteur had observed, was related to the case contemplated in article 63. The Commission would decide whether it should be dealt

with in article 63 or whether a special rule should be drafted on it as Mr. Bartoš had suggested.

41. The Commission seemed to be paying rather too much attention to rules of *jus cogens*. It should not be thought that every general multilateral treaty created rules of *jus cogens* from which the parties to a bilateral or even a multilateral treaty could not derogate. Besides, at its previous session the Commission had stated that a rule of *jus cogens* was a rule of general international law.⁸ Such a rule might appear in a treaty, but the treaty itself was not its source, even though it might help to define the rule more clearly. The force of the rule was due to its generality. He therefore agreed with Mr. Bartoš that the Commission need not concern itself with that issue in connexion with article 62.

42. Sir Humphrey WALDOCK, Special Rapporteur, said he had already dealt with two important points raised during the discussion: first, the principle that there should be no imposition of any obligation on the third State, and second, the question whether article 62 constituted an exception to the rule *pacta tertiis nec nocent nec prosunt*.

43. He now wished to comment on the point raised by Mr. Lachs, that all States interested in the subject-matter of a treaty should, in principle, be consulted. It would be generally agreed that such consultation was the normal practice, but he doubted whether any specific reference to the matter should be included in article 62 itself, as there could be some doubt as to the stage at which consultation should take place. The question of consultation was specially relevant to such matters as the revision of treaties and he was considering it in connexion with the articles on revision which he would submit to the Commission in due course.

44. He agreed that the reference to implied consent in paragraph 1 (b) need not be retained; and he would prefer to drop the words "expressly or impliedly" altogether. The provision would then state the firm principle that the consent of the third State was required; it would be explained in the commentary that the consent must be genuine. He confessed that he had been somewhat surprised at the anxiety expressed by some members concerning implied consent. The difficulty in practice generally was that States attempted to avoid compliance with the terms of treaties to which they had given their consent. It was decidedly unusual for any difficulties to arise because of an attempt to hold a State bound by a provision in a treaty to which it was not a party and to which it had not given its consent.

45. The problem of a treaty imposed upon an aggressor State had also been raised. The question arose whether such a treaty should be dealt with as an exception to the *pacta tertiis* rule. In any event the problem of the aggressor State might arise in other connexions and it might be preferable to reserve it for separate consideration.

⁸ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, pp. 11-12.*

46. Reference had been made to the distinction between general multilateral treaties and other treaties. It was very difficult to define general multilateral treaties — the so-called “law-making treaties”; indeed, the Commission’s attempts in that direction had met with criticism from governments, and the subject seemed to be connected with article 64, rather than article 62. In any case, the problem seemed more theoretical than practical, since it was unlikely that the parties to a general multilateral treaty would resort to devices of the kind envisaged in article 62.

47. Another problem which was more appropriate to article 64 than article 62 was that of rules of *jus cogens*. There were certainly cases in which a treaty constituted the primary source of such a rule; the nuclear test ban, for example, was fast acquiring *jus cogens* force. But such cases appeared to be cases of a customary rule whose development had its genesis in a particular treaty.

48. The other points raised could be dealt with by the Drafting Committee, assuming that members as a whole agreed that the draft articles should include a provision along the lines of article 62, paragraph 1, although it dealt with a situation which might not arise very frequently. The majority of cases of *stipulation pour autrui* concerned the acceptance of a right, rather than an obligation, and were covered by paragraphs 2, 3 and 4. There were instances of obligations for a third party, however, and one example was to be found in the *Free Zones* case. It was therefore appropriate to include paragraph 1, on the understanding that it would be subject to the safeguards laid down in the articles dealing with such matters as coercion and nullity, to which Mr. Rosenne and Mr. Jiménez de Aréchaga had referred.

49. Reference had also been made during the discussion to the rather complex problem of the creation of a new State and to the obligations that might be imposed on that State by treaty or by a multilateral act — for example a General Assembly resolution — setting up the new State. The matter was a very important one, because, questions such as those of minorities had been covered in such treaties or acts. However, it seemed hardly possible to deal with that problem in article 62, unless the new State were to be regarded as a third State within the meaning of that article. The provisions of article 62 would be inadequate if the obligations imposed on the new State were incorporated in its constitution and were not afterwards assented to by it in some way. The subject fell more within the scope of article 63.

50. The CHAIRMAN, speaking as a member of the Commission, said that the question of new States was indeed an important one which the Commission could not neglect and which was not entirely covered by the provisions of article 62. For example, if several States decided to establish an independent city having neutral status, could that city, once it was established, refuse to accept the rights and obligations entailed by neutrality on the ground that it had not consented to that status? That was a different situation from the one provided for in article 62, and it seemed that it would

be dangerous, and contrary to international practice, to ask for the consent of the new State subsequently.

51. Mr. AMADO observed that the discussion had broadened considerably since he had first spoken on article 62. He had already rejected the idea that there was any relationship between the United Nations Charter — in particular, Article 2 — and the case dealt with in article 62.

52. With regard to the expression “expressly or impliedly”, he had described implied acceptance by the third State as “mute consent”, as compared with the express and real will of the States which were actually parties to the treaty. He had been rather surprised at the expression “collateral agreement”, used by the Special Rapporteur in his commentary on article 62. As Mr. Tunkin had pointed out, if the third State had given its consent, that was a declaration of its will, and it was unnecessary to say “expressly or impliedly”. The expression “collateral agreement” did not satisfactorily define the form of acceptance by the third State. Was it to be supposed that a third State, whether large or small, or a new State, allowed its fate to depend on the good will of the parties and gave a kind of tacit consent? If the collateral agreement was in the nature of a treaty, it must be assumed that there were two treaties, one subordinate to the other. He therefore considered that the question of the form of acceptance by the third State was not satisfactorily settled in the text proposed.

53. Mr. de LUNA endorsed Mr. Amado’s comments. If there was a collateral agreement, there was no longer any third State, and the obligation derived not from the first treaty, but from the second, or from the declaration by which the State had given its consent. The principle of paragraph 1 was correct, but the Commission would be creating confusion if it stated the rule there.

54. He doubted whether the legal existence of a new State could rest on a treaty in the conclusion of which that State had not been able to participate because it did not yet exist. The new State came into existence by virtue not of the treaty, but of the principle of effectiveness, according to which a power that was able to maintain the order it had established must be regarded as the legitimate authority of a people settled in a particular territory. That order was valid by virtue of a rule of international law different from the rule engendered by the treaty. It was valid for the territory in which it was effective, and once it had begun to be effective in the international community it could be expected to be so in the future.

55. The Commission could leave aside the rather different case of a treaty whereby States which had previously been direct subjects of international law, became members of a federal State. But it could consider the case of a treaty establishing a free city, as the Treaty of Versailles had established the Free City of Danzig. Supposing that in such a case the treaty, which had even outlined the new State’s constitution, had not dealt with its capacity to conclude treaties; what would be the legal position if the new State refused to fulfil

the obligations laid down in the treaty because it had not been able to approve them constitutionally? He doubted whether there was any rule of international law which would oblige the new State, once it possessed a constitutional procedure for manifesting its will, to assume the obligations its founders had wished to impose on it.

56. Mr. YASSEEN said that Mr. Amado's remarks prompted him to raise the question of the form the third State's consent should take. A collateral agreement was not a treaty, because an agreement could be in unwritten form. Instead of "collateral" or "additional" agreement, he would prefer to use the expression "complementary agreement", in order to make it clear that the first treaty was only the beginning and that the obligation did not exist until the complementary agreement had been made. For the sake of certainty in international transactions, it would be advisable for article 62 to specify the form in which the consent of the third State must be given.

57. Sir Humphrey WALDOCK, Special Rapporteur, said that where rights were stipulated in favour of a third party, the problem of consent did not present itself in the same light; the consent became manifest as soon as the third party exercised or claimed the right in question. The problem of consent arose very clearly when an obligation was being created for a third party. In the *Free Zones* case, an attempt had been made to cover the question of Switzerland's consent to the abrogation of the *Free Zones* by incorporating a statement of it in the relevant article of the Treaty of Versailles.⁹ Undoubtedly, in most cases the consent of the third State would be embodied in some diplomatic document. He wondered what form of consent Mr. Yasseen had in mind.

58. Mr. YASSEEN replied that for the time being he had in mind only a written note to the governments concerned. An oral declaration was not enough; it might be withdrawn, and that would give rise to controversy. In the case contemplated in paragraph 1, the State which was presumed to have accepted the obligation was in the position of defendant, whereas in the case of a *stipulation pour autrui* the State presumed to have accepted a right was in the position of plaintiff. The third State could argue that the mere fact of claiming the right was equivalent to an acceptance. It would be advisable to lay down different rules for the two cases, which were not identical.

59. Mr. LACHS said he noted that the Special Rapporteur had agreed to take account of his suggestion that some reference should be made to the need for consultation of all interested parties in the negotiation of a treaty. One solution of the problem, but by no means the only one, would be to incorporate the consent of the third State in the treaty itself. There would then be no need for a supplementary or collateral agreement.

60. The problem of the status of an aggressor State certainly ought to be mentioned in article 62, since it

was indirectly connected with the subject-matter of the article.

61. Mr. TUNKIN said he thought paragraph 1 could now be safely referred to the Drafting Committee, which could very well deal with the problem of the form of consent of the third State, though personally he doubted whether it was necessary to go into too much detail on that point in article 62.

62. A paragraph should be included in the article specifying that its provisions did not apply to peace treaties imposed on aggressor States; the Commentary would explain that the problem of the aggressor State would be dealt with under the topic of State responsibility. The Commission would thus avoid creating the impression that the provisions of article 62 were so general that, even in the case of State responsibility arising from aggression, a different principle could not be applied.

63. The CHAIRMAN, speaking as a member of the Commission, said he was prepared to agree that the Drafting Committee should consider the question of the form in which the third State must give its consent. He pointed out, however, that it was solely for reasons of convenience that the Commission was discussing paragraphs 1 and 2 of article 62 separately; in reality, the rights and obligations of the third State were often stipulated together, and the Commission would be creating difficulties if it laid down different procedures for them.

64. As to the problem referred to by Mr. Lachs and Mr. Tunkin, he did not see how the Commission could deal with it in article 62. A treaty imposed on an aggressor State was a treaty concluded with that State; it was not a third State. No doubt the consent of the aggressor State was given under pressure, and possibly the terms of the treaty had been negotiated in advance by the other parties; but the fact remained that the treaty had been concluded with the aggressor State. State responsibility had been mentioned in that connexion; but that was a different question, and the Commission would be wrong to prejudge it, even in the commentary.

65. Mr. TUNKIN said that he had been referring to the agreements concluded by the Allied Powers during the Second World War. Germany had not been a party to those agreements, and yet the agreements had concerned and had been applicable to Germany; they had not been peace treaties. In his view, cases of that kind should be mentioned, at least in the commentary.

66. The CHAIRMAN, speaking as a member of the Commission, said he thought that in those agreements the parties had decided among themselves what treatment to apply to Germany, but that the agreements imposed no legal obligation on Germany.

67. Sir Humphrey WALDOCK, Special Rapporteur, said that in general the position was as described by the Chairman; the matter was covered by article 36¹⁰

⁹ Article 435.

¹⁰ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 10.*

which provided for the nullity of any treaty "procured by the threat or use of force in violation of the principles of the Charter of the United Nations". A treaty imposed upon an aggressor State would not constitute such a violation. There had, of course, been cases in which an aggressor had been asked to recognize the validity of certain acts performed by the States which had overcome the aggression, but the matter was usually covered by a clause in the treaty of peace.

68. The case of Germany was a special one because no treaty of peace had been signed.

69. Mr. BRIGGS said that the Commission was ready to refer paragraph 1 to the Drafting Committee, but a formal decision on that point could be postponed until it had dealt with paragraphs 2, 3 and 4.

70. Mr. LACHS said he regretted to find himself in disagreement with the Chairman. He had not been referring to a peace treaty imposed upon an aggressor, but to an instrument to which an aggressor State had not been invited to become a party for some reason. Other examples than the recent case of Germany could be cited. Article 62 would not be complete without some reference to the exceptional rule that applied in cases of lawlessness or aggression.

71. Mr. REUTER said that the Commission was discussing the law of treaties, not custom or *jus cogens*. *Jus cogens* was a very serious matter, and he could not regard as a rule of *jus cogens* one from which States had reserved the right to derogate for political reasons.

72. Mr. JIMÉNEZ de ARÉCHAGA said that although the Commission had concluded its discussion on the provisions of paragraph 1, two new problems had been raised, that of new States, and that of aggressor States. Those problems seemed to be more closely connected with article 63 than with article 62. He therefore suggested that the Commission should consider its discussion on paragraph 1 concluded, and agree to take up the two problems he had mentioned when it came to discuss article 63 or later.

73. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted that suggestion.

It was so agreed.

The meeting rose at 5.50 p.m.

736th MEETING

Tuesday, 2 June 1964, at 10 a.m.

Chairman : Mr. Roberto AGO

Law of Treaties

(A/CN.4/167)

(continued)

[Item 3 of the agenda]

ARTICLE 62 (Treaties providing for obligations or rights of third States) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 62 in the Special Rapporteur's third report (A/CN.4/167).

Paragraph 2

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the subject of rights created in favour of third States, which was dealt with in paragraph 2, was complicated and controversial. The leading case on the subject was the *Free Zones* case,¹ but it was not easy to discern the precise implications of the opinion delivered by the Permanent Court. He had explained in the commentary in some detail the considerations that had led him to the conclusion, expressed in paragraph 2, that a treaty might of its own force create a right in favour of a third State, which that State might or might not take up. There was, of course, no question of the right being imposed. His view was supported by the previous special rapporteurs on the law of treaties and by Mr. Jiménez de Aréchaga in his article in the *American Journal of International Law* (1956), to which reference was made in the commentary, though certain other authorities, including McNair and Rousseau, were not of the same opinion. Their interpretation of the *Free Zones* case, however, was one to which he could not subscribe.

3. If the view were taken that a treaty could establish only a means of creating a right, but not a right itself without some form of specific acceptance on the part of the third State, that would mean that the right arose not from the treaty, but from a further collateral agreement between the original parties and the third State. In that event, if there were any question of revision or termination of the treaty, the ordinary rules would apply and the consent of the third State would be needed. But if the treaty were regarded as having established an actual right in favour of the other State, it could be argued that the original parties, as the unilateral creators of the right, were free to take such action as they wished in regard to revision or termination, without reference to the third State. That was, perhaps, the crucial point of difference between the two views.

¹ *P.C.I.J.*, 1929, Series A, No. 22 ; *P.C.I.J.*, 1932, Series A/B, No. 46.

4. There was a real link and perhaps some overlapping between articles 62 and 63 and no doubt members might wish to reserve their final positions until the Commission had expressed its opinion on the subject of objective regimes.

5. During the discussion on paragraph 1, Mr. Elias had criticized the use of the word "class", which also appeared in paragraph 2. It was a normal term in legal usage as far as the English language was concerned, but could be replaced by either "group" or "category"; the purpose was simply to denote cases in which beneficiary States were indicated by some general description. So far as paragraph 1 was concerned there was little likelihood of there being many instances in which obligations were designed to come into existence for a class of third States. But in the case of rights the likelihood was much greater; he need only mention the examples of the Mandate in the *South-West Africa* case,² the Trusteeship Agreement in the *Northern Cameroons* case³ and the reparations clauses of peace treaties, which not infrequently extended to allied countries that were not at war with a particular belligerent, and consequently were not parties to its peace treaty.

6. Mr. VERDROSS said that, under paragraph 2, the creation of a right for a third State under a treaty concluded between two other States was subject to the fulfilment of two conditions. The first condition was positive—that the parties to the treaty must have intended to create such a right; the second condition was negative—that the right must not have been rejected, either expressly or impliedly, by the third State.

7. A distinction should be made between the existence of a right created in favour of a third State by a treaty concluded between two other States, and the exercise by the third State of the right thus conferred on it. The right existed from the moment when the treaty came into force, but its exercise depended on the will of the third State. Thus paragraph 2(b) did not seem to be in accordance with the true legal position, even if it was construed to mean that the third State could renounce the right conferred upon it by other States; but in that case the sub-paragraph would be unnecessary, for a right could always be renounced.

8. In his view, only one condition was necessary for the creation of a right in favour of a third State: the parties to the treaty must have manifested the will to create the right. The case was quite different from that contemplated in paragraph 1 of the article; although an obligation could not be imposed on a third State, there was no reason why it should not be granted a right, without having expressed either acceptance or rejection.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that in essence he did not dissent from the view expressed by Mr. Verdross, but he wished to explain that, according to paragraph 2, for a State to be entitled

to invoke a right two conditions must be fulfilled: the stipulation creating the right must exist and the State in question must not have renounced it. The paragraph formulated the rule in terms of the conditions necessary for the right to be invoked at any given time.

10. Mr. CASTRÉN said that paragraph 2 confronted the Commission with a very difficult and controversial problem. As could be seen from the commentary, a number of writers, including Rousseau and McNair, maintained that, apart from treaties of an "objective" character, a treaty could not of its own force create an actual right in favour of a third State. On the other hand, the three previous special rapporteurs on the law of treaties, as well as Mr. Jiménez de Aréchaga and other writers, took the opposite view, in which the Special Rapporteur himself concurred.

11. With regard to the Special Rapporteur's reasoning, it did not seem possible to cite in support of his thesis the provisions of certain treaties, most of them recent, or the opinions of certain courts, since they did not constitute a sufficiently clear and general body of practice. The final judgment of the Permanent Court of International Justice in the *Free Zones* case, quoted by the Special Rapporteur in paragraph (15) of his commentary, had not settled either the question whether actual rights could be created in favour of third States without their acceptance or the question of the revocability of a right deriving from a *stipulation pour autrui*. In the article cited by the Special Rapporteur, Mr. Jiménez de Aréchaga had recognized that, although it was possible to create a right in favour of a third State without its consent, that State could not be compelled to exercise the right.

12. With regard to State practice, especially the peace treaties concluded after the Second World War, the Special Rapporteur had examined at some length the Peace Treaty with Finland⁴ and the negotiations conducted by Finland with the United States to obtain compensation for the Finnish owners of ships requisitioned in United States ports during the War. In his (Mr. Castrén's) opinion, the statements and actions of the State Department were at variance with the thesis of the Special Rapporteur, who pointed out in paragraph (19) of the commentary that the State Department had replied that "since the United States was not a party to the treaty of peace with Finland, it had no legal right to benefit therefrom unless it performed some affirmative act indicating acceptance of the benefit." In the end, the question of the Finnish ships had been settled by legislative action, without any final conclusion being reached on the legal effect of stipulations in favour of third parties.

13. Nevertheless, although he did not agree with the Special Rapporteur's interpretation of the case-law and State practice, he accepted, in principle, the new ideas underlying the rules proposed. But a few changes in the text seemed to be needed.

14. Paragraph 2(b) provided that a third State was entitled to invoke a right provided for in a treaty to

² *I.C.J. Reports*, 1950, p. 128.

³ *I.C.J. Reports*, 1963, p. 15.

⁴ *United Nations Treaty Series*, Vol. 48, p. 228.

which it was not a party, on condition that the right had not been rejected in some way or other. For the reasons he had already given, he proposed a different, positive criterion, namely, clear acceptance, whether implied or not, which could be manifested, for example, by the exercise of the right conferred. Such an act of acceptance did not necessarily constitute a collateral agreement between the third State and the parties to the main treaty, so that the parties would not be able to modify or abrogate the right in question — though the right could in fact have been granted subject to unilateral revocation. Again, although acceptance could be express or implied acceptance, what was meant by implied rejection? If it meant that the third State refrained from exercising the right conferred on it, how much time would have to elapse before the right was finally lost? It was difficult to set a time-limit either for rejection or for acceptance.

15. In paragraph 3 (*a*), instead of speaking of a specific agreement between the parties to the treaty and the third State entitled to the right, it would be better to say that the parties to the treaty had declared that the right of the third State was irrevocable, or that they would not exercise their right to amend or revoke the provision in question for a specified or unlimited period. Some writers maintained that such a declaration could be revoked by a fresh treaty concluded between the parties to the first treaty without the consent of the third State, but he found it difficult to accept that view without reservations. If the third State had already exercised its right and in doing so had incurred heavy expenses, for example, it would be unfair to deprive it of its right unilaterally. Provision should therefore be made for that contingency in a sub-paragraph (*c*) to be added to paragraph 3. In any case, if the parties to the treaty amended or annulled it in such circumstances, they would be responsible to the third State and would be required to indemnify it.

16. With regard to the question of treaties intended to have objective effects, referred to in paragraph (20) of the commentary, treaties creating objective regimes which came within the scope of article 63 should be dealt with in a separate article. But if some other class of treaties was referred to, the provisions of article 62 would have to be made applicable to them in order to avoid undue complexity. The Commission would be able to decide that point more easily after discussing article 63.

17. Mr. PAREDES said that the Special Rapporteur had done well to state in separate paragraphs the conditions under which a treaty could create obligations for third States and those under which rights could be conferred on them; but it would have been better to devote separate articles to those two questions.

18. With regard to paragraph 1, he had already expressed his objection to the idea of "implied consent" being binding on third States. Nor did he believe that there was a collateral agreement, for when the third State accepted the consequences of the treaty it had already been concluded, and the act by the third State was much closer to an accession, even if it was not in accordance with the provisions of articles 8, 9 and 13.

19. An obligation could certainly not be imposed on a third State without its express consent, but it would not be satisfactory to delete the words "expressly or impliedly"; only the words "or impliedly" should be deleted, for if the word "expressly" was dropped, the question whether both forms of consent were valid would remain in doubt. It had been said that there were cases of oral agreement in which implied consent must be recognized. His own view was that express consent was always necessary, though it might be given either in writing or orally.

20. The position was different in the case of paragraph 2, since it referred to rights conferred by the contracting parties on third States, which could manifest their will by exercising or not exercising those rights. But the will to accept must be clear; not even rights should be conferred on States against their will.

21. Once a right had been granted or an obligation expressly accepted, the original parties to the treaty should not be able to revoke or modify it by themselves without the consent of the State which had accepted it. A kind of contractual relationship existed between the States making the offer and the State accepting it. It was all the more necessary for the latter to be consulted because its acceptance of the offer might have led to considerable expenditure on preparations for exercising the rights conferred. For example, if two States agreed to grant an outlet to the sea to a landlocked third State, and in order to make use of the promised waterway that State invested large sums in ships, could the right to use the waterway be revoked without consulting it? It must be emphasized, however, that all those considerations applied to the individual interests of peoples, not to the recognized universal interests which were part of the juridical heritage of the world.

22. With regard to paragraph 3, it was important to make a distinction between the rights promised and mere benefits granted. If two or more States entered into an agreement to provide technical assistance or some other form of help to developing countries, those countries should not regard it as irrevocable; the countries providing the assistance were always free to discontinue it.

23. Both the obligations referred to in paragraph 1 and the rights referred to in paragraph 2 constituted exceptions to the rule stated in article 61 that treaties created neither obligations nor rights for third States. So there was no reason to speak of a collateral agreement as their source; what happened was that the third State acceded to the treaty — whether to a part or to the whole of it. Once that accession had taken place, the acceding State had the same rights as the other parties, and the treaty could not be terminated without its consent.

24. Paragraph 4 was acceptable, and its wording showed that there must be an agreement of wills between the parties to the original treaty and those to whom it was subsequently applied, since they were "bound to comply with any conditions laid down in that provision or elsewhere in the treaty for the exercise of the right". The transaction comprised an offer and

an acceptance, which gave it the legal character of a contract.

25. Mr. LACHS said that on the whole he agreed with the Special Rapporteur's approach to the issue of stipulations in favour of third States. It was, of course, important that the Commission should be guided by the trend which had begun with the Treaty of Paris of 1856⁵ — on which Turkey, while not being a party, had relied to claim certain rights — and had continued to the *Free Zones* case and up to the present day. There was no theoretical or practical reason for limiting the freedom of parties to a treaty to include such stipulations if they wished and that, as he saw it, was the existing rule.

26. A telling example of a stipulation in favour of third States, coupled with the establishment of effective machinery for its application, was the most-favoured-nation clauses in the Peace treaties of 1947⁶ which were to apply to all Members of the United Nations, irrespective of whether they were parties to the treaties, for eighteen months after their entry into force. The Conciliation Commissions set up to ensure that the provisions were implemented had included Member States that were not parties. There had also been the decision in 1925 by the United States-German Mixed Commission recognizing certain rights accruing to the United States from the Treaty of Versailles,⁷ to which it had not been a party. For such stipulations to be effective it must be made clear that a right had been created and in whose favour, although, as the Special Rapporteur had rightly concluded, the beneficiary need not be designated by name.

27. He had some difficulty in accepting the wording of paragraph 2(b), because it might leave too much room for the third State to play for time and then reject or accept the right when it was convenient. In law there was already a wide area of uncertainty between acceptance and non-rejection which left a great deal of room for manoeuvre. The wording would need to be reconsidered and he was inclined to agree with Mr. Verdross that the right existed from the moment of its establishment under the treaty, so that the beneficiary third State must, at the first possible opportunity, indicate whether it would avail itself of the right or renounce it. That requirement ought to be plainly laid down in the provision. A presumption of acceptance was admissible in the case of rights, though not in the case of obligations, the structure of the two provisions being entirely different.

28. In practice, events would not necessarily fit into the provisions devised by the Commission, and it might well be that the duties and rights of third States would be interwoven, in which case the criteria applying to obligations must prevail.

⁵ *British and Foreign State Papers*, Vol. XLVI, p. 8.

⁶ *United Nations Treaty Series*, Vol. 41, pp. 78-80, article 29 and p. 204, article 33; Vol. 42, p. 66, article 31; Vol. 49, p. 166, article 82.

⁷ *Mixed Claims Commission, United States and Germany, Administrative Decisions and Opinions*, Washington, 1925, pp. 308 *et seq.*

29. Treaties establishing objective regimes and obligations *erga omnes* should be dealt with separately from article 62, paragraph 2.

30. He would not, at that stage, comment on the question of the revision or termination of treaties providing for obligations or rights of third States, because that was a matter affecting the whole issue.

31. Mr. REUTER thought that the presentation adopted by the Special Rapporteur was too complicated; a simpler and shorter text would be preferable.

32. In considering the problem dealt with in article 62, the essential question to be settled was that of the legal source of the rights of third States. Moreover, that question was suggested by various uncertainties in the wording of article 62, in particular the differences between the French and the English texts. Paragraph 3 of the French text referred to an "*accord*", whereas the English text spoke of a "*specific agreement*", which had different connotations.

33. Could it be said, as the Special Rapporteur had done, that the right of the third State derived from a collateral agreement, which was a true international agreement, or was some other explanation possible? His own view was that article 62, which dealt with the problem as a whole, should keep to the general principles which the Commission had recognized so far, namely, that States were sovereign, but that as sovereign States they could not conclude any agreement binding on a third State. Once that principle was acknowledged, it followed that States could not only bind themselves with respect to one another, but could also offer an option to a third State; otherwise accession clauses in bilateral treaties would not be possible.

34. But there was a third possibility: two States that laid down a rule might take steps which later, through the establishment of a custom, created rights in favour of third States. That was a case which the Commission should leave aside, but which should be borne in mind.

35. In the case contemplated in article 62, it was clear that the third State could accept the offer made by the States parties to the treaty in any way whatever, provided that its acceptance was real. Paragraphs 1 and 2 should therefore be symmetrical, for a third State was committed, even by a right conferred on it, and there was no more justification for binding that State by a right offered to it than by an obligation.

36. If a collateral agreement existed, it could be made subject to conditions or limits from the legal point of view. According to circumstances, the parties to the main treaty, who were also parties to the collateral agreement, could make the term of that agreement depend on the continuance in force of the main treaty or of one of its clauses. The principle raised no difficulty, but very complicated situations could arise in practice. The case contemplated was not that of accession. Certain new States had thought fit to send to the Secretary-General of the United Nations a declaration that they considered themselves bound by various general treaties which contained accession clauses. They had not become parties to the treaties by virtue of that

declaration, but there was a special legal relationship between them and the parties to the treaties. The Secretary-General had therefore been asked to notify those new States that they were entitled to accede to the treaties in question and thus to acquire more extensive rights by becoming parties. That was a special case with which the Commission was not concerned at present.

37. Once the general principles underlying article 62 were accepted, it should be possible to draft a much simpler article, for all that was needed was to restate certain consequences of general principles relating to the law of treaties. That would make it possible to dispense with some elements of the present wording that might suggest, for example, that the article covered the question of the effects of the most-favoured-nation clause, which was not the Special Rapporteur's intention.

38. The CHAIRMAN, speaking as a member of the Commission, said that most of the comments he had intended to make had been made by Mr. Reuter. The Commission could not evade the fundamental theoretical question: what was the source of the right? Everything else depended on the answer to that question.

39. It had been said that the right derived from the treaty itself, but he did not see how the Commission could content itself with such a reply. A treaty concluded between two States could confer rights and impose obligations on those two States, but it could not create rights or obligations for a third State. For the third State, a right could derive only from a general rule of customary law or from an agreement to which it was a party. He strongly doubted whether there was any general rule of customary law by which some States, by agreement among themselves, could confer a right on a third State. Such a rule would seem contrary to the spirit of international law, according to which the action of a group of States could not modify the legal position of a third State without its consent. No matter whether an obligation or a right was concerned, the consent of the third State was always necessary.

40. The only difference between the cases contemplated in paragraphs 1 and 2 was that mentioned by Mr. Lachs. If two States agreed to offer a right to a third State—for it seemed certain that the parties to the initial treaty could not confer a right on a third State, but only offer it—there was a presumption that the right would be accepted. No doubt that was why the Special Rapporteur had drafted a rule under which the third State was deemed to have accepted the right so long as it had not rejected it. If, on the other hand, the parties proposed an obligation, the presumption was the contrary, and a clear manifestation of acceptance by the third State was necessary.

41. The most difficult case was probably that in which the parties offered both a right and an obligation. Mr. Lachs had been right in saying that it was then more important to consider what happened in regard to the obligation than what happened in regard to the right.

42. He hoped the Commission would be able to express its views in simple terms. If it recognized that the basis of the third State's right was mutual consent between the parties and the third State, that consent would also be necessary for modifying or terminating the right.

43. Mr. ELIAS said that, unlike paragraph 2(a), paragraphs 2(b) and 3 created difficulties, mainly because of the confusion caused by the use of the word "right". An examination of paragraph 3 and of the views of previous Special Rapporteurs on the law of treaties, who had considered that parties to a treaty conferring rights on a third State could subsequently alter its provisions without seeking the consent of the beneficiary, or even informing it, showed that the right referred to in article 62 was not something that could be enforced in a court of law. Hohfeld had analysed the word "right" and found that it had sixty-four different meanings;⁸ that showed the kind of misunderstanding that could result from misuse of the word. In reality, paragraph 2 was concerned with conferring a benefit in favour of a third State.

44. Despite the arguments put forwards by the Special Rapporteur in the commentary, in which he had cited certain authorities in support of the view that the creation of stipulations in favour of third States was an accepted concept, he (Mr. Elias) had come to the conclusion that the thesis developed by McNair and Rousseau was the sounder one. He also considered that the passage quoted in paragraph (12) of the commentary, from the advisory opinion of the Committee of Jurists in the *Aaland Islands* case, in fact rebutted the Special Rapporteur's contention, by rejecting the possibility of Sweden having any direct rights under the provisions of the Convention of 1856.

45. Paragraphs 2 and 3 would have to be simplified and some time-limit imposed on the third State for acquiescence in the right created on its behalf.

46. Some safeguard would also need to be introduced against the parties to the treaty unilaterally modifying rights in the exercise of which the third State had incurred expenses; otherwise its position could be changed for the worse without its having any say in the matter.

47. Mr. ROSENNE said that, in principle, paragraph 2 was satisfactory. He understood the word "right" as used in that paragraph to mean a right that was legally enforceable by whatever means were available in international law or international relations. The expression "actual right", used in sub-paragraph (a) appeared unusual and it probably originated from the registry of the Permanent Court of International Justice, which had used it as a translation of the words "*véritable droit*", which appeared in the French authentic text of the judgment in the *Free Zones* case. That translation was not altogether appropriate because it was clear that what the Court had meant by "*véritable droit*" was a legally enforceable right.

⁸ Hohfeld, W. N., *Fundamental Legal Conceptions*, Yale University Press, 1923.

48. Like some other speakers, he was not altogether satisfied with the negative formulation of sub-paragraph (b). He would prefer to see the concept of implied rejection replaced by the idea contained in paragraph (1) of the commentary on article 47,⁹ which spoke of "the principle that a party is not permitted to benefit from its own inconsistencies".

49. A number of suggestions had been made for simplifying the wording and for introducing an element of symmetry into paragraphs 1 and 2, but he did not think that complete symmetry was possible; it must be remembered that two States could agree that one of them, and only one of them, would grant a right to a third State.

50. He wished to reserve his position regarding paragraph 3 although he could say that he was in broad agreement with some of the views already expressed by the Chairman.

51. Mr. VERDROSS, referring to a comment by the Chairman, said that there was indeed a customary rule that States could create a right in favour of a third State; that was proved by the generally accepted rule concerning accession clauses. The effect of those clauses was to create, for certain other States or for all other States, a right to become parties to the treaty by a mere declaration; States wishing to avail themselves of that right were not required to accept it in advance.

52. Everything really turned on what was meant by a "right". As he saw it, a right was the faculty conferred by a rule of law to require certain behaviour on the part of another person. It might be possible to overcome the difficulty by replacing the word "right" by "faculty", since no one would deny that two or more States could, by means of an agreement, grant a certain faculty to a third State. The use of that word might also satisfy those members who had a different opinion on the theoretical aspect of the problem.

53. Mr. YASSEEN thought that the crux of the problem was whether the right of the third State derived from the original treaty or from that State's acceptance of the right. The theory of the *stipulation pour autrui* was accepted in the municipal law of most countries to meet needs which had been felt in the internal legal order; it was an exception to the *pacta tertiis* rule. But neither the precedents nor case-law demonstrated convincingly that that theory was part of positive international law, in which, incidentally, it was not necessary. The Commission should not depart from the general principle that agreements could not be invoked against third parties. The method of the collateral or complementary agreement — or whatever it might be called — was sufficient for all the needs of the international order.

54. When a right was said to be created for a third State, it was in fact not an abstract right, but a concrete right, of which a State that was, or could be, determined was the subject. Some speakers had suggested that the word "right" was used to mean an advantage or a

favour; but it was for the third State itself to judge whether the alleged advantage really was an advantage. A cession of territory, for example, might not always be regarded as an advantage. It was necessary to be sure that the third State consented to the proposed change in its legal position.

55. Consequently, he could not accept the idea of paragraph 2, which was based on the theory of the *stipulation pour autrui*. States could not create obligations or advantages for a third State: they could only offer them, and the third State remained free to accept or reject them. The right offered did not come into being until it was accepted by the third State.

56. Mr. TUNKIN said that, while he recognized the usefulness of studying the decisions of international courts, he was rather alarmed at the undue emphasis being placed on the judgments of the International Court of Justice and the Permanent Court of International Justice at the expense of State practice. In fact, an analysis of that practice was essential, because it was States which created the rules of international law; their practice therefore meant more than judicial opinions of the views of prominent internationalists. Of course, he did not accept the view put forward by Kelsen that State practice as such could be taken as international law,¹⁰ since Article 38 of the Statute of the International Court of Justice referred to "practice accepted as law", not merely to practice as such. But more prominence should be given, in the Commission's work, to the study of State practice, which alone would enable it to formulate acceptable rules of international law.

57. Paragraphs 2 and 3 should be examined in the light of the basic principles of international law, the first of which was the equality of States. By virtue of that principle, no State or group of States could create rules of international law binding upon other States. The Commission had already accepted that principle in article 61 and should adopt the same approach in article 62.

58. If a State had a legitimate interest in the subject-matter of a treaty it should be invited to the Conference formulating the treaty or at least be consulted during its formulation; that should be clearly stated in the commentary. But in article 62, the question arose what constituted the real source of the rights and obligations of the "third State". He agreed with those members who considered that the source was the additional or "collateral" agreement to which the third State was a party. As he had already pointed out, strictly speaking it was not correct to speak of a "third State", since no treaty could create rights or obligations for a third State; the rights and obligations derived from the consent of the third State and the agreement entered into with the original parties to the treaty.

59. There had been some discussion on the subject of implied consent. Just as when dealing with obligations (paragraph 1), so too, when dealing with rights (paragraph 2), real consent was necessary. The con-

⁹ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 24.*

¹⁰ Kelsen, H., *Principles of International Law*, New York, 1962, pp. 307 *et seq.*

ferment of a right often carried with it certain consequences, some of which might well not be acceptable to the State on which the right was being conferred. Paragraph 2 should be redrafted to take those points into account.

60. With regard to paragraph 3, he inclined to the view put forward by the Chairman that the consent of the third State was necessary to modify or revoke a right conferred on it. That view, which was shared by several other members of the Commission, was based both on considerations of principle and on practical grounds.

61. Mr. LIU said that the rights dealt with in paragraph 2 often derived from existing circumstances which were acquiesced in, or acknowledged by, the parties to the treaty. In those cases it was not so much a matter of the creation of a right in favour of a third State, as of the acceptance of an obligation in respect of a third State by the parties to the treaty. He found it difficult to accept either the idea that that right had to be expressly accepted before it came into existence, or the idea that the right could be modified or revoked without the consent of the State entitled to it.

62. Mr. AMADO thought Mr. Tunkin had been right in saying that, in the case being considered, there was no third State. There were only States which could enjoy certain advantages provided by the treaty; but even so those advantages must not be like the Trojan horse.

63. He had been the first to express doubts about the "collateral agreement", which was really only a more or less audible murmur of consent. The Commission was now seeking the legal source of the right in question, and was moving towards a formula carefully adapted to a subject that carried within it the seeds of its own destruction.

64. Sir Humphrey WALDOCK, Special Rapporteur, said he did not believe that the question whether the third State possessed an actual right was so important in practice, although he did agree that it might assume importance if the parties contemplated revoking the right.

65. Personally, he had no difficulty in accepting the thesis that a treaty created a right for a third State. There were well-known examples of a number of States agreeing, often in connexion with a peace settlement, on a provision intended to confer a specific benefit upon a third State. In his mind there was no doubt that such an agreement would create an actual right if the parties so intended. The treaty had a quasi-legislative effect. It established a situation in which the third State could at any moment avail itself of the provision and enjoy the benefit which it offered. None of the parties to the treaty could individually refuse to accord the benefit to the third State or revoke the provision. The position of the third State therefore seemed to be that of a beneficiary of a right. The right existed under the treaty and would not disappear until terminated by the States which had created it by common agreement. Thus, unless the benefit provided for in the treaty was rejected by the third State, the right existed under, and was established by, the treaty.

66. Paragraph 3 was inspired by the view expressed in the *Free Zones* case by Judges Altamira and Hurst in their dissenting opinion, to which he had referred in paragraph (16) of the commentary. It allowed the parties to revoke the *stipulation pour autrui* except where it had been created by agreement with the third State or had been intended to be irrevocable. Some members of the Commission considered that it should always be irrevocable once the third State had manifested its acceptance. He had preferred the view of Judges Hurst and Altamira, because it seemed more likely to encourage the creation of rights in favour of third States.

67. Mention had been made of the possibility that the third State might incur considerable expense in preparing to exercise the right conferred upon it; in such a case, it would clearly be unfair for the third State to be placed in a position where the right might be amended or revoked without its consent. But in cases of that type, the parties to the treaty would almost certainly have entered into a specific agreement with the third State, and the case would be covered by the exception stated in paragraph 3(a), which had been formulated in order to cover cases such as that of the *Free Zones*. In that case, Switzerland had succeeded in establishing that there existed a contractual relationship with the other States, even though the real origin of the *Free Zones* was in another instrument of the 1815 peace settlement to which Switzerland had not been a party.

68. Paragraph 3 could, he thought, be reformulated in such a manner as to give satisfaction to the various views which had been expressed, by indicating that, where the third State had accepted the right conferred on it, that right would be irrevocable without its consent. A formulation of that type would avoid placing too much stress on the issue of principle, on which admittedly views were divided. Unlike some members, he held the view that a treaty could create rights for a third party, but disagreement on a matter of principle should not prevent the formulation of a provision which would be satisfactory to all.

69. It had been suggested that more prominence should be given to State practice. As shown by his commentary, he had made every effort to use the information available regarding the State practice. The obstacle was the inadequate publicity, which made it difficult to obtain information on State practice; he would always be grateful if members of the Commission would supply him with any additional information in their possession. He must emphasize, however, that he was quite unable to accept the view that the decisions of international tribunals were not evidence of State practice. Not only were the statements of the contesting States evidence of practice, but the decisions of the tribunals themselves were based on what they regarded as the general practice accepted as law. Moreover, the decisions of tribunals had particular value as being objective appreciations of the practice of States on the points which they were called upon to deal with.

70. The question of the link between rights and obligations had been raised by Mr. Lachs and it was not

always easy to determine in a particular instance which of the two was the uppermost element; in case of doubt, it would be appropriate to place the emphasis on the obligation and to insist on consent being given specifically by the third State. Where the right was the more prominent element, the evidence of consent need not be so clear-cut.

71. He would try to prepare for the Drafting Committee a new text of paragraphs 2 and 3 which would place rights conferred upon third parties more on the basis of agreement, although not such formal agreement as in the case of obligations.

72. Mr. TUNKIN said that his remarks regarding the judgments of the International Court had merely been intended to show that he disagreed with the opinion of the late Sir Hersch Lauterpacht that pronouncements by the International Court of Justice constituted the law.¹¹ Proof that that view was not generally held was provided by the fact that only some forty States had accepted the compulsory jurisdiction of the Court. But even if it were accepted that the decisions of the Court took State practice into account, there was a broad field of practice that had never come to the notice of the Court. In any case, the Commission should pay special attention to recent State practice.

The meeting rose at 12.30 p.m.

737th MEETING

Wednesday, 3 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Later: Mr. Herbert W. BRIGGS

Law of Treaties

(A/CN.4/167)

(continued)

[Item 3 of the agenda]

ARTICLE 62 (Treaties providing for obligations or rights of third States) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 62 in the Special Rapporteur's third report (A/CN.4/167).

2. Mr. JIMÉNEZ de ARÉCHAGA said that several speakers had emphasized the need to establish the source of the right of the third State. In common with Mr. Verdross, Mr. Lachs and the Special Rapporteur, he took the view that the right of the third State

derived directly from the treaty as such and was available to that State as soon as the treaty entered into force. As he understood them, the Chairman, Mr. Reuter, Mr. Yasseen and Mr. Elias took the view that the right of the third State was based on a second or additional agreement entered into between the original parties to the treaty and the third State. Notwithstanding that cleavage of opinion on the theoretical aspect of the problem, he believed that it was possible to draft a rule which would be generally acceptable and would at the same time reflect the practice of States.

3. The rule should incorporate one element on which all were agreed, namely, the principle that the consent of the third State was essential. The third State was the sole judge of whether or not it should exercise the proffered right. No one had suggested that a right could be imposed on a State against its will, for not only would that be contrary to the principle of the equality of sovereign States, but it would not be feasible. No State could be compelled to exercise a right against its will: that would, in fact, constitute the imposition of an obligation and as such would fall under the general rule contained in article 61 and in article 62, paragraph 1. As the Latin maxim had it, *invito beneficium non datur*. That element was clearly brought out in the opening sentence of paragraph 2: "... a State is entitled to invoke a right...". The provision was thus based on the assumption that the favoured State would perform an act of will by invoking or claiming the proffered right.

4. There was also general agreement on a second element, namely, that the consent of the third State need not take the form of a second or collateral agreement, but could be expressed in any form in which the real consent of States was manifested in international practice. What was essential was the existence of real consent, and practice showed that such consent could be revealed by conduct, the commonest form being the very act of claiming or invoking the right. It would be carrying a fiction too far to claim that the exercise of a right by a third State constituted the consent to a second or collateral agreement from which that very right originated; the second agreement could hardly come into being at the same moment as the right was exercised.

5. The Permanent Court of International Justice had held, in the *Free Zones* case, that the acceptance could result from the fact that the provision of the Treaty of Versailles on the Free Zones had been requested by Switzerland before that treaty was concluded.¹ It seemed impossible to contend that consent to a second or collateral agreement could result from a request that a certain provision be included in the first agreement in which the original offer was supposed to have been made. Nor did he believe that a collateral agreement was entered into by the Member States of the United Nations with a non-Member State every time such a non-Member State availed itself of the rights conferred upon it by Article 35 (2) or Article 32 of the Charter,

¹¹ Lauterpacht, H., *The Development of International Law by the International Court of Justice*, London, 1958, pp. 20-22.

¹ P.C.I.J., 1929, Series A, No. 22, pp. 17-18; P.C.I.J., 1932, Series A/B, No. 46, p. 141.

or by Article 35 (2) of the Statute of the International Court of Justice.

6. Paragraph 2 should be redrafted to take into account the two elements on which all members were agreed. It was neither possible nor desirable to attempt to draft it in exactly the same form as paragraph 1, which in fact made provision for a second or supplementary agreement. Sub-paragraph (a) should be worded so as also to cover the case in which a treaty provision created a right for all States, as did the Charter provisions to which he had referred. The opening words of the paragraph, "Subject to paragraph 3", were unnecessary and should be deleted.

7. Mr. Paredes had suggested that the provisions relating to rights and to obligations should be placed in separate articles; he himself would suggest that the four paragraphs of article 62 should form four separate articles.

8. There had been some criticism of the negative formulation of paragraph 2 (b). That formulation was understandable because the provision dealt with a waiver of the power to renounce a right. However, to meet that criticism, he suggested that sub-paragraph (b) should be reworded as a proviso to sub-paragraph (a), to read, approximately: "this right cannot, however, be invoked when the State has previously disclaimed it".

9. He could not support Mr. Lachs's suggestion of a time-limit for disclaiming or acquiescence; no time-limit had been imposed in State practice and there had in fact been cases in which provisions of that kind had benefited States which had not come into existence until long after the treaty had entered into force.

10. Paragraph 3 seemed to him to place undue stress on the right of the original parties to revoke the provision benefiting the third State; he therefore suggested that it be reworded in negative terms to read, approximately:

"The provision in question may not be amended... when

"(a) the parties to the treaty entered into a specific agreement with the latter with regard to the creation of the right; or

"(b) the intention to create an irrevocable right appears from the terms of the treaty..."

11. Paragraph 3 was the acid test of the theory of the offer and the collateral agreement. Its provisions could not be accepted by those who advocated that theory, since no State could be deprived of a contractual right without its consent. In practice, of course, instances of such rights being revoked had been rare. It was difficult to see how it was possible, for example, to revoke the rights granted to third States under the peace settlements of the first and second world wars or under the United Nations Charter. Three examples could be given from State practice, however. In the first two cases, the *Treaty of Prague*² and the *Aaland Islands*,³

² See Roxburgh, R. F., *International Conventions and Third States*, London, 1917, pp. 42-45.

³ League of Nations *Official Journal*, October 1920, Special Supplement No. 3.

it had been accepted that the provision could be revoked without the consent of the beneficiary; but in the third, the *Free Zones* case,⁴ the Court had held that a stipulation in favour of a third party conferred an irrevocable right when, and only when, the contracting parties had clearly had the intention of creating an irrevocable right. However, the Court had stated that the intention of granting an actual right "cannot be lightly presumed", but must be explicit or result from the circumstances. The matter was, as the Court had said "une question d'espèce". That judicial precedent could not be set aside by "lightly presuming" that in all cases the rights conferred could not be revoked or modified. As suggested by the Special Rapporteur in paragraph (23) of his commentary, the matter should be decided in light of the intention of the parties in each specific case.

12. The fact that it was not possible to provide for irrevocability in all cases seemed conclusive proof that the theory of a collateral agreement did not constitute an adequate description of the doctrinal position; it was clear that Articles 32 and 35 (2) of the Charter and Article 35 (2) of the Statute of the International Court could be amended at any time through the established amendment procedures. He could not agree with Mr. Elias that while provisions of that type remained in force they did not confer rights, just because they were liable to be amended without the consent of the beneficiaries. In all those cases, the Charter or Statute provision conferred a legally enforceable right while it remained in force.

13. Mr. ROSENNE said that on the main questions of principle involved in paragraph 3 he agreed with Mr. Jiménez de Aréchaga. The Commission should recognize that there was a fundamental division of opinion among its members with regard to the theoretical and philosophical issues involved. In fact, the Commission was divided over the meaning of such terms as "third party" and "right". In such circumstances, a pragmatic approach was desirable which would not prejudice the doctrinal attitude of any member, and the text to be adopted should be based on State practice.

14. He himself had no strong views on the theoretical issue and thought that a good case could be made for both of the views put forward. In drafting paragraph 2, however, it was essential to remember the importance of a reasonable measure of stability in international relations. Peaceful change was important, but it was undoubtedly true that stability was the primary concern in the law of treaties.

15. The question whether the right or benefit conferred on a third State was revocable or not must depend on the terms of the original agreement, as suggested by the Special Rapporteur in paragraph (23) of his commentary, where he said that "The revocability or otherwise of the stipulation must, it is thought, be essentially a question of the intention of the parties". In that context, "parties" meant parties to the original agreement. There were many arguments in favour of that

⁴ P.C.I.J., 1932, Series A/B, No. 46, pp. 147-148.

rule, but he need mention only one, which was that the right created in favour of a third State could derive from one of the original parties only, and that its subsistence could be a term of the agreement between the two original parties. It was therefore essential to give due weight to the intention of the original parties.

16. Paragraph 3 could be reformulated to incline towards a presumption of irrevocability unless a contrary intention appeared from the terms of the original treaty, the circumstances of its conclusion, or the statements of the parties. If there really did exist a collateral agreement between one or more of the original parties and the third State, it should have priority. Then the case would not really fall within the provisions of article 62; in fact, he saw no need to use the adjective "collateral"; the position would be that an agreement existed which made the law for the parties to it.

17. He could not support the suggestion that a time-limit should be set for the acceptance of the right by the third State, though of course a time-limit could be specified in a particular treaty if the original parties wished it. It would not be practical to lay down a general time-limit in the draft articles and it must be recognized that it was not usual to set such time-limits in treaties.

18. The thought underlying paragraph 2(b) should also find a place in paragraph 3; the third State undoubtedly had the faculty to reject the proffered right, whatever the effect on the original agreement.

19. With regard to the form of consent, it would be better to avoid any rigid formulation. State practice showed that many forms were used, some of which did not even involve direct communication; communication might be through a third party, such as the Secretariat of the United Nations. The essential point was that the consent of the third State, both to obligations and to rights, must be real.

20. As to the drafting of paragraph 3, he was not altogether satisfied with the words "amended or revoked". The verb "to amend" was used in connexion with revision and the verb "to revoke" came very close to the concept of termination. He therefore suggested that, if the idea underlying paragraph 3 were accepted by the Commission, the language should be co-ordinated with that of the provisions on revision and termination. The question of suspension of the operation of the principal agreement would also need to be covered.

21. Paragraph 4 was acceptable in principle. Although there was some justification for the suggestion that the four paragraphs of article 62 should be made into separate articles, it would be difficult to separate rights and obligations in the presentation of the provisions. Separation would have the advantage of presenting the rules in the form of statements of principle; but it might lead to the false assumption that it was always possible to differentiate between rights and obligations. His tentative view was that articles 61 to 64 might form a separate chapter of the draft articles.

22. Mr. PAL said he agreed with the substance of paragraphs 2, 3 and 4. Whatever doubts he might have entertained had been dispelled by the commentary on article 62 and by Mr. Jiménez de Aréchaga's remarks.

23. It had been said that, in the discussion, rights were being confused with benefits. The Special Rapporteur's commentary was free from any such confusion and drew a clear distinction between the conferment of a benefit and the creation of a right; he had discussed the position at length and arrived at the decision that the case to be dealt with in article 62 should be that in which a right was being conferred on the third State. The Special Rapporteur had consulted various authorities including the three previous Special Rapporteurs, had analysed State practice in the matter, which was far from uniform, and had put forward his own view, which he (Mr. Pal) was prepared to accept.

24. He agreed with Mr. Jiménez de Aréchaga regarding the significance of the word "invoke" in paragraph 2. Paragraph (7) of the commentary explained the view that the third State acquired a legal right to invoke directly the provision conferring the benefit, and that that right was not conditional on any specific act of acceptance by the third State, in other words, on any collateral agreement between it and the parties to the treaty. Paragraph (8) of the commentary gave the Special Rapporteur's own view.

25. In discussing the juridical basis of the right of the third State, the Special Rapporteur had reached the conclusion, after searching scrutiny, that it lay in the intention of the original parties, who had the capacity to confer either a mere benefit or an enforceable right. He had not stated that what was conferred upon the third State always constituted a right, but that the original parties to the treaty could confer a right upon a third State if they wished. He had also made it clear that, in his view, the intention of the parties to the treaty was sufficient without the need for an acceptance by the third State, a view in which he (Mr. Pal) concurred. The difficulty seen by some members of the Commission in that regard appeared to originate from the recollection of problems that had arisen in some systems of municipal law, in which it had once been held that the parties to a contract could confer a benefit upon a third party, but not an enforceable right, on the ground that enforcement was confined to the parties to the contract. However, it was now generally recognized in municipal law that the third party could have an enforceable right in certain circumstances.

26. With regard to paragraph 3, he could not agree that the right to revoke could be exercised at any time in all cases. Some adjustment was necessary at least, in view of paragraph 4. He did not believe anyone would accept the idea that if the third State complied with the condition laid down in the treaty, the right still remained revocable solely at the will of the original parties.

27. He supported the drafting suggestions made by Mr. Jiménez de Aréchaga.

28. Mr. de LUNA said that the discussion on article 62 had centred on the question whether a treaty could create obligations and rights for a third State. The members of the Commission were divided on the point, mainly, it seemed, because of the differences in their legal training. Mr. El-Erian had, of course, been right in saying that it was dangerous to carry the analogy between private law and international law too far. Nevertheless, it was noteworthy that article 1119 of the French Civil Code, which had inherited formalist concepts from Roman law, laid down that a person could normally enter into an undertaking or make a stipulation in his own name only for himself — a principle to which it then admitted exceptions — whereas article 328 of the German Civil Code and article 112 of the Swiss Code of obligations laid down that a contract could create a right in favour of a third party direct, without its knowledge or consent. It might therefore be better, as Mr. Rosenne had suggested, for the Commission to leave aside doctrinal questions and agree on the question of fact.

29. He had already explained that he did not believe that a treaty could create obligations for a third State. On the creation of rights he held a different opinion. Obligations and rights were two different things. A right was a subjective faculty, which the subject was free to exercise or not; hence, a right could be created and conferred on a subject without consulting him. A right derived, not from acceptance by a third State, but from the will of the parties, by virtue of the principle *pacta sunt servanda*.

30. The case of treaties which produced effects on a third State even against the will of the parties, merely as a result of international co-operation and the interdependence of States, could be disregarded; the same applied to treaties such as the Treaty of Prague,⁵ which purported to confer certain benefits on third States, but not to create rights.

31. The case to be considered was that in which a subjective right was acquired by a third State through the direct and immediate effect of a treaty. It had been asked whether the third State did not simply accede to the treaty; but the parties to a treaty sometimes wished to confer a certain right on a third State without imposing on it the obligations provided for in the treaty. It had also been asked how a third State, which was absent and unaware of the proceedings could acquire such a right. That was certainly what happened in private law — in testamentary disposition, for example, though it was true that in that case there was a legal norm. In international law the norm was the *pacta sunt servanda* principle, and the right derived from the reciprocal undertaking entered into by the parties to the treaty.

32. There was a difficulty, however, in explaining in that way the provision in paragraph 3(b) concerning the irrevocability of the right. It was necessary to have recourse to the principle of good faith or perhaps to that of estoppel.

33. He supported the suggestion made by Mr. Paredes and Mr. Jiménez de Aréchaga that paragraph 1, dealing with obligations — for which the consent of the third State was required — should be separated from article 62. The rest of the article could be revised by the Drafting Committee.

34. The CHAIRMAN, speaking as a member of the Commission, noted that the discussion had brought opinions a little closer together, at least on the practical level. Members of the Commission recognized, for example, that when the possibility of creating a right was discussed, it was a subjective right that was meant; no one questioned that a treaty could confer benefits on a third State, the problem was whether it could create an actual right for a third State.

35. It was also agreed that the treaty itself, of its own force, could no more confer a right on a third State than impose an obligation on it. The source of the third State's right could only be an agreement between the parties to the treaty and the third State, or a general rule of customary law whereby such a right could be created if it was provided for in a treaty between other parties. In private law, the right of the third party derived from the law, not from the contract. He himself did not believe that practice proved the existence of such a rule in international law. If the existence of such a rule was recognized, however, as it was by Mr. Verdross and Mr. Jiménez de Aréchaga, its logical consequences must also be recognized: the right of the third State existed from the moment when the treaty was concluded, and there was no question of its consent. The third State could waive its right, but it could not object to the right being created.

36. On the other hand, if it was held that the third State's consent was the source of the right, that consent must be required to be given, either expressly — the positive formulation preferred by Mr. Castrén and several other members of the Commission — or impliedly — the negative formulation proposed by the Special Rapporteur, according to which the right was presumed to have been accepted so long as it had not been rejected. Rejection, the negation of consent, was quite different from waiver. If the Commission could reach agreement on that fundamental point, the principal difficulty concerning article 62 would have been overcome.

37. With regard to the consent of the third State, he shared Mr. Tunkin's view that the Commission should not adopt a formalistic approach; the essential was the reality of consent. But the situation could differ widely from one case to another. It might be that the third State had in fact long been claiming the right which the parties to the treaty had agreed to grant it. In that case it could not be said that the parties were really making an offer; it was more like an acceptance on their part, so that it could then be acknowledged that the right existed immediately. Conversely, where the third State had not made any claim, the parties offered it a certain right, which would exist only from the moment when the third State gave its consent. In such a case it might be quite obvious from the

⁵ *British and Foreign State Papers*, Vol. LVI, p. 1050.

circumstances that the third State intended to accept the right, and the formula proposed by the Special Rapporteur would then be satisfactory.

38. But there could be less clear-cut cases, in which the third State had claimed a certain right and the parties agreed to grant it another, for instance, the use of free ports, with freedom of transit, instead of access to the sea. The third State might not be satisfied with what was offered it, and the very idea that its right could come into being without its consent was contrary to the principle of sovereignty. In such a case, and also where the third State was offered both rights and obligations simultaneously, the expression of consent was particularly necessary and its reality must be beyond doubt.

39. Theoretical differences should not prevent the Commission from reaching agreement on paragraph 3. Those who based the existence of the third State's right on a general rule of customary law would conclude that the right existed by virtue of that rule from the moment when the treaty was concluded, and that consequently it could not be revoked by the parties. Those who held — as he did — that the third State's right was based on consent would say that the right was revocable only if it had not yet really come into being. The offer by the parties could be withdrawn so long as the right had not yet been accepted or so long as the attitude of the third State was still uncertain, but as soon as the third State had given its consent the right was irrevocable. Even when the treaty terminated as between the parties, the conclusion must be the same: once the right of the third State existed, whether in virtue of a general rule or as a result of its consent, it could only be revoked with the consent of the third State.

40. Paragraph 4 raised no great difficulties.

41. As to whether the rules on those matters should be assembled in one article or made into several articles, both arrangements had their advantages; but perhaps division into separate articles might make it more difficult to deal with the very important case in which rights and obligations were proposed together.

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

42. Mr. BARTOŠ said he was convinced that even though it started from the old adage that rights and duties — or obligations — were the two sides of the same medal, the Commission should clearly distinguish between them. Paragraph 1 concerned an invitation to a third State to assume an obligation, whereas paragraph 2 dealt with the offer to that State of a right that did not yet exist. The first consideration in linking the two concepts must be that the parties to what had — wrongly, he thought — been called the “main treaty” could neither impose obligations nor confer rights on a third State; they could only agree among themselves to issue an invitation or make an offer to a third State. When they offered a right they reciprocally undertook to grant that right in the future. The source of the right was the link between the so-called main treaty and the expression of the will of the third State — a view which came close to that of Mr. Verdross.

43. The question of accession by the third State arose at that point. According to his theory rights and obligations did not exist in the abstract; they were always linked with their bases, in other words with certain facts and circumstances. Every right must be exercised in a particular context. The so-called main treaty should be regarded not only as a juridical fact for the States bound by the contractual relationship, but also, for third States, as a simple fact, but one which, if they consented, would determine the content and efficacy of the proposed obligation or right. The linking or combining of the so-called main treaty and the will of the third State did not constitute a collateral agreement, but a partial accession of the third State to the relevant provisions of the treaty. Such accession sometimes resulted from acceptance given even before the treaty had been concluded when, for example, the right had been previously claimed by the third State; then, if the terms of the treaty did not satisfy that claim, it became necessary to bring the two wills into agreement subsequently.

44. With regard to the rule proposed in paragraph 2, he thought that the parties created not an actual right, but the faculty, for the beneficiary State, to make use of provisions of the treaty and the possibility of exercising that faculty. In modern international law States were sovereign and could accept or reject what was offered to them.

45. Paragraph 2, and also paragraph 4, which was closely connected with it, raised two theoretical questions. The first was whether the right was really created by the treaty, or whether it had not already existed in the objective international order, the parties merely recognizing its existence and taking advantage of that recognition to determine the conditions for exercising it. There had been several cases in which that problem had arisen: for example, the provisions of the Treaty of Berlin concerning Montenegro's rights in its territorial sea.⁶ The general rule had been that every State had a sovereign right in its territorial sea. That right was a normal attribute of the sovereignty of the coastal State, which must also comply with certain conditions laid down on the subject. The Treaty had given Austria-Hungary maritime police rights, which were an attribute of the coastal State according to the normal rules of positive international law even at that time. It might be asked whether that provision had not in fact limited or denatured the existing right and whether the parties to the Treaty had been entitled to form a right contrary to the international legal order.

46. The second question was whether the parties to a treaty could in fact freely stipulate conditions for the exercise of a right offered to a third State, by restricting that State in the exercise of its right, which it possessed without restriction. In some cases it was to be feared that a right had been usurped under the cloak of benevolent intention. It should be specified that the stipulated conditions must remain within the limits of objective law. States could not by themselves create and use the right.

⁶ *British and Foreign State Papers*, Vol. LXIX, p. 760.

47. With regard to paragraph 2 (b), it might be asked whether the reference was to rejection of the right granted or renunciation of its exercise. If the third State had not yet made use of the right offered to it or had not yet expressed its acceptance, there could be no question of rejecting the right, for it had not yet come into being. As Mr. Verdross had said, only the "faculty" of exercising the right existed.

48. It was very important to settle the question of the period, whether indeterminate or not, within which the third State could decline to avail itself of that faculty, for the creation of such a right had sometimes been used as a device to establish a certain political or legal situation. If the theory of accession, or even partial accession, was accepted, it would be difficult to authorize a third State to reject such a right after accepting it.

49. Paragraph 3 raised the question whether the provision of the so-called main treaty could be amended or revoked without the consent of the third State concerned. He considered that as the legal relationship was created by the consent given to the parties to the so-called main treaty, sometimes even by a collateral agreement when certain conditions had to be specified or when the third State made certain reservations which were accepted by the parties, it was hardly possible to amend or revoke the relevant provision without the consent of that State, since the right had become part of its international heritage. But if there was a clause in the treaty providing for the possibility of revocation or of a precarious situation, the State which had accepted that clause had thereby accepted that possibility.

50. Another question arose when there was a change of circumstances. In that case the *rebus sic stantibus* clause applied and the matter could also be settled by agreement. In that case the revocability did not derive from the treaty, but from a general principle of international law having the force of a general rule on the *rebus sic stantibus* clause, accepted by the Commission at its last session, which recognized that clause as a legal institution.⁷

51. Mr. EL-ERIAN said that article 62 was certainly one of the most complex and important in Part III of the draft and touched on a number of theoretical issues on which the Commission, not surprisingly, was divided. It was important to keep in mind that the article was not to provide a residual rule for the interpretation of old treaties concluded in conditions rather different from those which now prevailed, but a general rule which would be applicable to both past and future treaties.

52. The starting point should not be the principle of a stipulation in favour of another, drawn from private law. As had been held in some of the dissenting opinions in the *Free Zones* case, such stipulations were not admissible in relations between States, because they conflicted with the principle of sovereignty.

53. In his opinion, the basis of the article should be the concept of an offer by the parties and a

collateral agreement between them and the third State or States, which would provide a more solid foundation for the obligation and would take the principle of sovereignty into account. All the necessary guarantees regarding free consent by the third State must also be inserted.

54. He was unable to see the relevance to the present article of the provisions of treaties creating objective regimes, referred to in paragraph 10 of the commentary, because the obligations and rights deriving from such provisions had a different source.

55. The word "right" had given rise to some difficulty, and in the context of paragraph 3 it did not seem to correspond to the idea formulated in paragraph 2. Perhaps the word "benefit" would express the intention more clearly: it was used in a similar context in article 18 of the Harvard research draft,⁸ in article 9 of the Havana Convention of 1928⁹ and in article 9 of the draft of the International Commission of Jurists, adopted in 1927.¹⁰

56. Paragraph 4 dealt with the relationship between a right and its corresponding obligations. But there were also instances of pre-existing rights being recognized in a treaty; for example, the right to the restoration of independence which had been usurped or restricted against the free will of the people and in violation of their inherent sovereign rights, which did not derive from the treaty itself. In such cases the sanctions laid down in article 42, namely, termination as a consequence of breach of a treaty by one of the parties, would not apply.

57. Mr. LACHS said that the modern trend was towards all interested States taking part in the drafting of a treaty, so that the institution of third States was vanishing. It was true that during the epoch of the European law of nations, when a certain group of States had formed as it were an exclusive club, certain instruments had been concluded containing stipulations on behalf of other States, and the potential beneficiaries had been debarred from claiming or enforcing the rights thus conferred, which had remained a dead letter. But that chapter of history was closed and it was now recognized, both in State practice and by authorities on international law, that from the time a third State manifested the intention of availing itself of the right stipulated, that right could be claimed and became enforceable.

58. The reasons why the parties to a treaty might wish to extend rights and obligations under it to third States could be economic or political, and it might seem that in the long run it would serve their own interests to do so, but there was hardly any justification for the view that such rights were in the nature of a gift.

59. The references made during the discussion to treaty provisions relating to the establishment of new States

⁸ *American Journal of International Law*, 1935, Vol. 29, No. 4, Supplement, p. 661.

⁹ Hudson, *International Legislation*, Vol. IV, p. 2381.

¹⁰ *American Journal of International Law*, 1928, Vol. 22, No. 1, Special Supplement, p. 245.

⁷ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 20.

did not seem to be pertinent, because in that case the rights had their source outside the treaty; the treaty could only confirm the fact that a new State was coming into existence.

60. Paragraph 3 would have to be modified, because once the legal relationship had been established between the parties to the treaty and the third State availing itself of the right conferred, that right must become irrevocable except with the consent of the third State.

61. Article 62 must be drafted in such a way as to take account of the progressive development of international law in the direction he had indicated. There should be no difficulty in drafting the provision concerning obligations, as the conditions for their validity were clear and had not given rise to any significant disagreement in the Commission. It should be made plain that the article was concerned with real and not with alleged rights. Provisions declaratory of an existing right which had its source outside the treaty would not come within the scope of the article, and the same applied to limitation of an existing right.

62. Finally, as he had said at the previous meeting, when rights and obligations were closely linked, they must both be subject to the requirement governing obligations.

63. Mr. TSURUOKA said he had followed the discussion on article 62 with great interest, but was not convinced that, from the practical viewpoint, it was really necessary to deal with that question in a set of draft articles on the law of treaties. If the majority of the Commission wished to retain the article, no matter what theory was adopted as a basis for it, the important point was to define clearly the situations which came within the scope of its provisions.

64. As the Special Rapporteur had clearly explained in his commentary, such a situation comprised two elements: the will of the parties, expressed in a treaty, to create a right in favour of a third State, and the acceptance of that right by the third State. Whatever form it took, acceptance was essential if the third State was to be given some legal security. The fact that a treaty contained a provision whereby two States offered a faculty or a right to a third State which was not a party to the treaty was one of the necessary conditions, but it was not enough; it was only with the acceptance of the third State that the situation envisaged was complete. Hence the mere fact that two States had expressed their will in a treaty was not enough to justify revocation or modification of the right or faculty in question by the parties to the treaty without the consent of the third State.

65. He attached some importance to the question of acceptance and he wished to stress that acceptance must be complete. If one of the conditions for the exercise of the right was altered, however, the original situation would no longer obtain, for the third State would have become a party to a new treaty; it would then be the provisions of that treaty which would apply in relations between the former third State and the parties to the original treaty. Paragraph 4 was necessary for the logic of the argument; but in order to avoid injury to the

third State, it should be stated in the commentary that the treaty must be sufficiently well known to the third State, and the stipulations affecting it sufficiently clear, to prevent any unnecessary complications, for instance, in cases of fraud.

66. As the situation contemplated in article 62 seldom arose in real life and as the situations that most nearly approximated to it were dealt with in a different way in the practice of most States, the Commission's aims should be to draft an article consistent with equity and calculated to safeguard the stability of treaties, while at the same time ensuring the effectiveness of the rules it proposed to establish.

67. Mr. YASSEEN observed that some members of the Commission found it difficult to accept the proposition that the actual exercise of a faculty or right could constitute an agreement. It was generally recognized, however, that the will of the third State could be expressed in any form that was not contrary to a rule of law; it followed that the actual exercise of a right offered showed the will to accept the offer and could *ipso facto* constitute the complementary agreement which must exist between the parties to the treaty and the third State.

68. With regard to paragraph 3, which dealt with the revocability of a right granted to a third State, he supported the theory of the complementary or additional agreement and believed that the right could not come into being before there was consent. It followed that the States parties to the treaty could change the situation and withdraw the offer they had made. But what happened after the third State had given its consent? It seemed that the answer to that question was to be found primarily in the main treaty, since it was that treaty which defined the offer made by the parties. Hence, it was quite proper to consult the original treaty to ascertain whether the right accepted could be revoked, even after the third State had given its consent. If the main treaty showed that the offer had been limited and precarious, then the third State could have accepted that offer only and it was therefore revocable even after consent had been given. The third State had no option but to accept that expression of will, for the complementary or collateral agreement was not a negotiated instrument; it was in the nature of a contract of accession, and the third State accepted the offer as defined in the main treaty.

69. Nevertheless, as the Commission was drafting a convention on the law of treaties and its main concern should be to safeguard the security of international transactions, it seemed essential to establish a presumption in favour of the irrevocability of the right conferred. Paragraph 3 should therefore be amended to emphasize that the offer by the parties, once accepted, could not be revoked unless the possibility of its revocation was apparent from the main treaty itself. That presumption should be understood to be subject to the possible application of the *rebus sic stantibus* principle, since the circumstances might change and the parties to the main treaty might consider it necessary to amend its terms. In that case, the presumption of

irrevocability should not be a bar to the operation of the *rebus sic stantibus* clause.

70. He had no objection to paragraph 4, which seemed to be in full conformity with the theory of the complementary agreement and of the offer defined by the main treaty. As some members of the Commission had stressed, however, the paragraph could not be strictly applied in the case of a right which derived, not from the main treaty, but from another source of international law.

71. Mr. VERDROSS said he noted, as Mr. Ago had done, that differences of doctrine in regard to paragraph 3 were diminishing at the practical level. For the supporters of the two conflicting theories recognized that a right or faculty conferred on a third State by virtue of a treaty was revocable so long as there was no agreement with the third State. He acknowledged that the right was imperfect so long as the third State had not given its consent, and he accepted the idea underlying paragraph 3. He had some doubts about subparagraph (b), however, for even if the parties to the treaty had intended to confer an irrevocable right on the third State, since it had not yet accepted the right, they could amend the provisions of the treaty and decide whether the right was revocable or not. Consequently, the question of revocability depended entirely on the existence of an agreement with the third State. He was therefore prepared to accept the provisions of subparagraph (a), but thought that subparagraph (b) should be deleted.

72. The case mentioned by Mr. Ago — in which negotiations had been conducted from the outset between the parties to the treaty and the third State, and having asked for a certain right, that State was granted a different right — did not seem to him to come within the scope of article 62. For the article only concerned cases in which the parties to the treaty granted a right to a third State without having negotiated with it; if they had negotiated with the third State, the problem of consent arose from the outset.

73. Mr. PESSOU said that situations like that contemplated in article 62 had, of course, occurred in the past, but they would probably be rather rare in the future; hence the Commission should probably not attach too much importance to an article which might not have any practical application.

74. As Mr. Lachs had pointed out in connexion with paragraph 1, it was for the Commission to prevent that situation from occurring, for it conflicted with the rule stated in article 61. Above all, in order to overcome the difficulty created by such a situation, it would be better to ensure that all the States and interested parties would be present at the negotiations than to provide for the granting of rights by an indirect procedure. It was difficult to imagine, for example, that the Niger, which had been an international river until 1963 and whose new status had been defined by the principal riparian States, could be the subject of a treaty without the participation of one of those States.

75. In his opinion, therefore, neither paragraph 1 nor paragraph 2 — and still less paragraph 3 — was satis-

factory in regard to drafting or to the principle laid down. The Commission should not spend any more time on the article, a redraft of which should make it possible to overcome the present difficulties.

The meeting rose at 1 p.m.

738th MEETING

Thursday, 4 June 1964, at 10 a.m.

Chairman: Mr. Herbert W. BRIGGS

Law of Treaties

(A/CN.4/167)

(continued)

[Item 3 of the agenda]

ARTICLE 62 (Treaties providing for obligations or rights of third States) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 62 in the Special Rapporteur's third report (A/CN.4/167).
2. Mr. AMADO observed that the discussion was throwing little light on a topic that involved elementary principles of international law. Ranged against each other in the controversy were the thesis of such writers as Rousseau and McNair, who to some extent followed Anzilotti, and the modern thesis upheld by the Special Rapporteur and Mr. Jiménez de Aréchaga, while some members of the Commission had not taken any definite position.
3. It would, of course, be difficult to avoid certain incidental questions, such as the creation of definitive legal situations. There were in fact situations to which the question of irrevocability was not relevant, such as that resulting from the treaty concluded between Brazil and Argentina recognizing the independence of Uruguay,¹ or the situations established by treaties having objective effects, such as certain treaties concerning communications. But cases of that kind were in reality remote from the normal concept of the *stipulation pour autrui*; so without seeking to hinder the development of modern treaty practice, the Commission should be very cautious about them.
4. Rousseau had clearly shown that it was difficult to decide whether the principle of the *stipulation pour autrui*, an institution of municipal law, was applicable in international relations, for it seemed that international practice was usually loath to admit that *pacta in favorem tertiis* could provide not only advantages, but "actual rights", the expression used in the Special

¹ *British and Foreign State Papers*, Vol. XV, p. 935.

Rapporteur's text.² The only case in which international jurisprudence had admitted the right of a third State to maintenance of a provision made in its favour was the judgment by the Permanent Court of International Justice in the *Free Zones* case.³ But Rousseau and other writers had held that that was an entirely exceptional case, comparable to the case of what had formerly been called "international servitudes". In its judgment, the Court had regarded Switzerland's right to the free zones as a real right which—having as it were effects *erga omnes*, as against treaty rights which were only valid *inter partes*—was independent of the decisions to which an ordinary convention might be subject.

5. In his opinion the agreement of a third State, or a manifestation of its will, to consent to a treaty between other parties, could not be regarded as irrevocable. The parties to a treaty were always absolutely free to amend or terminate it. However, it might perhaps be preferable for the Commission to finish considering the present series of articles on the law of treaties before taking a decision on the problems raised by article 62.

6. Mr. CASTRÉN said that he thought that, despite the differences of opinion dividing them, some of which concerned important matters, the members of the Commission could agree on a new text which provided a reasonable and practical solution without coming out in favour of any particular theory.

7. Paragraph 4 of the Special Rapporteur's text did not seem to present any problem; the difficulties lay in the subject-matter of paragraphs 2 and 3. He had therefore tried to redraft those two paragraphs taking at least the main comments made during the discussion into account, and proposed that they be replaced by a single paragraph, reading:

"2. (a) A State or States are entitled to invoke a right deriving from the provisions of a treaty to which they are not parties when the parties to the treaty intended to accord the said right to those third States.

"(b) Unless the treaty provides otherwise, the said provisions may not be amended or revoked by the parties to the treaty without the consent of the third States which have clearly manifested their intention to invoke them."

8. Sub-paragraph (a) of his proposal would replace paragraph 2 of the Special Rapporteur's draft. It referred to a right—which was necessary in his opinion—but not to an "actual" right; it merely stated the indisputable fact that the parties to a treaty could offer to one or more States—or where appropriate to all third States—the possibility of invoking a right deriving from the treaty. The third States were at liberty to avail themselves of that right or to refrain from doing so. There was no need to require a collateral agreement, an accession or some other form of acceptance, or to refer to rejection or renunciation. The third

States were also free to choose the time when they would begin to exercise the right.

9. The new draft left open the controversial question of the source of the right and the time when it came into being.

10. Sub-paragraph (b) of his proposal dealt with the amendment or revocation of a right offered to third States by the parties to a party. The Commission seemed to be generally agreed that, if the third States had in some way or other accepted the right offered them, their consent would be required for any amendment of the relevant provisions, which was no doubt fair and equitable. So long as the third States had not responded positively to the offer made them, the parties to the treaty were still free, but the position changed as soon as a third State had clearly manifested its will, for it might have taken steps to exercise its right.

11. The right might be restricted or subject to certain conditions; that possibility was provided for in paragraph 4 of the Special Rapporteur's draft. For example, the right might be granted only for a certain period, or the parties might have stipulated resolutive conditions or have reserved the power to revoke or modify the right unilaterally, and those conditions would have to be taken into account by third States wishing to exercise their right. But all such restrictions should be clear from the terms of the treaty itself; third States could not be required to know all the circumstances of the treaty's conclusion or the statements of the parties concerning the treaty, which, according to the Special Rapporteur's text, might even be made after the treaty had been concluded.

12. The CHAIRMAN,* speaking as a member of the Commission, said that members' hesitation over paragraphs 2, 3 and 4 arose from a question of legal theory. Their legal training had inculcated in them rigid concepts of a right and how a right could be created, with the result that their attention had unfortunately been concentrated on the creation of a legal right, whereas the purpose of the article was to deal with the taking up of an opportunity, whatever the name by which it might be called—right, benefit or faculty—by a third State, if the third State genuinely wished to accept the opportunity.

13. In private law, stipulation on behalf of another or the concept of trust had been found serviceable, even if not always theoretically satisfactory from the point of view of legal logic. In international law, past practice and possible future needs suggested that it might be useful to include in the draft on the law of treaties an article setting out a comparable concept, as was done in article 62.

14. There could be no question of the article's having the effect of imposing obligations or benefits on third States; both were entirely optional. It was clear from paragraph 1 that the treaty itself did not create the obligation; it merely provided a means of doing so which the third State might or might not accept. Possibly the French rendering of that paragraph was not altogether free of ambiguity.

* Mr. Briggs.

² Rousseau, C., *Droit international public*, Paris, 1953, p. 53.

³ *P.C.I.J.*, 1929, Series A, No. 22; *P.C.I.J.*, 1932, Series A/B, No. 46.

15. The draft of paragraph 2 might with advantage be modelled more closely on that of paragraph 1. The words "a right provided for" should be amended and the words "should be the means of creating a right" should be substituted for the words "should create an actual right". Paragraph 2 (b) should be recast in positive form.

16. On the question of revocation, he took the view that, if the right offered were not taken up by the third State, the parties could revoke it, subject to appropriate conditions, but if the third State had availed itself of the right, there could be no unilateral revocation.

17. References to a right being created by the treaty should be removed from paragraphs 3 and 4. It should be possible to redraft the article leaving aside the theoretical differences of opinion on whether the right was created by the treaty or arose from an offer by the parties which was taken up by another State.

18. Mr. de LUNA said he did not agree with members of the Commission who considered that the principle stated in article 62 should be rejected because its application had led to abuses in the past. Misuse of an institution did not prove that the institution was bad in itself. True, the present trend in international law suggested, as Mr. Lachs had said, that in future all interested States would generally be invited to participate in a treaty affecting them. But even in an ideal international community the procedure provided for in article 62 would still be necessary, for it might well happen that certain States, for political or other reasons, would not wish to be involved in a treaty, but would agree to certain rights being conferred on them by virtue of it.

19. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the Chairman that it should not be impossible to devise a satisfactory draft despite the differences of opinion on certain theoretical issues which, in any event, were not very fundamental. Although initially he had set out the provisions concerning obligations and rights in two separate articles, he had subsequently decided to combine them in one article, because they were frequently linked and sometimes correlative. It seemed preferable to maintain the structure he had finally adopted.

20. With regard to paragraph 1, there was general agreement that there could be no question of imposing an obligation under that provision and that its wording provided the necessary safeguards.

21. There was, of course, some difficulty in covering all the aspects of interlocking obligations and rights, but essentially the two elements that must be present were, in the one case, a provision intended to provide a means of establishing an obligation and, in the other case, a provision whose essential purpose was to provide the means of enjoying the right.

22. Whether the treaty provided a means of creating a right or a benefit, all members were agreed that there must be some manifestation of intention to exercise it by the third State, and some members had emphasized that consent under paragraph 2 (b) need not possess

the formal character of the consent required under paragraph 1.

23. In drafting paragraph 3, he had been largely guided by his conception of the right and by the firm rejection on the part of Judges Altamira and Hurst, in the *Free Zones* case, of the concept of an irrevocable right because it might be prejudicial to the creation of such rights in favour of third States.⁴ Perhaps paragraph 3 required some modification in order to show clearly that the parties were entirely free to revoke the right until it had been taken up. If the third State did avail itself of the right, the presumption must be that it was irrevocable unless the treaty provided otherwise, and the onus of making that clear must lie on the parties.

24. One point that might need consideration was what should be the position if a right offered to a group of States was only accepted by one of them. Would it then be revocable *vis-à-vis* the others?

25. Paragraph 4 was concerned with the case in which the exercise of a right was necessarily subject to the observance of certain obligations by the third State. The paragraph had not given rise to serious difficulties, but would need some revision in order to remove the reference to the creation of a right by a provision of the treaty, as suggested by the Chairman.

26. He was glad that Mr. de Luna had touched on the utility of such a provision for treaties concluded in the future. Although there might have been instances in the past of States creating obligations for others in a manner that would not be regarded as acceptable in modern times, it would be dangerous to conclude that because the world had moved into a new era such an article would serve no further purpose. On the contrary, the increasing co-operation between States might have the opposite effect.

27. The Commission might wish to give further consideration to article 62 in the light of its conclusions on article 63.

28. The CHAIRMAN suggested that article 62 be referred to the Drafting Committee.

It was so agreed.

ARTICLE 63 (Treaties providing for objective regimes)

29. Sir Humphrey WALDOCK, Special Rapporteur, said that he had prepared a very full commentary on the highly controversial subject of article 63, concerning which the authorities were very much divided. The possibility of treaties creating objective regimes was one of considerable delicacy, touching as it did on the sphere of international legislation, whereby instruments concluded by a majority could be held to have binding force for the minority. Rousseau and McNair, neither of whom was prepared to accept the notion of a stipulation on behalf of another State in international law, seemed inclined to admit the possibility of treaties creating objective regimes. He himself had felt very hesitant in the matter and shared the previous Special Rapporteur's view that States were unlikely to agree

⁴ P.C.I.J., 1932, Series A/B, No. 46, p. 185.

that treaties could, of their own force, create such regimes. Yet there were examples in practice of such regimes coming to be regarded as possessing an objective character, with effects *erga omnes*. Sir Gerald Fitzmaurice had in a sense admitted the notion through the back door, by appearing to allow that there was a general duty upon States to respect the legal relations created between the parties to a treaty, thereby giving it recognition.⁵

30. His own opinion was that only treaties of a particular character could be said to establish an objective regime, and that an essential requirement must be that the parties had some special competence in the matter. At the same time, he was aware that other States were likely to be unwilling to accept such regimes as automatically binding, so that some element of express or tacit recognition would have to be provided for, somewhat on the lines of the provisions included in the articles concerning reservations; he had sought to do that in paragraph 2.

31. If the creation of objective regimes were accepted as a phenomenon of international law, possibly recognition of such regimes was a process analogous to the growth of customary law.

32. He regarded article 63 as progressive and desirable, but would not be surprised if it should give rise to divergent views in the Commission.

33. Mr. PAREDES said that, as he had occasionally done before, he would refer mainly to questions of drafting, some of which affected the substance of the complicated and difficult article 63. He would begin with the title of the article: "Treaties providing for objective regimes". The term objective was ambiguous and did not suffice to describe the whole subject-matter of the provision. What was the idea it described? Was it the matters on which the right took effect, as opposed to the titular subject of the right? He did not think the Special Rapporteur had intended to refer to that, but rather to the scope or extent of the consequences of the treaty or its effects *erga omnes*. Consequently, the term "objective" was not strictly correct, and not adequate for the very broad subject-matter of the article. That was so even though the Special Rapporteur had very wisely left aside a great accumulation of questions dealt with by the former Special Rapporteur, such as the whole matter of formulating international customs. Nevertheless, there remained a great abundance of legal questions, not all of which had the same content or were of the same nature.

34. Although the establishment of international rivers and waterways and of sea and land areas for common use and other matters of the same kind came within the provisions of paragraph 1, there were other matters which did not appear to come within the scope of that paragraph. There was, for instance, the case of mandates and trust territories which, whatever might be said of them, involved subjective and subordinate conditions, both in the idea that created them and in the practice applied to them. The very instruments which established

them referred to the special protection accorded to countries that had not reached a high degree of progress, in order that they might do so. Hence, when dealing with those conditions it was essential to refer to the subjective aspect of the arrangement. He did not consider the provision applicable to the duty to accept the consequences of rights relating to third parties, legitimately established between the parties to a treaty, such as the delimitation of frontiers or the cession of territories.

35. Consequently, he found the title inadequate and defective and proposed that it should be amended to read: "Treaties providing for a general regime of rights *in rem*". The meaning of rights *in rem* had long been well defined in systems of municipal law and in case law: they were rights held without reference to a particular person; it could be said that they were incorporated in and applied to the subject-matter or object of the contract.

36. Incidentally, with reference to certain passages in the commentary, he wished to say that he did not approve of the voluntary and permanent exclusion from the Commission's work of everything relating to an enormous field of immediate future interest, namely, legislation on outer space and the use of atomic energy.

37. In the Spanish text of the commentary he noted that the word "rubrica" was used for the various "rubrics" employed by the previous Special Rapporteur: it should be replaced by the word "enunciado".

38. Mr. ELIAS said that the Special Rapporteur, in his introductory remarks, had provided the Commission with reasons for rejecting article 63, the subject-matter of which could be covered adequately in articles 62 and 64. The view that article 63 should be deleted was confirmed by what the Special Rapporteur had written in paragraphs (10), (11) and (20) of his commentary on article 62.

39. Mr. EL-ERIAN said that the main difficulty in article 63 arose from the attempt to deal, within the framework of the law of treaties, with a number of complex questions touching on other branches of international law. Paragraph 1 listed matters some of which related to the demarcation of the territory of a State, others to the setting up of an international legal order as a result of the establishment of the League of Nations and the United Nations, and others to territorial settlements and their recognition by other members of the community of nations. Those questions could be described as sensitive spots in international law and the Special Rapporteur had been very ambitious in attempting to deal with so many of them in a single article of his draft.

40. Doctrine, the case-law of international tribunals and State practice provided little guidance as to what constituted an "objective regime", what matters fell within the scope of that term and which of them belonged to the law of treaties as being effects of treaties, as distinct from those which belonged to other branches of international law.

41. It was obvious that the subject-matter of article 63, in so far as it related to the law of treaties, was closely

⁵ *Yearbook of the International Law Commission, 1960, Vol. II, pp. 72 et seq.*

bound up with problems of international custom, implied consent, rights *in rem* and their recognition by other members of the international community. In his opinion, it was not advisable to treat those matters purely from the standpoint of the effects of treaties, and he could not share the view expressed by the Special Rapporteur in his commentary, that the problems involved were best dealt with by the method used in article 63.

42. McNair spoke of treaties intended to operate *in rem*, against the whole world or *erga omnes*, and also "dispositive" or "real" treaties. The characteristic feature of the latter, which might be treaties of cession or boundary treaties, was that they recognized or granted or transferred "real" rights — rights *in rem*. The same author discussed the status of the great artificial waterways of the world and drew no distinction between one canal and another. He treated them as a general subject belonging to that of the territory of States. He rejected the concept of an "objective regime" and, in his search for a juridical basis for the status of international waterways, had said:

"Some might find the source of this rule in the public law theory, that is to say, that the groups of States that were the parties to the original treaties were acting in a semi-legislative capacity for the whole world. We incline, however, to think that a more attractive source is to be found in the inherent purpose of these waterways, namely to facilitate communications between States, and that upon the occasion of the opening of such a waterway there occurs a legal process recognized by the private law of some countries, namely a dedication *orbi et urbi* of some natural advantages or facilities, with the intention that the securing of these facilities for the public use is effected by their becoming a part of the public law of the world."⁶

The complex character of that example, which constituted only one of ten or more given in paragraph 1, showed how controversial a field the Commission would be entering if it included in its draft an article such as article 63.

43. Oppenheim had been very sceptical regarding treaties of a so-called "objective" character, and had written: "The question arises whether in exceptional cases third States can acquire rights (and become subject to the duties connected therewith) by giving their express or implied consent to the stipulations of such treaties as were specially concluded for the purpose of creating such rights, not only for the contracting parties but also for third States". After giving a number of examples relating to the Panama Canal and to boundary settlements, he had concluded: "The question must be answered in the negative."⁷

44. Sir Gerald Fitzmaurice, the previous Special Rapporteur, had shown no inclination to favour the theory of objective regimes and had emphasized that the articles devoted by him to the subject described a

process rather than laid down a rule. And he had been working within the framework not of a draft convention, but of a code, where it was possible to deal with matters which belonged to other branches of international law. The Commission should not depart from the principle it had adopted in connexion with rules of *jus cogens*, that subjects which did not come within the purview of the law of treaties must be excluded.

45. There were two specific points on which he wished to comment briefly. The first was mandates and trusteeships considered as a part of the international legal order, in connexion with the quotations given in paragraph (12) of the commentary from the opinions and judgment of the International Court of Justice in the South West Africa cases. The court had not pronounced on the question of objective regimes. The definition of mandate and trusteeship regimes and their legal effects depended on the interpretation of the League of Nations Covenant and the United Nations Charter — a question which could not be adequately considered within the scope of the law of treaties.

46. The second point was inter-oceanic canals, on which he must reserve position, as he did with regard to the international regimes applicable to the Suez, Panama and Kiel canals. In the *Wimbledon* case,⁸ the Permanent Court of International Justice had in some respects assimilated artificial waterways to natural waterways — in other words, straits. It had inclined to the view that customary international law supplemented conventional law on the regime of artificial waterways. He could not accept the view, which appeared to have been adopted by the Special Rapporteur in his commentary, that the various artificial waterways were subject to separate regimes. Although details of administration might differ from one canal to another according to the provisions of the conventions governing them, all had two fundamental features in common: the first was that they were dedicated to international navigation and the second was that the rights of the State in whose territory and under whose jurisdiction the waterways lay must be preserved. At a recent Congress of the International Law Association, Professor Baxter, the rapporteur on the topic of inter-oceanic canals, had submitted a series of draft articles⁹ based precisely on the fundamental assumption that, whatever differences of detail there might be, as means of international communication, the various inter-oceanic canals were subject to the same regime. Any attempt to claim that there existed a difference in regime between one inter-oceanic canal and another, when all had the same object and served the same purpose, would be contrary to the principle of sovereign equality of States. He therefore reserved his position regarding the distinctions made by the Special Rapporteur between the Constantinople Convention of 1888 relating to the Suez Canal,¹⁰ and the treaties dealing with other inter-oceanic canals.

⁶ P.C.I.J., 1923, Series A, No. 1.

⁷ See Baxter, R. R., *The Law of International Waterways*, Harvard, 1964, pp. 343 *et seq.*

¹⁰ *British and Foreign State Papers*, Vol. LXXIX, p. 18.

⁶ McNair, *The Law of Treaties*, 1961, p. 266.

⁷ Oppenheim, *International Law*, eighth edition, 1955, pp. 926-927.

47. He agreed with Mr. Elias that it would be advisable to drop article 63 altogether. The best method of dealing with the subject would be to include a passage in the commentary drawing attention to some of the objective effects of treaties and to the difficulty of dealing, within the scope of the law of treaties, with a matter that was closely bound up with other branches of international law. When the Commission came to examine article 64, it could consider whether the reservation it contained was not sufficient to dispose of what the Special Rapporteur, in paragraph (3) of his commentary, called the "admittedly difficult and controversial question" dealt with in article 63.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that it had been far from his intention, in paragraph (10) of his commentary, to make any distinction between one canal and another; he had not taken any absolute position with regard to the differences that might exist between one international waterway and another.

49. Nor could he agree that he had gone into questions outside the scope of the law of treaties; in article 63 he had dealt with treaties and their legal effects. It was perhaps unfortunate that certain of the treaties which set up regimes of the type envisaged in article 63 related to inter-oceanic canals, which were the subject of political controversy.

50. Mr. VERDROSS said that, in principle, he approved of the text of article 63. It covered cases which had occurred in practice and remained topical; for example, by the Antarctic Treaty,¹¹ a group of States had created a demilitarized regimes which in principle was valid for all States if they did not protest against it. The article was so worded as to avoid the difficulties inherent in the theory of rights *in rem*. Moreover, it was in no way revolutionary, since it was entirely based on the idea of consent; it was solely concerned with the application to special situations of principles already accepted by the Commission.

51. With regard to the drafting, it would be better to delete the words "expressly or impliedly" in paragraph 2 (a), so as to bring the text into line with that of other articles. In paragraph 2 (b) it would be enough to say "A State not a party to the treaty, which does not manifest its opposition to the regime..." since the idea of protest was included in that manifestation of opposition. At the end of that sub-paragraph, the word "impliedly" seemed superfluous; the essential point was that the State accepted the regime, and there was no need to specify the manner in which it did so.

The meeting rose at 12.20 p.m.

739th MEETING

Friday, 5 June 1964, at 10 a.m.

Chairman: Mr. Herbert W. BRIGGS

Law of Treaties (A/CN.4/167) (continued)

[Item 3 of the agenda]

ARTICLE 63 (Treaties providing for objective regimes) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 63 in the Special Rapporteur's third report (A/CN.4/167).
2. Mr. de LUNA congratulated the Special Rapporteur on having found, for such a difficult subject, accurate and felicitous formulas which corresponded to the true position in international law. He approved of the principle underlying article 63, which dealt with a particular application of article 62 — the case of a localized regime whose purpose was of general interest.
3. Such a regime was not precisely a *jus in rem*. For although a *jus in rem* had effects *erga omnes*, those effects were not necessarily desired, and not always even foreseen, by the parties; they were produced automatically, regardless of whether the parties wanted them or whether third States consented. For example, if a State ceded a territory to another State by treaty, it would be useless for a third State to claim that the first State must continue to assume responsibility for that territory.
4. As the Special Rapporteur had pointed out, article 63 did not apply to multilateral conventions of general interest; they were a separate case.
5. Article 63 stated rules similar to those in article 62, but in paragraph 2 (b) it added a new rule under which consent was presumed if third States remained silent for a certain length of time. Strictly speaking that was no innovation, either for the Commission or in international practice; many treaties concluded by the specialized agencies of the United Nations contained such clauses. In municipal law the presumption attached to the silence of the authorities was intended to protect the citizen against administrative delays. But that presumption was often a terrible trap. He himself was reluctant to accept silence as giving consent, but that should not be taken as a basic objection on his part.
6. Article 63 purported to settle cases of which there were instances in practice, such as the Antarctic Treaty,¹ to which Mr. Verdross had referred. It did not confer a right or impose an obligation on a third State without its consent, any more than article 62. The basis of

¹¹ United Nations Treaty Series, Vol. 402, p. 72.

¹ United Nations Treaty Series, Vol. 402, p. 72.

equality essential to international law was thus maintained in both articles.

7. Law was not only a logical and harmonious structure, however; it also had to be realistic. And it was to be feared that States might regard such an article as approval of *de facto* legislation or of government of the world by the Great Powers; for "objective regimes" had in fact been used to impose certain conditions on small States at a time when the sovereign equality of States had not been much respected and had not yet been affirmed by the United Nations Charter. The Commission should therefore consider how its draft was likely to be received. It should take steps to ensure that the draft would not meet with the same fate as some earlier drafts, such as that on arbitral procedure.

8. Although he approved of the article in principle, he would accept it only if the whole Commission, or at least a very large majority, was in favour of it.

9. Mr. RUDA said he agreed with Mr. El-Erian that the question dealt with in article 63 was closely connected with a number of other questions of international law.

10. He would examine the central problem raised by article 63 in the context of the provisions proposed by the Special Rapporteur on the effect of treaties on third States. Article 61 laid down the general rule that treaties created neither obligations nor rights for third States and articles 62, 63 and 64 provided for exceptions to that rule. Article 62 dealt with treaties from which obligations or rights derived for third States and were accepted by them; under that article acceptance was always necessary. Article 64 dealt with the case in which a treaty was applicable to third States because its provisions became transformed into rules of customary international law. Article 63 gave recognition to a special kind of treaty which provided for an "objective regime" in the general interest. It laid down that the third States concerned were bound by the objective regime in question if they accepted it; from that it followed that the source of the rights and obligations of the third States was their consent. The Special Rapporteur explained, in paragraph 18 of his commentary, that the objective regime became binding in the absence of timely opposition from other States.

11. Three possibilities had been open to the Special Rapporteur in his endeavour to explain why third States acquired rights or became bound by obligations under a treaty setting up an "objective regime". The first was to recognize that the type of treaty envisaged in article 63, either by its nature or because of the procedure followed in concluding it, had a semi-legislative character and therefore operated *erga omnes*; the Special Rapporteur had not chosen that approach and it must be admitted that, at the present stage of development of the international community, it was hardly possible to adopt an explanation based on the semi-legislative effects of a treaty. The second possibility was to consider that the third States were bound by a customary regime; the Special Rapporteur had not chosen to do that either. He had chosen the third

possibility, which was to regard the consent of the third States as the basis of their rights and obligations. On that assumption, article 63 appeared to deal with a special case of the situations covered by article 62, and could therefore be dropped.

12. Consequently without going into certain special cases dealt with in the commentary, he would support the proposal to delete article 63.

13. Mr. TSURUOKA said that on thinking over article 63, his first conclusion had been that it was of no great value; situations created by so-called objective regimes, which were sometimes of a legislative character, would in future be settled, in most cases, by the United Nations or its specialized agencies, and consequently did not really come within the scope of the draft.

14. It must be recognized, however, that sometimes, and especially for political reasons, very important matters were settled outside the United Nations, at least from the legal point of view, as in the case of the Antarctic Treaty and other well-known treaties. Hence, if article 63 could help to settle such matters more easily and improve the international legal order, it would render a great service. The Commission should therefore try to work out a formula acceptable, first, to the majority of its members and then to the majority of States Members of the United Nations.

15. He agreed with Mr. de Luna that article 63 dealt with a particular application of article 62. Consequently, even if article 63 were dropped, the situations to which it applied would still be governed by interpretation of article 62.

16. Lastly, there was the legal question whether article 63 would have retroactive effect. As a general principle, the articles prepared by the Commission should have no immediate retroactive effect, so the Commission could disregard for the time being any effect article 63 would have on existing regimes, such as those of the Suez Canal and the Panama Canal. The Commission should work for the future.

17. Mr. JIMÉNEZ de ARÉCHAGA said that he shared the general misgivings regarding article 63. He could see no valid basis for the extraordinary effects attached to "treaties providing for objective regimes", a description which could be given to a great many treaties, particularly if they were considered from the point of view of States which were not parties to them.

18. States could be said to have a general duty to abstain from interfering with, and thus to have a duty to respect, situations of law or of fact established by lawful and valid treaties to which they were not parties; but it would be going too far to suggest, as was done in paragraph 3 (a), that they became "bound by any general obligations" contained in such treaties. The duty to respect such situations was not a rule of treaty law, but a consequence of the principle of non-intervention and perhaps also a corollary of the principle of co-existence, which had been referred to another United Nations body for consideration.

19. Of course, from certain treaties of the type described in paragraph 1, rights could be derived for third States which might involve incidental obligations. More specific obligations could also arise for non-parties as a consequence of their agreement, or because the treaty had supplied the basis for the growth of a rule of customary international law. In the latter case, however, it was the rule of customary international law, rather than the treaty, that would bind the third party concerned.

20. He therefore agreed with Mr. Elias that article 63 should be dropped; the situations envisaged in it were covered either by article 62 or by article 64, and it could thus be safely deleted without leaving any gap in the draft.

21. An additional reason for deleting article 63 was the highly objectionable provision in paragraph 2 (b), which would oblige all States to review every treaty entered into by other States and to place on record their disapproval of any treaty they thought might fall within the category described in paragraph 1, under the extremely severe penalty of becoming bound by it if they failed to do so. Such a rule would clearly not constitute codification of existing law and it was extremely unlikely that States would regard it as a progressive development. States would not be prepared to accept a provision that would force them to declare themselves for or against treaties entered into by other States, thereby placing an unduly heavy burden on their foreign ministries. They would undoubtedly prefer the present situation, in which they remained legally unconcerned by what constituted for them *res inter alios acta*, retaining their freedom to take a position with respect to any such treaty only if and when the need to do so arose.

22. Equally objectionable was paragraph 3 (a), by which States became bound by the general obligations of a treaty entered into by other States unless they took the invidious course of entering a formal protest against it. It was quite likely that, by the combined effect of the provisions of paragraphs 2 (b) and 3 (a), certain groups of States might acquire a sort of legislative power over the rest of the world. If the draft allowed it, that power would be exercised mainly by the Great Powers, as in the case of the so-called "international settlements". It was significant that nearly all the examples of "international settlements" given by such authorities as Rousseau and McNair were taken from the acts of the Concert of Europe in the nineteenth century; one example was the provisions of the Treaty of Berlin relating to the River Niger.² The Commission could not sanction a formula which might serve as a basis for reviving a situation that belonged to the past.

23. There were, of course, recent examples in which, for very good reasons, a limited number of States had taken it upon themselves to legislate for the rest of the world. But such a power of legislation could only be envisaged in exceptional cases and if the States participating in the treaty constituted the vast majority of

the international community, as in the case of the United Nations Charter.

24. Mr. YASSEEN said that the idea underlying article 63 did not seem to be incompatible with the recognized principles of international law. The article sought to base the extension of the treaty on the consent of the third States. He had no more difficulty in accepting the proposed machinery than in the case of article 62, provided that it included a complementary agreement.

25. He was, however, reluctant to accept the details of the proposed rules because they carried the presumption of acceptance by third States too far. The rule in paragraph 2 (b), in particular, was artificial; its effect would be to impose on third States an obligation which had no foundation in international law, and to confront those States with a *fait accompli*; it would create a presumption favourable to the parties to the treaty.

26. Some writers had sought to base objective regimes on the idea of *de facto* government: some particularly privileged States considered themselves capable of regulating a situation, and if they were able to enforce the regime they had established, it became mandatory; but that was an explanation, not a justification. The proposed article 63 might give the impression that the Commission wished to facilitate the task of States aspiring to act as a *de facto* international government.

27. Lastly, he did not think the article would be of any use. All the effects which it was expected to produce could be secured by means of article 62. There could be no better procedure for extending the effects of a treaty than a collateral or complementary agreement. Article 63 should therefore be deleted from the Commission's draft.

28. Mr. CASTRÉN congratulated the Special Rapporteur on his objective treatment of a question on which doctrine was much divided and State practice fragmentary. The Special Rapporteur had tried to deduce a few principles, the justification for which he had gone into very fully in his commentary, and he proposed detailed rules on procedure.

29. The idea of objective regimes was defensible in itself, but he doubted whether it was advisable to deal with the problem in the draft and to devote an article to it which embraced a number of different questions of great political importance. Several of the rules proposed were entirely new and might, in practice, create unexpected situations. He was therefore inclined to agree with those who had proposed that article 63 should be deleted and that the question, or some of its aspects, should be dealt with either in articles 62 and 64 or in the commentary.

30. The Special Rapporteur had been right to exclude from the list of treaties which could provide for objective regimes law-making treaties, treaties concerning the cession of territory of the delimitation of frontiers and treaties establishing international organizations. But he (Mr. Castrén) would prefer the list to omit, among others, treaties concerning a particular area of sea or sea-bed, because paragraph (19) of the commentary

² *British and Foreign State Papers*, Vol. LXXVI, pp. 17 *et seq.*

showed that treaties of that kind related solely to the territorial sea and not to the high seas.

31. Paragraph (18) of the commentary stated that the assent of the State or States having territorial competence with reference to the subject-matter of the treaty must be express. But in paragraph 1 of the article the idea of consent was presented without further particulars, which seemed preferable. Near the end of paragraph 1, the French text might lead to misunderstanding, because the expression "*un Etat*" did not correspond to the English "any State".

32. As Mr. Verdross had observed, the words "expressly or impliedly" should be deleted from paragraph 2 (a), and the word "impliedly" from paragraph 2 (b). The words "expressly or impliedly" should also be deleted from paragraph 4.

33. In paragraph 3, the expressions "general obligations" and "general right" were not very precise, and paragraph (23) of the commentary did not throw much light on them.

34. Lastly, the stipulation "and have a substantial interest in its functioning", at the end of paragraph 4, was rather vague: it might well be asked who would decide objectively whether such an interest was involved.

35. Mr. PAL said he fully endorsed the wise suggestion made by Mr. Elias and supported by Mr. Ruda, that article 63 should be dropped; he had found the reasons given by Mr. Jiménez de Aréchaga and Mr. Yasseen very persuasive and his conviction had been further strengthened by the sober and critical analysis contained in the commentary, which made it clear that the Special Rapporteur had put forward the provisions of article 63 with considerable hesitation. The commentary examined the treatment of the subject by the previous Special Rapporteur, then gave the present Rapporteur's comments on it and expressed his inability to support the proposition that there was a general duty to respect, and a general right to invoke, the international regime set up by the treaty. After discussing the relevant State practice, mostly of past centuries, the Special Rapporteur summarized his doubts and hesitations on the whole question of exceptions to the rule *pacta tertiis nec nocent nec prosunt* and presented a few hesitant solutions, including that of recourse to the principle of tacit recognition.

36. It had been said during the discussion that the subject-matter of article 63 reflected real situations. But it should be remembered that present conditions were different from those that had obtained in the past. The many fundamental changes that had taken place included the change in the geography of the international community, the emergence of new trends in the structure of world politics, the progress of the colonial revolution emerging as a mighty new force in world politics calling for new politics, and the activities of the United Nations. International society, which in earlier centuries had consisted of a few European Powers, had changed completely. The period since the end of the nineteenth century had been marked by great political upheavals in which people

almost everywhere had been trying to break new historical ground. The end of the World Wars had aroused the latent impulses of gigantic forces in Asia and Africa, bringing huge masses of hitherto dominated colonial peoples into the international political arena in search of independence, and introducing new moral forces of nationalistic universalism.

37. He did not believe that any case had been made out for retaining the article.

38. Mr. AMADO said he did not wish to add to the already numerous arguments advanced against article 63 but he must pay a tribute to the Special Rapporteur who had been the first to realise that the article was out of keeping with all the others he was proposing to the Commission. For it should not be forgotten that a treaty was the outcome of long discussions and even bargaining—a kind of struggle in which self-interest was the prime mover. Hence, common sense could only regard with astonishment the idea that States could acquire rights or obligations by virtue of a treaty in the negotiation of which they had taken no part whatever. But everything had already been said on that point, and he could support the arguments put forward by previous speakers.

39. It was the Commission's function to promote relations between States, and the article did not contribute in any way towards solving the problems that arose. Everyone knew that, when States decided to establish a regime of general interest, it was because each of them saw advantages and compensations in it; their interests were connected.

40. In the case of article 63, if the source of the obligations and rights was to be found in the consent given by the third States, the situation was in effect that which had been dealt with in article 62. But if a legislative process was involved it was a different matter, because law-making treaties were of a different nature—they were theoretical constructions. The present case concerned concrete facts which had many practical aspects and affected many inalienable interests.

41. Mr. PAREDES said he fully agreed with Mr. Jiménez de Aréchaga's objections to paragraph 2 (b) because it carried to extremes the obligations of third States under treaties to which they were not parties, recognizing as acceptance not only mere implied consent, but even silence on their part, which might result from not knowing what the other States had stipulated. That would affect the basic principles of freedom and independence. Moreover, as Mr. Yasseen had said, the whole structure of the article suggested that the way was being left open for the Powers which believed themselves called upon to legislate for the world to impose certain conduct on the rest.

42. He urged that when third States were to be bound by the decisions of others, express consent should be required, as Mr. Castrén had emphasized; and he noted that in paragraph 1 the consent was not qualified, while paragraph 2 (a) referred both to express and to implied consent.

43. Referring to the desirability of avoiding political discussions in the Commission, which some speakers

had mentioned, he said he found it impossible to do so in many cases, because politics were an aspect of the law as applied to real life and were protected by it.

44. He strongly supported the proposal by Mr. Elias that article 63 should be deleted.

45. Mr. TUNKIN said that article 63 created more problems than it solved. It was concerned with an obsolete practice which might have been common fifty years earlier, but could not be regarded as a rule. For example, in the case of the treaties governing the regime applicable to certain rivers, such as the Danube or the Congo, the Great Powers had played a dominant, if not an exclusive part, and in some cases the riparian countries had not participated in the conclusion of the treaty at all. The practice should be viewed in the light of the general principles of modern international law.

46. When the Commission had considered article 62, it had come to the conclusion that a State or group of States could not impose an obligation or an actual right on other States without their consent. Thus article 62 covered situations which might lawfully arise today. But article 63 seemed to him to be somewhat ambiguous; although the "objective regimes" envisaged were based on consent, the very term implied the imposition of conditions by a group of States on other States.

47. That had not been the intention of the Special Rapporteur who, after very thorough research, had confessed to many doubts and hesitations. The Special Rapporteur had thought that one possible solution would be for the Commission to limit its proposals to the rule laid down in article 61 and the exceptional cases dealt with in article 62 where a *stipulation pour autrui* could be admitted, and to leave aside all other cases as being essentially cases of custom or recognition. He (Mr. Tunkin) was prepared to accept that suggestion, which, moreover, had been endorsed by most of the previous speakers.

48. The CHAIRMAN,* speaking as a member of the Commission, said that objective regimes unquestionably existed in international law. He had tended to regard them as based on customary international law, even though they might have been initiated by treaties. The process of their creation was a slow one, and the Special Rapporteur had drafted article 63 with the commendable aim of hastening that process in the interests of the progressive development of international law.

49. Paragraph 1 indicated the types of treaty which could create objective regimes, setting aside general law-making instruments or categories so broad as to include all treaties. Paragraph 2 dealt with acceptance, paragraph 3 with the general obligations entailed by acceptance, and paragraph 4 with revocation.

50. The first three paragraphs were perhaps not precise enough. Paragraph 1 failed to take sufficient account of the differences between regimes relating to territory,

rivers or waterways and those relating to the neutralization of territory. The wording of paragraph 2 would also give rise to difficulties, as it did not say how a State was to express or imply its consent. Furthermore, there was some lack of sequence between paragraphs 2 and 3, in that no clear provision on acceptance was contained in the former, whereas the latter dealt with the obligations that ensued on acceptance. Nor was it clear what particular rights could be invoked in a given situation.

51. Perhaps the article could be re-shaped in the form of a broad generalization to the effect that a State could become bound by, and entitled to enjoy the benefits of, an objective regime initiated by a treaty to which it was not a party, if it expressly or by its conduct manifested its acceptance of the regime.

52. Mr. BARTOŠ observed that when speaking on article 62 he had expressed the view that because of the *pacta tertiis* rule, rights or obligations could not be imposed on third States, but had said that he could agree to an exception being made in favour of law-making treaties. In that instance, he could agree that the international community could impose obligations and confer rights on States which might not have taken any direct part in the conclusion of the law-making treaty. In reality, such treaties were tantamount to universally accepted rules. But he could not accept the present text of article 63, which perpetuated a practice of the Great Powers already abandoned by the international community.

53. On the other hand, there was one practice not mentioned in article 63 which was still current. In certain cases an objective regime could be binding on third States which had not taken part in establishing it, when the situation was quite different from those contemplated in article 63. It was generally accepted in international river law that the riparian States were entitled to establish the regime applicable to a river. For instance, the States which had established the regime of navigation on the Danube by the Belgrade Convention of 1948³ had established an objective regime. Third States were bound to comply with it, because the States which had established it had been entitled to do so under the rules of international law. He asked the Special Rapporteur to draw attention in his report to that exceptional case in which it could be said that there was a division of competence between the States of the international community.

54. Mr. ROSENNE said that, although he had given a good deal of thought to the subject-matter of article 63, he would have welcomed further time for reflection because he was opposed to the majority view. The general thesis which underlay article 63 and was advanced in the commentary by the Special Rapporteur, that States could, by treaty, create a state of affairs valid *erga omnes*—and he used those neutral terms advisedly—was established international practice and was *lex lata*. Moreover, that possibility met a real need in international life. Possibly the expression "objective

* Mr. Briggs.

³ United Nations *Treaty Series*, Vol. 33, p. 197.

regimes" was not a particularly happy one, and it certainly should not be regarded as necessarily denoting the equivalent of something permanent: treaties and treaty arrangements could always change.

55. The obligations and rights referred to in article 62 were intended to extend to a particular State or class of States, whereas those referred to in article 63 would extend to every State having an interest in the subject of the treaty. He was therefore unable to support the contention that the substance of article 63 was already covered in the previous article.

56. Nor did article 63 come within the scope of article 64, which related to the formation of international custom. There were inherent differences between customary and conventional law, the essential one in the present context being that observance of customary law by a State would not depend on any legal interest. Despite the argument advanced during the discussion, he still thought that articles 62, 63 and 64 dealt with entirely separate matters.

57. The drafting of article 63 would require some modification. It failed to differentiate sufficiently between the different kinds of consent required of States in different circumstances. For instance, there would be a great difference between the formal consent required of a State with territorial competence, which must be explicit, and the type of acquiescence which might be required of a State taking advantage of the facilities offered by parties to a treaty whose intention had been to establish a regime in the general interest. The last clause in paragraph 1 "or that any such State...etc.", should be dropped. Paragraph 2 (a), if referring to a State possessing territorial competence, seemed to be redundant.

58. Paragraph 2 (b) might not be acceptable as it stood and he did not know what importance the Special Rapporteur attached to registration as a form of notice of the existence of a treaty for States wishing to protest against it. It might be advisable to bear in mind the lapse of time between registration of the treaty with the Secretary-General and its publication in the United Nations *Treaty Series*, which could be as much as twelve months. Moreover, Article 102 of the Charter and the Regulations on the Registration of Treaties distinguished between registration and publication; and registration did not mean that other States had any right to study the text before it had been published.

59. He presumed that paragraph 3 was intended to deal with the question of States which were not parties taking advantage of the facilities offered by the regime, when they would be bound to observe all the regulations which validly formed part of the regime, not merely those contained in the treaty itself.

60. Paragraph 4 contained a provision of the kind which certain members, including himself, had thought ought to appear in article 62, in order to ensure that States accepting the regime would be consulted concerning its amendment or revocation; but it went even further by requiring their concurrence.

61. As to the general question of the value of the article, he believed it was legally useful and indeed a necessary consequence of the concept of law-making

treaties and of the Commission's definition of a "general multilateral treaty" as one which "concerns general norms of international law or deals with matters of general interest to States as a whole".⁴ Personally, he would welcome the development of a genuine system of international legislation, provided that the position of the minority was always adequately safeguarded. Most members of the Commission lived in countries where a qualified parliamentary majority legislated for the minority and that was, after all, not usually regarded as a process of imposition. The Special Rapporteur had rightly stressed, in article 63, the feature of general interest which the treaties in question possessed and the necessity for the consent of the States having direct competence in the matter. That approach was fully consistent with contemporary international law.

62. The question whether such an article was politically opportune would have to be left to governments to decide. The Commission's duty was to state the law as it existed.

63. Though it was a tradition of the Commission not to dwell on political matters, he felt bound to reserve his position on the regimes governing certain inter-oceanic canals.

64. He suggested that article 63 be referred to the Drafting Committee for consideration in the light of the discussion and in relation to article 62.

65. Mr. TABIBI said that he subscribed to the majority view on article 63. Countries in the region from which he came had reason to know the meaning of the regimes referred to in the commentary, many of which did violence to the sovereign will of States. It should be remembered that there had been cases of regimes imposed by certain States which had thereby enjoyed more extensive rights than those possessing true territorial competence. Such an article was not likely to prove acceptable in the modern world, which was so different from that of the nineteenth century. Moreover, it conflicted with many provisions already adopted by the Commission; its retention might jeopardize the whole draft and create political problems. Some examples of regimes willingly accepted by States not parties to the original treaty could be mentioned in the commentary on article 62.

66. The provision in paragraph 2 (b) would raise serious problems for States whose officials found it difficult to keep up with the enormous volume of documents issued by international organizations; new treaties might escape their notice.

67. Sir Humphrey WALDOCK, Special Rapporteur, suggested that some of the criticism of article 63 had been a little exaggerated, since there could be no question of the treaties referred to imposing obligations without the consent of the States concerned. It was perhaps unwise for the Commission, as a body concerned with the codification and progressive development of law, to look back too often to the days of the Concert of Europe, when treaties had been concluded

⁴ *Yearbook of the International Law Commission, 1962, Vol. II, p. 161.*

and enforced under very different conditions from those which now prevailed or would be regarded as desirable.

68. He would have thought there was room in the draft for the limited category of treaties with which article 63 was intended to deal, and although treaties concerned with such matters as rights of passage over territory, rivers or maritime waterways could perhaps be covered in article 62 if the drafting of that article was adjusted, the same did not apply to treaties concerned with the demilitarization or neutralization of territory. Such problems did not belong exclusively to the nineteenth century, and although it might be the general hope that the United Nations would assume responsibility for settlements involving treaties of that kind, they were still often left to States. Treaties affecting peace were of very special importance and had been in the forefront of his mind when drafting article 63.

69. Article 63 differed from article 64 in that it was intended to provide a means for the speedy consolidation of a treaty as part of the international legal order, without having to await the longer process of formation of a customary rule of international law. One example was the Antarctic Treaty of 1959, which had dealt with a rather difficult political problem. That treaty had been drawn up by a conference of all the States having pretensions to territorial competence with respect to Antarctica, together with a number of other States which had shown an interest. Although the parties had included an accession clause in the treaty so that other States could accede to it, there was a clear intention to create an objective legal regime for Antarctica. The treaty had been concluded in the interest of all States; it specified that there was no intention of preventing any State from using Antarctica for scientific purposes, but laid down the fundamental rule that the continent must not be used for military purposes. Accordingly, it would be inadmissible for any State not a party to the treaty to claim that Antarctica was *res nullius*.

70. Article 63 was intended as a draft of the law of today; controversial political settlements of the past should be left out of the discussion; the examples from the past which he had given in his commentary were intended merely by way of illustration. It was clear, however, that the majority of the Commission did not favour the retention of article 63. Personally, he believed that, if redrafted, it could be included without putting any State in difficulties; but if the Commission decided to drop it, the gap would to some extent be filled by article 62 in the form in which he suggested that it be redrafted. That article would then cover much, although not the whole, of the ground covered by the present article 63. It would not cover treaties of neutralization or demilitarization, but perhaps those cases could be left to State practice and the development of customary law.

71. The Chairman for the session, Mr. Ago, had expressed the intention of discussing the problem of new States in connexion with article 63. Where the objective regime involved rights for third States, he did not believe that any serious problem would arise; it would be generally admitted that new States were entitled to invoke such rights in the same manner as

other States. A problem might arise if an attempt were made to bind a new State by certain obligations, for instance, in relation to the protection of minorities.

72. Mr. LIU said he had not intended to speak because he shared the view of the majority of the members that article 63 should be dropped. But his view was not based on the belief that its subject-matter was already covered by article 62. In fact, he thought that article 63 dealt with a different subject, and the Special Rapporteur had confirmed his interpretation. It was precisely because article 63 covered different situations, which were charged with political implications, that he thought it should be deleted.

73. He supported the arguments advanced by Mr. Jiménez de Aréchaga, which had not lost any of their force as a result of the Special Rapporteur's explanation of the difference between articles 62 and 63.

74. Unfortunately, he could not share the Special Rapporteur's optimism regarding the difference between present conditions and those which had prevailed in the nineteenth century.

75. Sir Humphrey WALDOCK, Special Rapporteur, replied that he was very much aware of the practice of States, and it was not because he took a utopian view of the political scene that he had advocated the inclusion of article 63. As Mr. Rosenne had said, the purpose of the article had been, precisely, to reflect an existing practice. What had changed was the organization of the international community.

76. Mr. TSURUOKA said that, after listening to the Special Rapporteur's explanations, he would suggest that the Commission request the Special Rapporteur to redraft article 63 in the light of the views expressed during the discussion. He did not think that the Commission should decide forthwith simply to drop the article, for its function was always to help to solve the problems confronting the international community.

77. Mr. TUNKIN said he wished to comment briefly on the two procedural issues that had arisen. First, he thought it would be illogical to ask the Special Rapporteur to redraft article 63 when the great majority of the Commission were in favour of deleting that article. Secondly, since Mr. Ago had expressed a desire to speak on a particular point during the consideration of article 63, he suggested that the discussion should not be closed at the present meeting.

78. The CHAIRMAN said that consideration of article 63 would be continued at the next meeting.

The meeting rose at 1 p.m.

740th MEETING

Monday, 8 June 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Later: Mr. Herbert W. BRIGGS

Welcome to Mr. Kanga

1. The CHAIRMAN welcomed Mr. Kanga, who was attending a meeting of the Commission for the first time.
2. Mr. KANGA thanked the Chairman and said he regretted that he had not been able to attend earlier; he appreciated the great importance of the Commission's work, and hoped to contribute to it.

Law of Treaties

(A/CN.4/167)

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 63 (Treaties providing for objective regimes)
(continued)

3. The CHAIRMAN invited the Commission to continue consideration of article 63 in the Special Rapporteur's third report (A/CN.4/167).
4. Mr. VERDROSS suggested that the Commission take up article 64 while continuing its discussion on article 63, since some members would probably accept, in article 64, the idea they rejected in article 63, namely, that a treaty between a few States could be transformed into a general rule.
5. Mr. TUNKIN said that although, when it came to discuss article 64, the Commission might touch on some problems dealt with in article 63, the fact remained that the subject-matter of the two articles was different and the wide field covered by article 63 could not be covered in article 64. He therefore urged that the discussion of the two articles be kept separate.
6. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that for the time being the discussion of the two articles should be kept separate. As at present conceived, article 64 was merely a reservation of the question of custom.
7. With regard to article 63, the discussion during the past week had shown that the majority of members recognized that the phenomenon considered in it existed, but that they were not prepared to include in the draft articles a provision embodying the concept of an objective regime generated by the treaty itself. If then, in deference to the wishes of the majority, it were decided not to include article 63, it would be necessary to adjust the formulation of article 62 so as to cover those treaties which constituted a means of creating a right for all States in general, and not merely for a particular category of States.
8. At the close of the previous meeting, he had mentioned the Chairman's interest in the question whether article 63 covered the case of a new-born State. He would like to hear from the Chairman, now that he was back, whether he thought that case came within the scope of the law of treaties and, if so, whether a special article was required to deal with it.
9. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion it was not quite correct to say that treaties could, of themselves, create an objective regime. Treaties merely laid down the conditions necessary to enable a situation to come into existence; objectively, that situation was created by the fact that the parties to the treaty acted in a certain way in fulfilling the obligations they had assumed under it. It could certainly be held that that problem went beyond the law of treaties proper, which was essentially concerned with the rights and obligations created for the parties to the treaty, not with the later consequences of the treaty's application.
10. During the discussion, however, the Commission had also considered the case in which two States reciprocally undertook to perform certain acts for the purpose of creating a new State, and made the birth of that new State subject to certain conditions. The Commission had recognized that a treaty could not create obligations for a third State without its consent. The question therefore arose whether the State about to be born was bound to observe a stipulation which was the very condition of its birth. The Commission could hardly disregard that special problem. If it did not think a special article could be devoted to the subject, it should be mentioned in article 62 or at least in the commentary on that article.
11. Mr. TUNKIN said that article 63 was intended to cover a variety of cases which differed greatly, both in factual background and in legal character.
12. One such case was the delimitation of a land frontier or of the territorial sea by two neighbouring States; so far as third States were concerned, that type of settlement constituted *res inter alios acta*.
13. Another case was that covered by the Montreux Convention on the regime of the Straits;¹ the material and legal bases of that settlement were completely different from those of the former example.
14. Another case was that of the 1948 Convention on the regime of the Danube² which provided for the right of free passage by merchant vessels of all nations, subject to the obligation to respect whatever rules might be established by the riparian States.
15. Yet another case of the type envisaged in article 63 was that covered by the Antarctic Treaty of 1959.³

¹ League of Nations *Treaty Series*, Vol. CLXXXIII, p. 215.

² United Nations *Treaty Series*, Vol. 33, p. 197.

³ United Nations *Treaty Series*, Vol. 402, p. 72.

Antarctica was of interest to all States ; some had made claims to territorial sovereignty, but a great many others did not recognize those claims. Speaking from his recollection as the Soviet Union representative at the Conference which had drafted the treaty, he would say that the intention had been to create a regime which could become universally accepted. But there had been no intention of imposing that regime ; any attempt to do so would have been illegal. Once again, the factual and legal situations in regard to that treaty differed from the other examples he had given.

16. To the extent that the problems considered in article 63 came within the scope of the law of treaties, they were covered by articles 62 and 64. If the language of those articles did not fully cover them, it could be amended to do so.

17. Mr. JIMÉNEZ de ARÉCHAGA said he would deal with two points that had arisen during the discussion : that of States *in statu nascendi*, and that of aggressor States.

18. With regard to States *in statu nascendi*, he wished to clear up a misunderstanding which appeared to have arisen in connexion with his statement earlier in the discussion. He had not said or intended to imply that it would be legitimate to make a State's right to independence, or the granting of independence, subject to certain conditions laid down in a treaty. History showed that the independence of a State was never granted graciously by another political community through a *stipulation pour autrui*, whether accompanied by conditions or not. Independence invariably resulted from the efforts of the subject people but, once thus earned, one of the juridical forms in which it could be acknowledged was a treaty to which the newly independent State was not technically a party. In mentioning that situation, he had intended to refer only to the legal superstructure and not to the sociological facts behind it.

19. It had been suggested by the Chairman that a special article should be devoted to the case of the State *in statu nascendi*, since it could not be covered by article 62, on the stipulation of rights in favour of third States ; the State concerned did not yet exist, so that it could not benefit from or accept the stipulation.

20. He was not of that opinion, however, because in cases of that kind, before the new State came into being, some recognition was granted to a belligerent community or *de facto* authority in favour of which the stipulation was made in the treaty. The community or authority in question, upon accepting the rights and obligations specified in the treaty, became a fully-fledged State. Examples of that situation were provided by Czechoslovakia with respect to the Treaty of Versailles in 1919, and Uruguay in 1828. But the Commission should abide by its earlier decision to deal only with treaties to which States were parties and leave aside agreements which might be entered into, or from which benefits might be derived, by other subjects of international law. If the Commission were to enter into the question of treaties that might benefit subjects of international law other than States, it would have

to consider such questions as that of rights stipulated in favour of individuals, as in the human rights conventions.

21. With regard to the question of aggressor States, to include a special article on the subject of treaties imposed on such States would raise more problems than it would solve.

22. The problem of the exercise of powers by a belligerent with binding effect on the territory of an aggressor State could not be divorced from other problems of international law, such as the law of *debellatio*, the responsibility of States, mentioned by Mr. Tunkin, and the difficult question of the limits of legitimate action against aggression, including both the application of sanctions by an international organization, and self-defence by the State attacked and by States supporting such legitimate defence. There would also be the serious difficulty that what had happened at the end of the Second World War, which had been legitimate then and continued to be legitimate by virtue of Article 107 of the Charter, might not be the appropriate action against future aggression under the existing law of the United Nations Charter.

23. He therefore suggested that the commentary should mention that certain members had wished to cover the subject of the aggressor State, but that others had thought it would lead the Commission into a discussion of matters alien to the law of treaties.

24. Mr. YASSEEN said that, from the technical standpoint, article 63 differed from article 62 only in regard to the machinery for determining the attitude of the third State towards the treaty. Under the terms of both articles, the extension of the rights and obligations provided for in a treaty could be based only on a collateral or complementary agreement establishing the acceptance of the third State. But article 63 sought to hasten acceptance by compelling the third State to decide within a certain time. On reflexion, he thought that the States directly concerned always gave a decision within a reasonable period ; as to States not directly concerned, there was no reason to lay down any special rule under which, after a certain period, their silence would be deemed to constitute consent. Article 63 was not really necessary ; all conceivable situations to which it might apply could be settled under article 62.

25. Mr. TABIBI said he agreed that articles 63 and 64 should be discussed separately, but decisions on them should be taken together.

26. Mr. LACHS said he agreed with Mr. Tunkin that article 63 attempted to cover, under the heading "objective regimes", a number of cases which were different in nature, in objective character and in scope. It was certainly difficult to cover all those cases in article 63, but it was also true that article 62, as it had emerged from the discussion, did not cover all the problems that could arise with regard to third States.

27. In particular it did not cover situations which had an effect *erga omnes*, even if they did not constitute objective regimes. He would deal with only one such

situation, which he had already described as combining both rights and obligations: the neutralization of States — in peace, not in war. The nineteenth century conception of neutralization had been different from that which now prevailed, but the Treaty of London of 1839,⁴ establishing the neutrality of Belgium, laid down that it should be observed *envers tous les autres Etats*. Consequently, at a time when States had still been considered to enjoy *jus ad bellum*, States which were not parties to the treaty had benefited by the neutral status of Belgium in that they could count on Belgium's not attacking them. But that benefit had been accompanied by certain obligations. The guarantors of the London Treaty had had a double obligation: to respect the neutrality of Belgium and to see that Belgium's neutrality was respected by other States.

28. Today, the status of neutrality had a different meaning, but it nevertheless had effect *erga omnes*. It could be created by a treaty or it could result from internal legislation, later confirmed by an international document. For example, Austria had adopted neutral status by an internal law of 26 October 1955 and its neutrality has been guaranteed by a number of States on 6 December 1955, by an exchange of notes.⁵ That status gave States not signatories to the guarantee certain benefits resulting from the consequences of the neutrality thus established. The rights and obligations were thus linked with one another, and that contemporary conception of neutrality created a situation *erga omnes* which was not fully covered by the wording of article 62. The signatories to the treaty accepted the dual obligation to observe the status of the neutral State and to see that other States also respected it. Third States which acquiesced in that status, had only the duty to refrain from violating it.

29. The Commission should provide for that type of situation in its draft. It was, however, a matter of expediency whether it should do so in article 62 or in a separate article.

30. Another point which the Commission should bear in mind was the necessity of including a provision on the question of ex-aggressor States. Notwithstanding the difficulties to which Mr. Jiménez de Aréchaga had referred, the question could not be ignored. Since the Commission had included draft articles on the effects of treaties on third States, its silence on the question of ex-aggressor States might lead to an unwelcome interpretation of its attitude towards the treaties concluded after the Second World War; in the interests of the rule of law, it was essential that any doubts regarding the validity of those treaties should be dispelled.

31. Mr. ELIAS said he feared that the Commission was being drawn into entirely new fields. He had been the first to suggest the deletion of article 63 and he adhered to the view that much of its contents could be placed in article 62 or in article 64. That also applied to such subjects as neutralized and demili-

tarized zones, as indicated by the Special Rapporteur himself at the previous meeting. He therefore considered that the matter was ripe for decision and urged the Commission to drop article 63 altogether and proceed to consider article 64.

32. The CHAIRMAN said he noted that most members took the view that article 63 should not appear in the Commission's draft. But it remained to be decided whether some of the cases contemplated in article 63 should not be covered by other articles. The Commission could consider that question when it examined the redraft of article 62.

33. Sir Humphrey WALDOCK, Special Rapporteur, said he would regret the deletion of article 63, which, he believed, served a purpose and had a progressive element in its provisions. In so far as article 63 was intended to cover the granting of rights to third States, article 62 could, if redrafted, cover its subject-matter; it would, of course, be necessary to reformulate article 62 in such a way as to cover the case of provision for rights in favour of all States.

34. Like Mr. Lachs, he feared that article 62 could not cover the case of negative obligations, such as those arising from demilitarization. Such obligations were often concomitants of rights, but occasionally they were independent of the exercise of rights. For example, the Antarctic Treaty provided for freedom to use Antarctica for scientific purposes; but it also laid down an objective obligation in the form of the definite prohibition of all nuclear activities in Antarctica. If the Commission dropped article 63, that type of situation would have to be left to be covered by custom, which was necessarily a slower process. His intention in drafting article 63 had been to provide legal machinery for accelerating the process of recognition of such a regime as part of the established international legal order. In that type of situation, it could be said that tacit recognition ought to be regarded as being established quite quickly, as it had been in such cases as the Antarctic Treaty and the Austrian State Treaty.⁶

35. However, since many members were not prepared to accept the provisions of article 63, article 62 must be redrafted and the deletion of article 63 must be borne in mind by the Commission when it came to consider article 64. Some of the material relating to article 63 must be preserved in the commentaries on articles 62 and 64 in order to avoid misunderstanding.

36. With regard to the problem of the new-born State, he thought that the Commission must take a decision. The same applied to the problem of the aggressor State. He himself believed that the Commission would be entering on somewhat delicate ground if it tackled that problem, and that to do so would unduly complicate its draft on the law of treaties.

37. Mr. TUNKIN said that although the problem of the aggressor State in relation to the law of treaties was very complex, it was nonetheless one of crucial impor-

⁴ *British and Foreign State Papers*, Vol. XXVII, p. 990.

⁵ See, for example, *Command papers*, H.M. Stationery Office, London, 1955, Cmd. 9645.

⁶ *United Nations Treaty Series*, Vol. 217, p. 225.

tance to contemporary international law, which took a firm stand against aggression. He suggested that members should reflect on the matter and that the Commission should reconsider it at a later stage.

It was so agreed.

38. The CHAIRMAN said that if there were no further comments he would consider that the Commission agreed to delete article 63 on the understanding that the problem of the new-born State could perhaps be covered in the redraft of article 62.

It was so agreed.

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

ARTICLE 64 (Principles of a treaty extended to third States by formation of international custom)

39. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 64, said that it had been drafted in negative form as a reservation in the light of the provisions contained in articles 61, 62 and 63. It was concerned with general law-making treaties and other treaties not initially framed as such, but which came to be recognized as embodying rules of general application. The article was not intended to cover the regimes he had sought to provide for in article 63.

40. In view of the Commission's decision on article 63, it might be thought desirable to re-cast article 64 in positive form and to include in it a reference to objective regimes the rules governing which developed into custom. Some members might consider that the subject-matter of article 64 required fuller treatment, but he believed that that would mean going beyond the scope of the law of treaties as such.

41. Although law-making treaties could, in certain cases, be regarded as formulating customary law, in most cases the treaties themselves were not binding on third States.

42. Mr. VERDROSS said he believed that article 64 would be very useful, and that it would be better to formulate it in positive terms. The Nuremberg Tribunal and other judicial authorities had taken the view that the Hague Conventions, for example, although not ratified by all States, had acquired binding force for the whole international community because they enunciated general norms of international law. That was also true of other conventions, and it might be that in the future the two Vienna Conventions, on Diplomatic Relations and Consular Relations, would have effects of the same kind.

43. He had spoken in support of article 63 and still thought that the fields of application of articles 63 and 64 did not entirely coincide. But if article 63 disappeared, article 64 would be all the more necessary, in order to make up, in part, for the provisions which the Special Rapporteur had embodied in article 63.

44. Mr. YASSEEN said that article 64 expressed an undeniable truth. A treaty could be the beginning of a *de facto* and *de jure* situation that could lead to the formation of a custom. That was so obvious that the

article might not seem entirely necessary. Nevertheless, since it dealt with one aspect of the relationship between custom and conventional rules, the Commission should consider whether it might not be useful to examine other aspects of that delicate and controversial question, in particular the relationship between an existing custom and a new conventional rule. The object of codification was, precisely, to derive written rules from existing custom; but a conflict might later arise between the existing custom and the new written rules, especially if their effect was not the same.

45. At the Vienna Conference of 1961 it had been asked what would become of customs that were not codified, or not completely codified. The Commission would be well advised to try to resolve difficulties that would constantly arise by reason of the very fact of codification.

46. Mr. REUTER thought that article 64 was very important and useful, and should reassure those who regretted the deletion of article 63. To give it its full significance, it should be drafted so as to avoid doctrinal questions and to make its scope as wide as possible.

47. Fortunately — from the doctrinal point of view — the word "recognition" was not used in the article. But in connexion with the expression "principles of law" the Special Rapporteur had expressed his doubts about the distinction between law-making treaties and contractual treaties. He (Mr. Reuter) had never understood that distinction, and he thought it would be better to use the expression "rules of law".

48. There might be a treaty by which two States agreed to make an artificial island in the high seas for peaceful uses. Assuming that that was permissible, the case would not come within the scope of the article 63 as proposed; nevertheless, it could be admitted that the status of such an island might subsequently be recognized by other States. That example clearly showed that article 64 was wider in scope than article 63 and was indispensable.

49. Mr. JIMÉNEZ de ARÉCHAGA said he believed that article 64 should be retained; indeed, the Commission had decided to drop article 63 on the understanding that its omission would be partly offset by article 64.

50. Article 64 should be amplified to cover not only the formation of international custom on the basis of a treaty, but also the more frequent case of a treaty codifying or enunciating existing custom. In both cases the treaty reached States which had not ratified it, although it was always the rule of customary international law which bound non-parties, not the treaty as such. The failure to ratify a treaty codifying established rules could not, despite some *obiter dicta* pronounced in the *Asylum case*,⁷ be considered as a repudiation of such rules if their existence could be proved by other means. The customary rules in question would also survive the extinction or termination of a codifying treaty.

⁷ *I.C.J. Reports*, 1950, p. 266.

51. He hoped that, before taking up article 65, the Commission would discuss the question of most-favoured-nation clauses, which was of direct relevance to that of the effects of treaties on third States.

52. Sir Humphrey WALDOCK, Special Rapporteur, said that in his opinion the question of most-favoured-nation clauses did not belong to the section of his report under consideration, and constituted a special problem.

53. Mr. AMADO said that article 64 confirmed one of the more remarkable phenomena of international law: the fact that certain treaties could lead to the formation of an international custom. However, in view of his own understanding and experience of the conclusion of a treaty, which was the concrete result of a hard struggle, he found it rather surprising that a rule of law should require ratification by States.

54. There seemed to be some discrepancies between the French and English texts of article 64. In the first line of the French text the word "*interprété*" should not be used, because the Commission was to draft rules on interpretation, and because that word did not seem to be an accurate translation of the English word "understood". Again, instead of speaking of *principes de droit "énoncés"*, which did not seem to correspond exactly to the English expression "laid down", it would be better to say "*reconnus*", in other words, principles which had been made evident by practice and case-law.

55. Mr. LACHS said that article 64 should certainly be retained, as it constituted an important element in the law of treaties; but he would hesitate to extend its scope to treaties confirming existing principles or customary law, because the binding force of such principles or customary law would lie outside the treaties themselves, which would only be evidence of their existence. The article should be confined to treaties creating new principles or rules of customary law.

56. The article should be worded in more positive form and reference should be made to generally accepted principle of law. It should be remembered that the Nuremberg Tribunal had declared that the provision of the 1907 Hague Convention and of the 1929 Geneva Convention had been generally binding rules at the time when the crimes examined had been committed. The expression "international custom" was not sufficiently emphatic and should be replaced by the expression "customary rule".

57. Mr. ROSENNE said that article 64 was necessary and reflected existing law, but ought if possible to be re-drafted in a more affirmative manner, avoiding doctrinal issues. It was unnecessary to go into the actual source of the rule; it might indeed be impossible to establish which had come first, the customary or the conventional rule.

58. The Commission had already accepted the principle of article 64 in article 53, paragraph 4,⁸ which

dealt with the legal consequences of the termination of a treaty, but it was now given a more independent status.

59. Perhaps, instead of referring to articles 61 to 63, it would be preferable to refer to the articles in general, since some of the provisions in Part I of the draft might also be relevant. He was not sure that article 64 should be placed with those dealing with the effects of treaties on third States. As it embodied a fundamental rule, perhaps it should be given a more independent position.

60. Mr. TUNKIN said he agreed with Mr. Rosenne that article 64 did not belong to the group concerned with the effects of treaties on third States, since it dealt with the separate issue of the relationship between conventional and customary norms of international law. Perhaps it ought to be transferred to a different part of the draft.

61. He approved of the way the article had been formulated by the Special Rapporteur and would deprecate its being broadened to refer to all rules of international law. Such a general formula might render the article virtually meaningless.

62. Although principles of international law were not merely concepts but, as in the case of those mentioned in the United Nations Charter, involved rights and obligations and possessed a normative character, in the context of article 64 perhaps the word "rules" would be more appropriate.

63. As the word "custom" was ambiguous both in English and in Russian, it would be better to substitute the expression "customary norm".

64. The CHAIRMAN,* speaking as a member of the Commission, said he was in favour of retaining article 64. The Drafting Committee could consider the question of transferring it to another part of the draft.

65. He agreed with Mr. Rosenne that the provision should refer to the articles of the draft in general and not specifically to articles 61 to 63. It would also be preferable to refer to customary rules of international law rather than to an international custom, and to rules rather than to principles of law.

66. Mr. CASTRÉN said that article 64 was useful and necessary; on the whole he was prepared to accept the text submitted by the Special Rapporteur, but he agreed with Mr. Rosenne that it should not refer to articles 61 to 63 only.

67. Mr. PAL said that, in his opinion, the purpose of article 64 was to mitigate the effects of the immediately preceding articles; it should therefore remain where it was, otherwise its force would be greatly diminished. Another such article of general application could be inserted elsewhere if the Commission so desired.

68. Mr. ELIAS said that article 64 should be retained, but the drafting would require considerable

⁸ Official Records of the General Assembly, Eighteenth Session Supplement No. 9, p. 28.

* Mr. Briggs.

amendment. The Special Rapporteur had adopted the right approach to the matter and it would be unwise to extend the scope of the provision.

69. Mr. de LUNA said he fully agreed with the Special Rapporteur's statement in his commentary on article 64 that it was not appropriate to deal with the extension of the effects of treaties through the growth of custom as a true case of the legal effects of treaties on third States. As several members had already stressed, it was a particular case of the more general subject of the relationship between customary international law and conventional international law — of parallel norms whose content might be the same, but which had an entirely independent existence. He too was in favour of leaving aside doctrinal problems concerning the nature of the sources of positive international law. It was quite evident that the inclusion of a rule of international law in a treaty did not deprive the pre-existing customary rule of its validity. Moreover, it should be made clear in the text that the article referred to customary international law, for the expression used could have several meanings.

70. A problem arose because, in customary international law, a distinction could be drawn between two kinds of international legal custom: that which created ordinary international law because it satisfied a need of the international community, and that which formed a special or regional customary law. In both cases a rule laid down in a treaty might subsequently be approved by States other than the parties — not as third States, but because the rule reflected the *convictio juris* of the international community. It might happen, however, that the customary rule and the conventional rule did not coincide exactly. Hence a rule laid down in a treaty should not be too closely linked with the corresponding rule of customary law. That did not mean that the Commission should not deal with the matter; he approved of the principle on which article 64 was based, but doubted whether the rule was in its proper place in the section of the draft relating to the effects of treaties on third States.

71. Mr. TUNKIN suggested that the words "international custom" should be replaced by the words "customary rules of international law": that expression would have the additional merit of stressing the unity of international law.

72. Mr. RUDA said he fully endorsed what had been said by Mr. Yasseen; the principle laid down in article 64 was incontestable and generally accepted. Treaties forming international custom acquired binding force for States not parties to them and were a source of rules of law.

73. He agreed with Mr. Reuter that the word "rules" should be substituted for the word "principles" and also welcomed the drafting suggestion made by Mr. Tunkin. He hoped Mr. Lachs had not intended to suggest the insertion of a reference to generally accepted principles of international law; that would detract from the force of the article.

74. Mr. TSURUOKA said that, broadly speaking, he agreed with the previous speakers. Like Mr. de

Luna, he thought it might be dangerous to establish too close a connexion between the provisions of a treaty and the formation of a custom in the manner provided for in the draft. Although it was self-evident, it might nevertheless be useful to draw attention in the commentary to the fact that such a custom should be regarded as derived from the treaty only in so far as it coincided with the provisions of the treaty. With regard to Mr. Yasseen's observations on the partial coincidence of a new written rule with existing custom, it might be advisable to mention in the commentary that such a conventional rule did not affect the custom.

75. He could accept the position chosen for the article by the Special Rapporteur, because the section in which it was placed dealt with the effects of treaties not only in relation to the parties, but also to non-party States, and because what was stressed was not the formation of the custom, but the effects of a treaty on the formation of the custom.

76. Mr. LIU said he agreed with Mr. Pal that article 64 supplemented the three preceding articles and belonged to that group. He hoped its present scope would not be enlarged.

77. Mr. BARTOŠ said that, although he might be opposed to article 64 on theoretical grounds, he could approve it from the practical point of view.

78. The first problem that arose was one of definition: were the rules in question really general and, consequently, binding rules? Although some international tribunals had adopted a positive attitude towards certain rules in their judgments, there were dissenting opinions of equal weight. In his view, the rules in question were certainly rules of positive law; but it was also necessary to know whether the parties to the treaty had intended to state a rule that would really be binding on other States, and whether a sufficient number of third States had agreed to abide by that intention, thus establishing quasi-unanimity of the international community.

79. The controversies that arose at most international conferences when it came to deciding whether the content of a rule laid down should be regarded as a general principle of international law, showed what a delicate question that was. It was thus rather dangerous, in international law, to confuse the source of rules with the effects of treaties; if the content of a rule was in dispute, could the existence of the rule be proved by the text of a law-making treaty or treaty of general interest ratified by a large number of States? That was a debatable point. He feared there might be some confusion between two different questions: the question whether general principles were binding, irrespective of whether they were laid down in treaties or not, and the question whether the use of certain formulas in treaties was conclusive proof of the existence of general rules?

80. Consequently, while he supported the Special Rapporteur's proposal, he did so subject to certain

reservations, because he was not absolutely sure whether such rules were always rules of pre-existing positive international law, or whether they were created by the treaty itself. Moreover, it was very doubtful whether certain rules laid down in treaties could be regarded as binding. There was, as yet, no international legislation that could be relied on to determine which rules were really binding. The rule enunciated in the article was accordingly in the nature of international quasi-legislation, which was certainly useful, but still exceptional.

81. Mr. YASSEEN said that, as he saw it, article 64 regulated only one aspect of the general problem of the relationship between custom and written rules, namely, the effects of a treaty on third States. It might be useful to consider whether the problem should not be treated as a whole in a general study which would include the question of the codification of law.

82. Sir Humphrey WALDOCK, Special Rapporteur, said that most members seemed to view article 64 as a corrective to the preceding provisions and only a few wished to deal with the matter in a broader way. Perhaps he might be allowed to postpone his summing-up of the discussion until the following meeting.

83. In the meantime he would suggest that, after concluding the discussion on article 64, the Commission should take up article 66; it could then discuss article 65 together with the articles on revision, with which it was closely connected.

It was so agreed.

The meeting rose at 6 p.m.

741st MEETING

Tuesday, 9 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties (A/CN.4/167) (continued)

[Item 3 of the agenda]

ARTICLE 64 (Principles of a treaty extended to third States by formation of international custom (continued))

1. The CHAIRMAN invited the Commission to continue consideration of article 64 in the Special Rapporteur's third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the most important suggestion made during

the discussion of article 64 was that its provisions should deal more generally with the relationship between international custom and treaties. Like the majority of the Commission, he thought it would be inadvisable to broaden the scope of the article in that way; the relationship between international custom and treaties depended to a large extent on the nature of the particular custom involved and on the provisions of the treaty. The subject would be considered later in connexion with interpretation, and he had in mind to include in that section of the draft a provision which would touch on the subject-matter of the former article 56. He therefore proposed that article 64 be confined, as at present, to the application of the rules of a treaty to a non-party State by reason of an international custom.

3. It had been suggested by some members that article 64 should be made to deal specially with the case of general multilateral treaties — the so-called "law-making treaties". It was characteristic of those treaties that although ratifications proceeded very slowly, the international community tended to act on them comparatively quickly. In other words, sooner or later the treaty began to be considered as the most authentic statement of the customary international law on the matter with which it dealt. He was not, however, in favour of extending article 64 to deal specially with general multilateral treaties. The chief difference in their case was that the great majority of States were not altogether strangers to the treaty; they had signed it, even though through inertia or otherwise they might not have become parties. But the treaty was not binding on them as such; it was still a case of the principles embodied in the treaty coming to be recognized as customary law and being binding on them for that reason. As he had envisaged it, article 64 was intended simply as a corrective to the fundamental rule laid down in article 61, *pacta tertiis nec nocent nec prosunt*.

4. Mr. Jiménez de Aréchaga and some other members had suggested that article 64 should be made to cover the fairly common case of a treaty which wholly or in part embodied rules of customary international law from the outset. That situation was somewhat different from the one envisaged in article 64, in that the other States were already bound by the rules of customary international law codified by the treaty. It must be recognized, however, that codification conventions contained a mixture of rules of customary international law and elements of progressive development intended to settle controversial points. Nevertheless, the Drafting Committee could attempt to cover the point in article 64 without abandoning the article's main purpose, which was to operate as a corrective to article 61.

5. The Drafting Committee could also consider the suggestion made by some members that article 64 should be couched in positive rather than negative terms. At the same time, certain points of drafting could be dealt with, such as the suggestion that the word "principles" be replaced by "rules". He had no objection to that change, but had hesitated to use the word "rules" from a desire not to appear to be introducing a suggestion of international legislation.

6. It had also been suggested that the expression "international custom" should be replaced by "customary international law". He had no objection to that change either. He had borrowed the term "international custom" from Article 38, paragraph 1.b of the Statute of the International Court of Justice, where it was followed by the words "as evidence of a general practice accepted as law". In drafting article 64, he had thought that the words "becoming applicable to States..." covered that same notion of a binding custom, as opposed to a mere usage.

7. The CHAIRMAN, speaking as a member of the Commission, said he approved of the conclusions reached by the Commission. If the article were left in the position suggested by the Special Rapporteur, it would be better for it to remain restricted in scope — simply stating that a customary rule identical in content with the conventional rule might be formed subsequently — and negative in form, appearing as a corrective to the preceding articles. If, on the other hand, the Commission preferred to use a positive formula and to deal with cases in which a treaty provision reproduced an existing customary rule, it would be better to place the article elsewhere in the draft. The Drafting Committee should be able to settle that question quite easily.

8. Mr. JIMÉNEZ de ARÉCHAGA suggested that it might be advisable to include in the draft articles a few provisions sanctioning the practice of the most-favoured-nation clause and dealing with its modalities and mode of termination. It was true, as the Special Rapporteur had pointed out, that the mechanism of operation and the effects of that clause were simple and easy to understand, but he did not think the subject should on that account be excluded from draft articles, which already contained a number of self-evident provisions.

9. The most-favoured-nation clause was acquiring increasing importance in international law and international relations; it provided a suitable mechanism for enlarging the traditional contractual framework of treaty-making and for allowing States not parties to a treaty to benefit from its provisions. As a result of the operation of the clause, treaties could assume a quasi-legislative function; and another useful service it performed was to permit the continuous adjustment of commercial and other economic agreements to new circumstances, since it was generally the most recent treaty which came to be applied through its operation. It was significant that the whole of the GATT system was based on the most-favoured-nation clause.

10. It could not be said that no difficulties of a general legal nature arose in connexion with the most-favoured-nation clause. In practice, such difficulties did arise and, in a recent case, the International Court of Justice had examined the problem of the manner in which most-favoured-nation treatment might terminate. The judgment of the Court in the *Morocco* case could provide a useful rule of law for incorporation in the draft articles on the law of treaties.¹

11. The problem was thus of both theoretical and practical importance and should find a place in the draft — perhaps between articles 62 and 64. He therefore suggested that provisions should be included in the draft articles sanctioning the practice of the clause and dealing with its modalities and the specific forms of termination of the treatment it afforded.

12. Sir Humphrey WALDOCK, Special Rapporteur, said that his decision not to include any provisions on the most-favoured-nation clause had not been due to any feeling that the clause was unduly simple; in fact, although the idea behind it was simple enough, its application could be extremely difficult. Nor had it been due to any idea that the subject was unimportant, since the clause played an important part in treaty practice. But it did not appear to add much to the general rules of treaty-making. The effect of the clause was to incorporate in a treaty, by agreement, the provisions of another treaty. Perhaps some mention of the practice could be included, either in the draft articles or in the commentary, though he saw no need for the Commission to go out of its way to give its sanction to a practice which was well established and was based on the sovereignty of States and their freedom to make agreements at will. Any serious consideration of the problem of the most-favoured-nation clause would deserve, and require, a special study.

13. Mr. BRIGGS said he was not inclined to favour the inclusion in the draft articles of provisions on the most-favoured-nation clause; he thought a reference in the commentary should suffice. Generally speaking, he found the draft articles too long already; they should deal only with general principles and not go into excessive detail.

14. Mr. REUTER agreed with the Special Rapporteur that there was no reason to refer to the most-favoured-nation clause in a general draft on the law of treaties. The subject was not only broad and complex, but also highly specialized. The effect of the clause differed, according to whether it appeared in an economic treaty or, for instance, in the form of a national treatment clause in an establishment treaty. Technically, the most-favoured-nation clause was a *renvoi* to another treaty, whereas the national treatment clause was a *renvoi* to municipal law. The Commission would therefore have to deal with the whole question of *renvois* to another rule, whether conventional or not, and also with the whole question of reciprocity, since the clause was very often only applicable subject to reciprocity. In addition, very complicated economic problems were involved, which the Commission could not tackle without the help of economic experts.

15. The CHAIRMAN said that the Commission was at present dealing with the effects of treaties on third States. But the most-favoured-nation clause only appeared to provide for the treaty to produce an effect on third States; in reality it was rather a rule left blank, which filled itself in of its own force when other more favourable treaties were concluded. If the Commission wished to refer to that clause it could only do so in a very simple and general provision, which would per-

¹ *I.C.J. Reports*, 1952, pp. 192-196 and 204.

haps be more appropriate in Part II of the draft. The Commission could therefore keep the question in mind and take it up when it reconsidered the draft as a whole.

16. Mr. JIMÉNEZ de ARÉCHAGA said he had not been convinced by the arguments he had heard. In the first place, other articles dealt with matters just as common and obvious as the most-favoured-nation clause, and secondly, the Commission would not have to deal with the substance from the economic point of view, but could confine itself to the formal and legal aspects. He would not press for an immediate decision, however; the matter could be mentioned in the commentary and taken up again when the draft was re-examined as a whole.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that on the whole he agreed with Mr. Reuter and did not consider it advisable to deal with the question of the most-favoured-nation clause. However, the Commission should not be influenced by the fact that the subject had been raised in connexion with articles 61 to 64. Except for article 61 itself, those articles did not really deal with the effects of a treaty on third parties, but rather with the acceptance of particular treaty provisions by a third State. Thus the question of the most-favoured-nation clause was not so remote from their subject. There was, however, a difference between that clause and the acceptance given to certain provisions of a treaty by a third State which thereby became a party to those provisions. The effect of the most-favoured-nation clause was that, by concluding another treaty, a State bought, as it were, rights in a treaty already concluded or to be concluded by another State.

18. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to refer article 64 to the Drafting Committee on the understanding that the question of the most-favoured-nation clause would only be mentioned in the commentary; it would be discussed again by the Commission during the second reading of the draft articles.

It was so agreed.

ARTICLE 66 (Application of treaties to individuals)

19. The CHAIRMAN invited the Special Rapporteur to introduce article 66 in his third report (AC/N.4/167).

20. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of article 66 were intended to reflect the existing situation in regard to the application of treaties to individuals. In drafting those provisions, he had endeavoured to avoid any pronouncement in the theoretical issues involved. If the Commission agreed on the usefulness of including an article on the lines of article 66, it would be necessary to expand the commentary.

21. Mr. VERDROSS said that, in his opinion, article 66 dealt with two quite different cases. The first was that

of a treaty under which a State was bound to confer certain rights or impose certain obligations on individuals. That was the normal case of a treaty concluded between States and to be executed by them; there was no need to draft a rule on it.

22. The second case was that of a treaty which directly created rights or obligations for individuals. States were perfectly free to make such a treaty. A treaty could directly confer on individuals the right to lodge a complaint against a State before an international body, which was equivalent to creating international rights for individuals. Many cases of that kind had occurred in practice. For example, the second Hague Conference had adopted a treaty — not subsequently ratified — establishing an international prize court and giving individuals whose cargo had been seized the right to bring a claim against a State before that court.² The Upper Silesian Arbitral Tribunal and the many other mixed arbitral tribunals established after the First World War had also been bodies before which individuals could proceed against States.

23. Such treaties were therefore possible. Whether the Commission should devote an article to cases of that kind was another question.

24. Mr. CASTRÉN said he entirely agreed with Mr. Verdross. The Special Rapporteur himself did not seem to be sure that the article was necessary; he (Mr. Castrén) thought it should not be included in the draft. Sub-paragraph (a) stated a well-known and almost universally accepted general rule. Sub-paragraph (b) confirmed the obvious fact that States were free to concert special procedures for applying the treaties in question.

25. If the Commission nevertheless decided to retain the article, it should be drafted differently. First, it should be made clear that the procedure referred to in sub-paragraph (a) was the normal course, and that sub-paragraph (b) provided for an exception. Secondly, the opening words of the article were rather strange; strictly speaking, it was the State itself, as a party to the treaty, which, in most cases at least, was the subject of the treaty. Consequently, it would be better to begin the article with a more neutral and general expression, such as "Where a treaty concerns individuals".

26. Mr. YASSEEN said that article 66 was very controversial, because it raised two problems: that of the individual as a subject of international law and that of the monistic or dualistic nature of the legal order. But doctrinal controversies apart, and without taking any general position on either of those problems, he thought the Commission should include in its draft an article in which it recognized that, to a certain extent and in certain circumstances, a treaty could be invoked directly for or against individuals. For a treaty could provide for obligations imposed directly on individuals as well as rights conferred directly on individuals. That view was consistent with the recent trend in the development of international law and was supported by case-law.

² Scott J. B. *The Hague Conventions and Declarations of 1899 and 1907*, New York, 1915, p. 188.

27. International case-law tended to recognize the direct application of treaties to individuals, especially where the treaty itself contained provisions in that sense. As early as 1910, in the *North Atlantic Fisheries* case, the Permanent Court of Arbitration had intimated that it was a question of interpretation of the treaty, when it had said: "But considering that the treaty does not intend to grant to individual persons or to a class of persons the liberty to take fish. . .".³ In its advisory opinion on the *Jurisdiction of the Courts of Danzig*, the Permanent Court of International Justice had stated that "... it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations enforceable by the national courts."⁴ That tendency was evident in the case-law of certain countries. He agreed with Mr. Verdross that there was nothing to prevent States from stipulating in a treaty that the treaty was directly applicable to individuals. The parties were free to fix the scope of the treaty and to decide the details of its application.

28. The Commission should certainly propose a solution in its draft, but the article should be differently drafted; it should stress the tendency, supported by international case-law, to consider the treaty itself as the basis of the solution.

29. Mr. PAREDES said that in his commentary on article 66 the Special Rapporteur had very wisely drawn attention to the disadvantages of discussing the controversial question of whether an individual could be a subject of public international law, which he thought would lead the Commission very far afield. He (Mr. Paredes) believed that that was so, but at the same time he found it difficult to reach a decision on the content of article 66 without taking some position on the question.

30. In his opinion, when two or more States agreed to guarantee certain rights for individuals, those individuals were not given the capacity to plead before an international court, but duties were agreed between the contracting parties, of which the individuals were the beneficiaries. The obligation was established between the States and it was for them to ensure that it was fulfilled and to demand its fulfilment in case of default. In the case of an agreement on human rights, for instance, if one of the parties violated the agreement on its own territory and with respect to its own nationals, they could not bring an action before an international court, but could only act through one of the contracting parties, which would assume the role of protector of the individuals concerned and demand fulfilment of the obligation in its own name.

31. He thought it would be extremely dangerous to attack the jurisdiction of the State on the pretext of providing international protection for the individual citizen, by creating yet another court in addition to those already established under the municipal law of

every country. In Ecuador, for example, litigants were protected by three courts (even four, if actions for damages were taken into account); would it be advisable to prolong litigation by introducing yet another — international — court? He did not think so. Consequently, he was not sure that it was advisable to retain article 66.

32. Mr. ROSENNE said that his first reaction to article 66 had been to doubt its relevance to the subject of treaties between States. On further reflection, however, he had arrived at the conclusion that a provision on the question dealt with in article 66 was necessary, if only because of the definition of a "treaty" adopted by the Commission.⁵ However, he was not certain that the article, as drafted, was adequate.

33. He agreed with the Special Rapporteur that it was not necessary for the Commission to become involved in the controversy regarding the precise legal status of the individual in international law. Doctrinal controversies could be avoided if the treaty itself were taken as the real starting point. The question might be easier to deal with if obligations and rights were treated separately, since they raised different problems.

34. The Commission should omit any reference to the very special problem of international criminal law, on which much more could be said than appeared in the commentary; there was, for instance, the Commission's own work on the subject and that of the two special committees set up in 1951 and 1953 by the General Assembly to study the question of international criminal jurisdiction.

35. From the point of view of the general law of treaties, the question of obligations on individuals presented a very real problem, which was illustrated by the recent "pirate" radio broadcasts in Europe. Those broadcasts seemed to involve breaches of the international agreements on the allocation of radio frequencies and of a number of other treaties, such as those dealing with copyright. The position in such cases was that a State was not entitled to escape its obligations under a treaty on the plea that the breaches were being committed by individuals. The principle *pacta sunt servanda*, meant that a State was under an international duty to take the necessary steps to ensure that a treaty was not violated by individuals under its jurisdiction — not only persons in its territory, but also its nationals who were not within the territorial jurisdiction of another State. The provisions on the subject of obligations should express the idea that a State committed a breach of a treaty if it did not take all the necessary steps to ensure that individuals under its jurisdiction respected the provisions of the treaty. The matter was directly connected with State responsibility, and would have been covered if paragraph 4 of article 55 had been retained.

36. The problem of obligations was more serious than that of rights. A State could, in its relations with

³ United Nations *Reports of International Arbitral Awards*, Vol. XI, p. 192.

⁴ *P.C.I.J.*, 1928, Series B. No. 15, pp. 17-18.

⁵ *Yearbook of the International Law Commission*, 1962, Vol. II, p. 161.

other States, subscribe certain undertakings as a result of which rights appeared to be granted to individuals. In fact the individuals concerned benefited from the consequences of the rights conferred on States. Examples of that situation were provided not only by the treaties on the protection of minorities, but also by the copyright conventions and many agreements relating to matters of private law. The position in those cases was that the State was under an international duty to give effect to the treaty in its municipal law. Any statement to the effect that a treaty could be invoked by individuals would lead the Commission on to controversial ground. Personally, he preferred the approach adopted by the previous Special Rapporteur, Sir Gerald Fitzmaurice, in his fourth report.⁶

37. He noted that in sub-paragraph (a) the expression "national systems of law" was used, and he would like to know whether there was any reason for departing from the expression "internal law of the State" used in articles 1 and 31.

38. Mr. AMADO said that his position was similar to that of Mr. Verdross, Mr. Castrén and Mr. Yasseen. The article was simplicity itself. The German positivist doctrine had failed to gain acceptance, and case-law had long since swept away the complications that might have attached to the problem of the rights of individuals in international law. The one thing that was essential and fundamental in international law was the will of the parties. States could not be prevented from agreeing on stipulations concerning individuals.

39. Mr. Verdross's comment on sub-paragraph (a) was quite justified, however; it was unnecessary to say that treaties could act on individuals through the State, because that was the normal process.

40. Mr. de LUNA said he agreed with Mr. Amado and considered, like Mr. Paredes, that the subject called for the most careful formulation. His own opinion was that if the parties so wished a treaty could confer rights or impose obligations on individuals; but the Commission should not pronounce on that point of doctrine. Many pertinent examples could, of course, be given, such as the treatment of minority rights by the League of Nations or the option clauses in treaties for the transfer of territory; but some writers, particularly Anzilotti, denied that treaties created actual rights in favour of individuals. It was certain that States could create such rights and were free to do so, but he doubted that they had ever done so or that any treaty had ever created a subjective right for individuals. In a system of law, one must not confuse the owner of a subjective right and the beneficiary or object of a legal rule or norm. Individuals belonging to a minority, for example, might have the right to petition and inform a body such as the Council of the League of Nations; but in so doing they merely provided the datum on the basis of which the right would be exercised.

41. Hence it was important to draft the article with great caution and to choose the examples in the commentary very carefully. He had no theoretical objection to the wording proposed, but he feared that, especially in sub-paragraph (a), it took a definite doctrinal position and that the examples given in the commentary were not conclusive.

42. Mr. BARTOS said he did not intend to discuss the doctrinal question which arose in connexion with article 66, but it must inevitably be asked whether individuals could be regarded as relative — or indirect — subjects of international law, in other words, as the potential beneficiaries of rights deriving from the treaty, or whether, on the contrary, they could be granted actual rights enabling them to act directly.

43. Article 66 had the merit of reflecting an idea that was gradually gaining ground in international law; the idea that, in the international public order, individuals could be direct subjects *vis-à-vis* all States, including that of which they were nationals. The question had arisen in connexion with the draft covenants on human rights, which were under discussion in other United Nations organs, and the same trend was discernible to a certain extent in conventions of general interest. Without taking sides in that controversy the Commission could, therefore, by adopting a very cautious formulation for article 66, simply recognize that States could confer certain direct rights on individuals by a special treaty. That might be a reasonable first step in introducing the idea as an institution of positive international law.

44. It was very difficult to say that the examples given really justified the assertion that such direct rights existed. The United Nations Charter spoke of nations and peoples, not of individuals. It did, however, provide for the possibility of bringing certain international machinery into operation for the benefit of individuals. The Convention for the Protection of Human Rights and Fundamental Freedoms,⁷ gave individuals who considered themselves injured in that respect the right to apply direct to the European Commission of Human Rights. Similarly, it seemed that certain labour conventions drawn up by the International Labour Organisation, sought to give individuals a direct right to remedies. But in any event, in a draft convention prepared with a view to the progressive development of international law, it was the Commission's moral and intellectual duty to recognize that rights could be directly conferred and obligations directly imposed on individuals, juristic persons, or groups of individuals, especially as nothing was said in the present article about the measures to be taken by States for the effective application of the treaty to individuals.

54. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had tried to draft the article without taking any definite position on one of the most controversial theoretical problems of internationalist doctrine. If he had not succeeded, it

⁶ *Op. cit.*, 1959, Vol. II, p. 49, articles 32 and 33.

⁷ United Nations *Treaty Series*, Vol. 213, p. 222.

was because any such undertaking was doomed to failure from the start.

46. He (Mr. Ago) recognized that the ultimate object of nearly all international rules in treaties was to create rights and obligations for individuals. That was true, for instance, of all rules relating to the status of aliens ; but in that case the rights and obligations would only be created by the State through internal legislation enacted to implement the treaty. The Commission was not required to consider that problem at present for it must not be forgotten that the preceding articles dealt with the effects of treaties on third parties that were subjects of international law, not on third parties governed solely by municipal law.

47. As several speakers had said, it was open to question whether rights and obligations deriving from a treaty really existed for individuals. The examples given in the literature and by the Special Rapporteur himself showed that different interpretations were possible in support of either thesis. None of them settled the questions whether subjective international rights and international obligations of individuals really existed, whether such rights and obligations were really international or rather internal in character, whether they derived from the treaty itself or from action taken by States or by other bodies in pursuance of the rights and obligations created by the treaty, or whether those bodies themselves were international or national in character. One of the most important examples mentioned was that of mixed arbitral tribunals ; but, there again, there was only controversy and most of the authorities were inclined to consider that they were ordinary courts of internal law.

48. The case referred to by Mr. Rosenne was very interesting, but it was hard to say whether the international obligation was an obligation on the individual or an international obligation of the State not to permit an individual to perform a certain act.

49. It was therefore essential for the Commission to avoid taking any definite position on such a controversial question as whether an individual could be a subject of international law. The Commission was bound to be divided on that point, and the law of treaties would gain nothing from any majority decision for or against. But if the Commission acknowledged that an international treaty had effects on third parties, and if, when speaking of third parties, it referred to individuals, it would be implicitly admitting that individuals could possess international rights or obligations and were consequently subjects of international law.

50. He therefore thought it preferable to delete article 66. He could not subscribe to an article that took a positive view on the international personality of the individual at that stage in the development of international law.

51. Mr. ELIAS said that article 66 should be deleted or at least left aside until the observations of governments had been received and the Commission took up the whole draft on second reading. Some of the problems the article set out to solve were so complex that

even with the most ingenious drafting, he feared it would be impossible to devise an acceptable text. In all probability the Special Rapporteur had inserted the article mainly for the sake of logical completeness.

52. Mr. BRIGGS said he was unable to see what purpose article 66 was intended to fulfil. Presumably the sense in which it talked of rights being applicable to individuals was through the contracting parties by their systems of law. As to the obligations, it was presumably the duty of States to see that they were performed by individuals. Neither of those two provisions appeared to be necessary, since they were self-evident. The article could be dropped.

53. Mr. JIMÉNEZ de ARÉCHAGA said that, although the Special Rapporteur was to be commended on his effort to by-pass the doctrinal issues, the drafting of the article raised difficulties, as it adopted an Anglo-Saxon common law approach identifying rights with remedies. The way in which it had been formulated would not be appropriate for continental systems of law, under which rights were regarded as coming into existence before remedies. Under those systems it could not be stated, as proposed, that a right was "applicable to the individuals through... international organs and procedures". The provision would have to stipulate that an individual could derive rights direct from a treaty, and that the remedies provided for in the treaty could be invoked by him without recourse to the State of his nationality. But such a formulation would certainly not be considered a neutral formula by the Chairman. In view of the drafting difficulties, he agreed with some other members of the Commission that the article should be deleted.

54. Mr. LIU said that article 66 had its place in the Commission's draft, because it laid down the important principle that only contracting States could enforce rights and obligations of individuals under a treaty. It was important to recognize that as a result of recent developments some kind of international machinery and procedures did exist, which placed States under some pressure to ensure that certain treaty rights were respected. The article was compatible with modern trends and its inclusion could be regarded as a progressive step.

55. Mr. TUNKIN said that the Special Rapporteur had submitted article 66 for discussion without committing himself on the principle. After studying the article, he (Mr. Tunkin), had come to the conclusion that it was not indispensable and should be dropped — a point on which he largely shared the views put forward by the Chairman.

56. The main purpose of the article was to ensure the observance of treaty obligations affecting individuals ; but the Commission had already approved an article embodying the principle *pacta sunt servanda*⁸ under which States were bound to observe treaty obligations, the manner in which that was to be done being left to them. The statement made in sub-paragraph (a)

⁸ Article 55.

added nothing to the provisions already adopted and there hardly seemed to be any need for the provision in sub-paragraph (b) even if the existence of such exceptions were admitted — a matter about which he had serious doubts.

57. Mr. EL-ERIAN said that although he was in favour of the principle underlying the article and its basic idea, he subscribed to what had been said by most members, and in particular by the Chairman, concerning the technical difficulties to which its formulation gave rise. Like Mr. Briggs, he was not altogether clear about the purpose of the article. As it was essentially concerned with internal processes and machinery for ensuring the observance of treaty obligations, it had no real place in the draft.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that he had tried to avoid doctrinal issues by not specifying, in article 66, what the rights and obligations were and whether they were possessed by individuals, but he agreed with Mr. Briggs's criticism of the drafting of sub-paragraph (a). The purpose of the sub-paragraph was only to state that there was an obligation on States to ensure respect for the provisions of a treaty by their own nationals. That provision was made necessary by the one contained in sub-paragraph (b); otherwise the article would not have been properly balanced.

59. He would prefer to withdraw the article altogether than to adopt the solution advocated by Mr. Rosenne, which was to deal with the important issue of compliance by individuals with obligations arising under treaties by converting the article into a statement of the obligations on States with respect to the actions of individuals. The Commission had already rejected an article concerned with the duty of States to take the necessary steps in their national law to ensure the due performance of their treaty obligations, largely on the grounds that it was a matter falling within the topic of State responsibility.

60. As the general feeling seemed to be against including article 66, he wished to put on record his view that sub-paragraph (b) dealt with a phenomenon which already existed in international law and the extent and importance of which had perhaps not been sufficiently recognized during the discussion. For example, he could hardly conceive of the European Commission of Human Rights as a municipal tribunal, and it applied a Convention through international machinery; he believed the view expressed by the Chairman on that point to be in contradiction with the existing practice.

61. There were other examples of the transfer to the international plane of matters concerning individuals; for example, the right of petition in the United Nations trusteeship system was expressly accorded to individuals by the Trusteeship Agreements. Some members who had been opposed to article 66 had on various occasions referred to the right of self-determination; he would like to know what kind of right that was and whether it belonged to individuals and groups of indi-

viduals or only to embryonic States and whether they considered that it existed on the international plane. In general, he would much regret the deletion of sub-paragraph (b) since it would not accord with the high importance attached by the Charter and by modern international law generally to human rights and freedoms.

62. The CHAIRMAN said that that concluded the Commission's discussion of Article 66 which was now withdrawn.

63. Mr. BARTOŠ said that he supported the idea expressed in article 66 and regretted its withdrawal from the draft.

64. Mr. YASSEEN said that he, too, regretted that the draft convention would not contain an article on a practical problem mentioned by most of the writers, when case-law and international practice seemed to be tending towards a certain solution. He did not intend to discuss the main problem underlying the article — namely, whether an individual could be a subject of international law — but wished to emphasize that, especially in the case of treaties intended to confer rights and impose obligations on individuals, the national courts should ensure that individuals would have direct enjoyment of those rights and would assume those obligations. He thought it would have been useful to deal with the question in the draft articles and regretted that the majority of the Commission had decided otherwise.

65. Mr. TSURUOKA said that he agreed with the minority view and regretted that the question had not been considered more thoroughly.

66. Mr. RUDA said he very much regretted the Commission's decision to drop article 66 as he fully subscribed to its main purpose. The article did not touch upon the controversial issue of whether or not an individual could be a subject of international law, but it did deal with something which had become a fact in the modern world. As Mr. Rosenne had pointed out, it was both useful and necessary, because it recognized the legality of States entering into treaties having as their object the creation of international machinery or procedures to enable individuals to exercise rights of an international character, as well as to discharge the obligations laid down in such treaties.

67. The CHAIRMAN, speaking as a member of the Commission, observed that the decision not to retain the article did not mean that the majority of the members of the Commission considered it illegal for States to set up international bodies to which individuals were entitled to submit claims, petitions or other requests of that kind.

68. Mr. REUTER said he agreed with Mr. Bartoš. He could not accept any interpretation which cast doubt on the fact that the principles laid down in the Charter were intended to benefit individuals.

69. Mr. LACHS said he agreed with the Chairman that article 66 could be dropped without prejudice to

the question it covered or to progressive development. As drafted, the provision did not correspond to existing law and sub-paragraph (b) would give rise to serious objections.

70. Since the Special Rapporteur had mentioned the question of self-determination, it was necessary to point out that that right was certainly something wider and more important than an individual right. Some of the examples mentioned in the commentary evoked painful memories, particularly for his own country, inasmuch as the institutions and procedures established during the inter-war period had been used to overthrow the State and to pave the way for the Second World War. That was particularly true of the German-Polish Convention of 1922 on Upper Silesia.⁹ Undoubtedly there were cases of rights being guaranteed — for example, the right of petition under the trusteeship system — but that was a step in the direction of full self-determination.

71. The CHAIRMAN said he thought that if it continued the discussion, the Commission would only move further and further from the subject-matter of the article itself, until it became increasingly obvious that it would have to take a definite position on the doctrinal issue. His purpose in suggesting the deletion of article 66 had been, precisely, to avoid doing so. But, of course, the decision to withdraw the article was entirely without prejudice to the Commission's opinion on the matter.

72. Mr. ROSENNE said that a paragraph explaining the meaning of the Commission's decision to drop article 66 should be inserted in its report.

The meeting rose at 12.35 p.m.

742nd MEETING

Wednesday, 10 June 1964, at 10 a.m.

Chairman: Mr. Herbert W. BRIGGS

Later: Mr. Roberto AGO

Law of Treaties (A/CN.4/167) (continued)

[Item 3 of the agenda]

ARTICLE 65 (Priority of conflicting treaty provisions)

1. The CHAIRMAN invited the Commission to consider article 65 in the Special Rapporteur's third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 65, said that the subject of conflicts

between treaty provisions had already been discussed by the Commission at its previous session¹ when it had decided to re-examine the issue in the context of application. He had explained at some length in the commentary the reasons underlying the new draft he was now presenting in article 65. During the earlier discussion it had become clear that the majority of the Commission viewed the matter essentially as one of priority rather than invalidity.

3. In accordance with the trend of that discussion, he had moved the general reservation of article 103 of the Charter, which gave supremacy to its provisions, to the top of the article. But he had not attempted to state its effects on a non-Member State. The Commission had previously taken the view that it should leave the interpretation of provisions of the Charter to the competent organs called upon to apply them.

4. Paragraph 2 was concerned with cases in which an express clause was inserted in the treaty stipulating in one form or another that its provisions were to be subject to, and give way to, those of another treaty. That form of clause, unlike some others regulating conflicts between treaties, affected the normal rules governing the priority of treaty obligations, and it was therefore necessary to mention it as an exception.

5. The principal provisions of article 65 were in paragraphs 3 and 4. Paragraph 3 dealt with cases in which all the parties to the earlier treaty were also parties to the later one. If the intention of the parties was that the later treaty should supersede the earlier one, the provisions of article 41² would come into play automatically, but if that were not so, the second treaty must necessarily prevail as a later expression of intention.

6. As he had explained in paragraph (20) of the commentary, after further reflection he had come to the conclusion that partial supersession should be dealt with in article 65; that would necessitate some modification of article 41.

7. Paragraph 4 dealt with cases in which some of the parties to the earlier treaty were not parties to the later one — cases which raised the problem of conflicting treaty obligations. At the previous session the Commission seemed to have taken the view that no reservation should be made of a special class of treaty with regard to which a conflict could raise the question of the invalidity of the later treaty and that that question should only be considered to arise when a subsequent treaty contained rules of *jus cogens*.

8. Mr. CASTRÉN said he thought the Special Rapporteur had satisfactorily overcome the difficulties he had already had to face at the previous session concerning the question dealt with in article 65. The commentary on the article was convincing in every respect and the chosen point of departure appropriate. A conflict between treaties, or the existence of conflicting provisions in different treaties, did not raise a question of

¹ *Yearbook of the International Law Commission, 1963*, Vol. I, 685th, 687th and 703rd meetings.

² *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 16.

⁹ See Kaeckenbeek, G., *The International Experiment of Upper Silesia*, London, 1942, Oxford University Press, p. 572.

nullity, but one of priority, as the Special Rapporteur had shown in his commentary.

9. He was in favour of placing the revised article where the Special Rapporteur had put it and of keeping article 41, adopted at the previous session, where it was, with the changes suggested by the Special Rapporteur. Thus he was in agreement with the Special Rapporteur on the substance of article 65.

10. The form might possibly be improved, particularly in paragraph 3, by more concise drafting, but the Commission could safely leave that to the Drafting Committee.

11. There was one provision in the article which might be controversial, however — the last part of paragraph 4 (c) which provided that, as between a State party to both treaties and a State party only to the later treaty, the later treaty prevailed “unless the second State was aware of the existence of the earlier treaty”. That proviso, which had been suggested by McNair, was generally consistent with the principle of good faith, but it could be argued that for the second State the earlier treaty was, strictly speaking, *res inter alios acta*.

12. Sir Humphrey WALDOCK, Special Rapporteur, observed that the phrase “the circumstances of its conclusion or the statements of the parties”, in paragraph 2, was one previously used by the Commission in a number of articles. It had been agreed to reconsider the second part of that phrase, which would undoubtedly be amended by the Drafting Committee.

13. Mr. VERDROSS said that in principle he was in favour of the ideas embodied in article 65. Paragraph 2 involved a problem of interpretation, however; where two treaties had been concluded between the same parties and the second treaty was not intended to replace the first, it must be interpreted in the light of the provisions of the first treaty. The paragraph should therefore be worded so as to convey that meaning.

14. The provisions of paragraph 3 were an application of the principle *lex posterior derogat anteriori* and raised no difficulty; but he was rather doubtful about paragraph 4. If, for example, State A concluded a treaty with State B and then signed with State C a treaty conflicting with the earlier treaty, it could not be said that the earlier treaty “prevailed”, for both treaties were valid with respect to each party. Of course, if State A was unable to perform the second treaty, it was then responsible to State C and must give it compensation. That idea did not seem to be made clear enough in the provisions of paragraph 4; he wondered whether the Special Rapporteur disagreed with him.

15. Sir Humphrey WALDOCK, Special Rapporteur, said he did not disagree with Mr. Verdross. The provision in paragraph 4 (c) would cover the case in which one of the parties to a treaty concluded a second treaty that violated the first. The provisions of the first treaty would prevail and the action of entering into the second treaty would engage the responsibility of the State concerned.

16. Mr. VERDROSS said he fully agreed with the Special Rapporteur, but in that case “prevails” was not the appropriate word. In order to express the Special Rapporteur’s idea, he suggested saying that the first treaty must be executed. But he doubted whether such a rule of law existed.

17. Mr. YASSEEN suggested that it would be better to say that the new treaty “applies” as between the parties.

18. Mr. TUNKIN said that article 65 raised two problems of the utmost importance. First, if the Commission adopted the article, would it thereby be giving its own interpretation of Article 103 of the United Nations Charter? That was not clear from the proposed text. The Special Rapporteur’s idea seemed to be that, if a treaty conflicted with Article 103 of the Charter, the validity of the treaty would not be in question, but the Charter would prevail. He doubted whether such an interpretation was progressive, even on the assumption that the wording of the Charter admitted of it. To his mind, the construction that might be placed on paragraph 1, and even on the article as a whole, rather weakened the scope of Article 103. That Article could equally well be interpreted to mean that treaties whose terms conflicted with those of the Charter were not valid — an interpretation which tended rather to strengthen the Charter provisions.

19. Secondly, the rules laid down in article 65 seem to be derived from private law, whereas the situation was entirely different in international relations, since States, not individuals, were involved. Admittedly, some rules might occasionally be borrowed from private law; but, in this particular case, the rule did not fully cover the situation. In municipal law, if the provisions of a treaty conflicted with the law, it was invalid. In article 65, conflict with a previous treaty was not a ground for the invalidity of the second treaty unless it conflicted with a rule of *jus cogens*. That probably did not go far enough. The Special Rapporteur himself recognized in paragraph (17) of his commentary, that any treaties laying down “integral” or “interdependent” obligations did not admit of derogations; but that problem did not seem to be covered by article 65 as at present worded.

20. Mr. JIMÉNEZ de ARÉCHAGA said that he was in general agreement with article 65. The discussion at the previous session had shown that the majority opinion was that a treaty concluded with the deliberate purpose of violating an earlier one should not be regarded as a nullity, but would merely engage the responsibility of the parties. He did not share that opinion, but the Special Rapporteur had now moved some way towards the opposite point of view by inserting the clause “unless the second State was aware of the existence of the earlier treaty and that it was still in force with respect to the first State” at the end of paragraph 4 (c). Such a proviso went some way towards meeting the concern expressed at the previous session by Mr. Pal and himself over the possibility of States buying themselves out of old treaties by paying an indemnity to those whose treaty rights had been

violated by the conclusion of a new instrument. To give an example, if State A concluded a treaty with State B and then another with State C having the same object, State C, if aware of the existence of the first treaty, could not invoke the second against State A and the second treaty would not be applicable.

21. Sir Humphrey WALDOCK, Special Rapporteur, referring to the first point raised by Mr. Tunkin, said he agreed that it was important not to minimise the significance of Article 103 of the Charter; on the other hand, it had been the Commission's consistent policy not to attempt to interpret that Article or to determine its effects, and he had been guided by that consideration.

22. In regard to Mr. Tunkin's second point, the rule of *jus cogens* apart, it seemed necessary to treat all instances of conflicting provisions as issues of priority. There was a definite tendency in the Commission not to admit limitations by treaties on the treaty-making capacity of States and it was very doubtful whether nullity would result where a small number of States failed to observe an undertaking that they would not derogate from the provisions of a treaty in the future. It might be that general multilateral treaties, such as the Vienna Conventions on Diplomatic and on Consular Relations and the Conventions on the Law of the Sea, contained certain rules from which the parties intended not to allow any derogation and which might have the status of rules of *jus cogens*.

23. As the principle of *jus cogens* had been very clearly enunciated in article 45,³ he had not made express mention of it in article 65, though a general reservation in that regard could of course be inserted. But where a treaty was invalid for conflict with a rule of *jus cogens*, it was not a treaty for legal purposes and no question of a conflict between two treaties arose. It was therefore more logical not to mention the case.

24. Mr. TUNKIN explaining that he had put his two points without taking a position of principle on either, said he had understood the first two sentences in paragraph (17) of the commentary to mean that there were certain types of treaty or treaty obligations from which States could not contract out. But that proposition was not reflected in the text of the article itself.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that the first two sentences in paragraph (17) of the commentary referred to cases of special clauses against contracting out of a treaty. His purpose in paragraph 17 had been to emphasize that the mere insertion of such a clause in treaties of secondary importance would not mean the establishment of a compulsive regime from which no derogation was possible, for there were many cases in which such clauses had not been included in more important treaties containing interdependent obligations. In his view, an undertaking not to contract out was implied in every treaty containing "integral" or "interdependent" obligations, but the consequence of the breach of any such undertaking, whether express or implied, was to raise an issue of

priority rather than validity, except in cases of *jus cogens*.

26. Mr. de LUNA said that the Commission had a two-fold task: first, to promote the progressive development of international law, and, secondly, to formulate rules of law which would, if possible, avoid all ambiguity and uncertainty liable to lead to disputes and conflicts in international relations. While congratulating the Special Rapporteur and approving of the solution proposed in article 65, in the interests of clarity he nevertheless wished to make a few comments.

27. In the first place, paragraph 2 contained two different rules, the first of which was a rule of interpretation. He had no objection to that, although the Commission had decided to deal with the whole body of rules of interpretation separately. The general rule was that subsequent obligations of a State must always be so interpreted as to avoid the presumption that the State had failed to meet an international obligation, which would engage its responsibility.

28. The starting point chosen by the Special Rapporteur seemed to him entirely justified: a treaty whereby States declared the consensus of their wills could only be amended or terminated by the will of the same parties. Hence a State could not cease to be a party to a treaty merely because the obligations deriving from that treaty were incompatible with those of another treaty, except in the case covered by Article 103 of the Charter. The unanimous agreement of the parties was accordingly necessary before a treaty could be replaced by a new instrument. That was the normal case of one treaty being substituted for another. But it might happen that certain parties to a treaty were not entirely satisfied with it and concluded among themselves, or, as often occurred, with the participation of States which were not parties to the original treaty, a new treaty on the same subject. Some of the parties to the earlier treaty would then be bound by two instruments, with a consequent conflict between incompatible treaty provisions; that was the problem contemplated in article 65.

29. The second part of the paragraph was concerned with a new treaty which was not intended either to conflict with or to replace the previous one, but to supplement it or render it more specific. According to the Special Rapporteur's proposal, in the event of a conflict, the earlier treaty would prevail. It frequently happened, however, that the later treaty prevailed by virtue of a clause inserted in the earlier one. Geneva Convention No. IV of 12 August 1949, on the Protection of Civilian Persons in Time of War, provided, in article 154,⁴ that the Convention should be supplementary to Sections II and III of the Regulations annexed to the Hague Conventions on the Laws and Customs of War on Land. Geneva Convention No. I, on the other hand, provided, in article 59,⁵ that the Convention should replace former conventions in relations between the contracting parties. Lastly, in ILO practice,

⁴ *The Geneva Conventions of August 12, 1949, International Committee of the Red Cross, second revised edition, 1950, p. 212.*

⁵ *Op. cit. p. 45.*

³ *Ibid.*, p. 23.

cessation of participation by a party in a convention revised by a new instrument resulted from a clause inserted in the first convention providing that rectification of a new revising convention should *ipso jure* involve the immediate denunciation of the first convention.⁶ Thus, ratification played the part of a resolutive condition. However, that was not the only possibility proposed by the Special Rapporteur, whose solutions varied according to the circumstances of the case.

30. He was glad, therefore, that the Special Rapporteur had taken the view that conflicts between the provisions of different treaties raised a question not of validity, but merely of priority as between the provisions of those treaties. For there was no rule of international law which invalidated treaties whose provisions were in conflict with those of an earlier treaty, except in case of conflict with a rule of *jus cogens*. The solution proposed by the Special Rapporteur would make it possible to maintain the legal relationships established in the original treaty and to create new ones.

31. It had been objected that that system of co-existence of the original treaty with the new one might involve unnecessary complications and conflicts between treaty provisions. The answer to that was that the complications were not very great and that concern for simplicity should not prevail over all other considerations or be allowed to obscure the objective of obtaining the maximum possible commitments from States. He recognized that there were exceptions, however; it was sometimes not possible for two States to be bound by two treaties simultaneously: that was the case when each treaty required one particular line of conduct which was incompatible with the other.

32. Mr. YASSEEN said that generally speaking he found article 65 acceptable: it proposed solutions that were accepted in practice and were based on the intention of the parties, in other words, on the treaties themselves.

33. With the exception of conflict between a treaty obligation and a rule of *jus cogens*, all conflicts which might arise between treaties should be regarded as raising questions of priority and responsibility, not of validity. Even where States had undertaken by a treaty not to enter into treaty relations with other States which derogated from that treaty, such a stipulation was only a treaty provision like any other and could not have the effect of limiting the State's treaty-making capacity. Such a stipulation could not invalidate a subsequent treaty unless, of course, the treaty obligation not to conclude other treaties derogating from the earlier one had been imposed to guarantee the supremacy of a rule *jus cogens*, in which case the conflict was settled in another way.

34. In view of the Special Rapporteur's comments he need not make the reservation he had already made to other articles in regard to the reference to "the statements of the parties".

⁶ *International Labour Conference, Conventions and Recommendations 1919-1949*, Geneva, ILO, 1949, final clauses, *passim*.

35. His only serious objection related to the last clause in paragraph 4 (c), beginning with the word "unless". The fact that a State party to a treaty had been aware of the existence of an earlier treaty was not sufficient to justify invoking the earlier treaty against it. He could not admit that exception unless it was based on the concept of responsibility, but in that case no complaint would lie against the State which was not a party to the earlier treaty unless it had committed a wrongful act. If the Commission laid down that the earlier treaty was applicable, it would be relying on the idea of a sanction.

36. Mr. LACHS said the commentary contained a remarkably clear and detailed exposition of the considerations underlying article 65. In drafting paragraph 1, the Special Rapporteur had taken account of the views expressed at the previous session and had very properly not attempted to interpret Article 103 of the Charter which, being in the nature of a rule of *jus cogens*, was of the greatest importance. As almost all States were now Members of the United Nations, the effect of that Article on treaties concluded between Member and non-member States was becoming less significant, but it was still desirable to include in the commentary some mention of the consequences for third States of obligations deriving from the Charter. As the Charter was so widely known he doubted whether a third State could plead ignorance of its provisions, and particularly of the implications of Article 103, in attempting to hold a Member State responsible for breach of a treaty obligation which conflicted with that Article.

37. Paragraph 1 should not be restricted to conflicts between two treaties, because more than two were often involved, as for example, in the case of the Sanitary Conventions of 1903,⁷ 1912⁸ and 1926.⁹

38. He agreed with Mr. de Luna that the first part of paragraph 2 was concerned with interpretation, and perhaps it would be undesirable to encourage States to examine the compatibility of later and earlier treaties, as that might give rise to difficulties in practice; as an example he might mention the statement made by the United Kingdom Government to the effect that the 1956 Supplementary Convention on the Abolition of Slavery did not revoke or abrogate any previously existing treaty rights.¹⁰

39. With the present significant increase in the number of treaties, States should be urged to do away with obsolete or conflicting treaty obligations and to consolidate those that were still appropriate in new instruments; something, but not enough, was already being done in that direction by the United Nations.

Mr. Ago took the Chair.

40. Mr. ELIAS said that both the form and the substance of article 65 were largely acceptable and the Special Rapporteur had clearly gone far to meet most

⁷ *British and Foreign State Papers*, Vol. XCVII, p. 1085.

⁸ *League of Nations Treaty Series*, Vol. IV, p. 283.

⁹ *Op. cit.* Vol. LXXVIII, p. 231.

¹⁰ *Official Records of the Economic and Social Council, Seventeenth Session, Annexes, agenda item 15*, p. 7.

of the objections made to the text he had submitted in article 41 at the previous session.

41. In view of the obvious link between article 65 and the provisions concerning revision they should perhaps be brought together.

42. Notwithstanding the Special Rapporteur's argument in the last sentence of paragraph 8 of the commentary that the near universality of the membership of the United Nations had greatly reduced the area for the application of Article 103, he had been right to leave aside the question whether that Article was binding only on Member States. He had also been wise not to mention *jus cogens* rules expressly.

43. Paragraphs 25 to 31 of the commentary dealt with the relationship between an earlier and a later treaty, and in addition to the two cases mentioned — those of *Oscar Chinn*¹¹ and the *European Commission of the Danube*¹² — a reference should be made to the Convention and Statute concluded at the Niamey Conference to regulate the regime of the Niger River,¹³ article 9 of which read :

“Subject to the provisions of this Convention and of the annexed Statute, the General Act of Berlin of 26 February 1885, the General Act and Declaration of Brussels of 2 July 1890, and the Convention of Saint-Germain-en-Laye of 10 September 1919, shall be considered as abrogated in so far as they are binding between the States which are parties to the present Convention.”

As that wording showed, care had been taken not to declare the Treaty of Berlin null and void, as some participants in the Conference had wished. The successor States to those which had concluded the original Treaty could plead that its provisions were abrogated as a consequence of a change in circumstances. That was a striking example of a third treaty replacing two earlier instruments.

44. Mr. JIMÉNEZ de ARÉCHAGA said that some of the confusion which had arisen during the discussion was perhaps due to doubts as to whether it was intended to follow the principle of nullity or that of State responsibility in the case of conflicting treaties. According to the principle of nullity, a treaty which conflicted with a prior treaty was void. According to the principle of State responsibility, it was valid, but the State which had assumed conflicting obligations was free to choose which of the treaties it would fulfil ; so far as the unfulfilled treaty was concerned, it was required to pay an indemnity. The State which had assumed conflicting obligations thus “bought” its choice.

45. The Special Rapporteur, however, appeared to have followed a system of his own — the system of priority. The State which had assumed conflicting obligations did not have a choice. There were four possible cases ; first, with respect to a party to an earlier

treaty, the earlier treaty prevailed ; second, with respect to parties to both treaties, the later treaty prevailed ; third, with respect to an innocent party to the later treaty, the earlier treaty prevailed ; and fourth, with respect to a guilty party to the later treaty, the earlier treaty prevailed. That system could not be described as one of State responsibility. In the fourth case, the guilty party could not claim an indemnity for non-fulfilment of the treaty, as would have been the case under the rules of State responsibility.

46. Another problem, to which Mr. Tunkin had also referred, was that of a treaty which imposed indivisible obligations that must be fulfilled equally and simultaneously with respect to all the parties to the treaty. In many cases, it was not possible to separate the obligations *vis-à-vis* the various parties, as had been done in paragraph 4. As he understood it, the system proposed by the Special Rapporteur was that in that case the earlier treaty prevailed. The State which had assumed conflicting obligations had to fulfil the earlier treaty and would be obliged to indemnify the innocent new parties to the later treaty. In other words, the rule embodied in paragraph 4 (a) prevailed over the rules laid down in paragraph 4 (b) and (c). If that understanding was correct, the position should be stated clearly, perhaps in an additional paragraph.

47. Mr. BRIGGS said he fully agreed with the Special Rapporteur that article 65 did not deal with nullity, except for the matter of *jus cogens*, which was dealt with elsewhere. It raised a question of priority, with consequent State responsibility for derogation of obligations. In the third and fourth sentences of paragraph (17) of the commentary, the Special Rapporteur had clearly shown his support for the system of priority and responsibility in preference to that of invalidity or nullity.

48. He approved of the terms of paragraph 1, where he regarded the mention of Article 103 of the Charter as being in the nature of a reservation ; there was no intention to place any interpretation on the meaning of the Article. It would be regrettable if the Commission were to seek to broaden the meaning of that important provision of the Charter.

49. He agreed with Mr. de Luna that the first sentence of paragraph 2 raised a question of the interpretation of treaties. The second sentence should be read in the light of the first ; then the difficulty mentioned by Mr. de Luna would not arise. The later treaty itself would show whether it was intended as *lex specialis* and should therefore prevail over the earlier treaty.

50. With regard to paragraph 3, at the previous session he had been unable to support the provisions of article 41 on the termination of conflicting treaties, because he had considered that the matter should be dealt with as one of priority. Since the Commission had adopted article 41, however, he was now prepared to accept the modification to that article suggested in paragraph (20) of the commentary on article 65.

51. Paragraph 4 was acceptable, though he shared Mr. Yasseen's view regarding the final proviso in subparagraph (c). Mere awareness of the existence of the

¹¹ *P.C.I.J.*, 1934, Series A/B, No. 63.

¹² *P.C.I.J.*, 1927, Series B, No. 14.

¹³ See *The American Journal of International Law*, 1963, Vol. 57, No. 4, pp. 873 *et seq.*

earlier treaty on the part of a State did not make it invocable against that State. The final proviso should therefore be deleted. It was not desirable to introduce the notion of guilty and innocent parties, without any criteria for differentiating between them.

52. He could accept article 65 subject to drafting adjustments.

53. Mr. ROSENNE said that, during the consideration of articles 14 and 19 of the Special Rapporteur's second report (ACN.4/156) at the previous session, he had explained his reasons for thinking that the whole question at present under discussion should be dealt with as one of priority rather than of termination or nullity. He agreed with the thought behind article 65, and the commentary, which had been considerably enlarged by comparison with the second report, was most enlightening.

54. It should be remembered, however, that even under the system of priority, two kinds of conflict could arise. The first kind involved no question of bad faith and was due to the technique of multilateral agreements; the conflict arose because, in international law, there was nothing that corresponded to renovating legislation for repealing *erga omnes* the earlier provisions. The second kind of conflict did involve an element of bad faith; it was brought about deliberately. The provisions of paragraph 4 (c) were intended to deal with that kind of conflict.

55. He agreed with Mr. de Luna that the first sentence of paragraph 2 contained a large element of interpretation, but he saw no reason for dropping it on that account. The difficulty could perhaps be overcome if article 65 were placed elsewhere in the draft, possibly after the articles on revision but before the articles on interpretation.

56. At the previous session, he had made an express reservation with regard to article 41,¹⁴ and he must maintain it. He accepted the modification to article 41 suggested by the Special Rapporteur in paragraph (20) of his commentary on article 65, though it only disposed of the problem of partial termination. In addition to that problem, however, he had difficulties with regard to the inclusion in article 41 of the concept of suspension of a treaty. Consequently, he could not accept the reference to article 41 and the introduction of the concept of suspension of a treaty in paragraph 3 (b) of article 65.

57. The whole of article 65, except for paragraph 3 (b), was drafted in terms of a conflict between two treaties in their entirety. But in the case of a partial conflict between two treaties, where only one clause or a certain number of provisions conflicted, the concept of separability embodied in article 46 could be relevant.

58. He shared the misgivings of other members regarding the final proviso of paragraph 4 (c). Apart from the ambiguity of the concept of awareness of the existence of a treaty, it would be extremely difficult for

the second State to know whether the treaty was still in force or not; the argument on that point in paragraph (22) of the commentary was difficult to follow. The proviso appeared to imply that the second treaty could be null and void, whereas there was a distinct difference between non-invocability and nullity, if only because nullity rendered the treaty altogether invalid, while non-invocability would be only relative so long as the first treaty was in force.

59. He reserved his position on the problem raised by Mr. Tunkin regarding the first two sentences of paragraph (17) of the commentary; he would like to know whether the Special Rapporteur considered that the fact of entering into a second treaty in the circumstances described in that passage would involve a breach of treaty provisions within the meaning of article 42.

60. He agreed with Mr. Lachs on the need to improve the drafting so as to cover cases in which there were more than two conflicting treaties.

61. He also agreed that attention should be drawn to the desirability of the General Assembly or some other appropriate organ initiating action for the modernization of obsolete treaties. The Commission had already referred to the matter in Chapter III of the report on its fifteenth session¹⁵ and the General Assembly was contemplating some action. He therefore suggested that the Commission should once again draw attention to the problem in general terms, without, however, proposing any specific solution.

62. The CHAIRMAN, speaking as a member of the Commission, said that on the whole he approved of the principles which the Special Rapporteur had embodied in article 65. Except on one point, his comments would refer, not to the substance but to the drafting of the article, which he thought could be simplified.

63. First, he doubted whether it was advisable to use the term "conflict". In article 41 the Commission had referred to "a further treaty relating to the same subject-matter". Article 65 was concerned, *inter alia*, with the case in which all the parties to a treaty decided to conclude a new treaty to regulate the same matter in a different way. Whether the second treaty replaced the first entirely or only in part, it was not correct in that case to speak of a "conflict" between the two treaties.

64. Secondly, it should be remembered that the article was in its right context in so far as it dealt with problems of the application of treaties, and not with problems of termination or validity, which were dealt with elsewhere.

65. In paragraph 2, the idea that the provisions of a treaty could be subject to obligations was not very satisfactory; it would be better to say that its provisions could be subject to other provisions.

66. Paragraph 3 (a) was unnecessary, for it referred to the case in which the new treaty entirely replaced the earlier one, and that was covered by paragraph 1 (a)

¹⁴ Formerly article 19; see *Yearbook of the International Law Commission, 1963, Vol. I, p. 244, paras. 74-76.*

¹⁵ *Official Records of the General Assembly, Eighteenth Session Supplement No. 9, p. 35, para. 50 (e).*

and (b) of article 41. If the parties had intended the second treaty to replace the first entirely there was no conflict and no question of precedence: the second treaty applied. On the other hand, if the parties had not intended to replace the first treaty or to regulate the matter in an entirely different way, a problem of application arose. Paragraph 3 should therefore be confined to cases in which the new treaty, though regulating the same matter as the earlier treaty, did not put an end to it. The essential provision of paragraph 3 was in sub-paragraph (b); at the end of that sub-paragraph the words "replaced by" should be substituted for the words "in conflict with".

67. Paragraph 4 dealt with the case in which the parties to the later treaty were not the same as the parties to the earlier treaty. Sub-paragraph (a) was perfectly clear and logical. Sub-paragraph (b) merely repeated paragraph 3 (b) and it should be possible to combine those provisions. Sub-paragraph (c) was acceptable but for the final clause beginning with the word "unless"; the fact that one of the new parties was aware of the existence of the earlier treaty was not sufficient to prevent the new treaty from being valid and applicable.

68. Sir Humphrey WALDOCK, Special Rapporteur, said that, in his opinion, it was appropriate to use the term "conflict", which was used in Article 103 of the Charter. The idea conveyed by that term was that of a comparison between two treaties which revealed that their clauses, or some of them, could not be reconciled with one another. The process of determining whether a conflict existed presupposed an element of interpretation. He did not believe that the fact that the parties to the two treaties might be the same made it inelegant to speak of a conflict; the point would be of interest only if the parties were in dispute as to the compatibility of the two treaties.

69. The CHAIRMAN, speaking as a member of the Commission, said he had not been convinced by the Special Rapporteur's arguments. He still believed that there could be no "conflict" between two successive treaties concluded by the same parties. Either the second treaty prevailed entirely over the first, or the provisions of the first treaty which were not replaced by those of the second remained in force. If, for example, all the States Members of the United Nations decided to replace the Charter by another instrument, the provisions of the existing Article 103 of the Charter would not apply to the new treaty.

70. Sir Humphrey WALDOCK, Special Rapporteur, replied that the problem with which article 65 attempted to deal was different. Even where the parties to the two treaties were the same, the case was not one of a desire to replace one treaty by another, but of a dispute in which one party claimed that the two treaties were incompatible.

71. Mr. BRIGGS said that the term "conflict" was used in Article 103 of the Charter, and asked the Chairman what other term he would prefer.

72. Mr. AMADO said that the word "compatible" at the end of the first sentence of paragraph 2 was

important; in the next sentence, the words "in the event of conflict" might be replaced by the words "in the event of incompatibility".

73. Mr. YASSEEN thought that even where both treaties had been concluded by the same parties, the word "conflict" was preferable. In municipal law, where there was only one legislator, it could be said that conflict sometimes arose between different rules.

74. The CHAIRMAN, speaking as a member of the Commission, said he doubted whether it was possible to speak of "conflict" between two successive laws regulating the same matter.

75. Mr. AMADO said that the word "conflict" suggested contemporary things and was less appropriate when applied to successive ones. Consequently, he would prefer the word "incompatibility".

76. The CHAIRMAN suggested that that question could be settled by the Drafting Committee.

77. Mr. ROSENNE said that the discussion had confirmed his view that article 41 should be removed from Part II of the draft and linked with article 65.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that he had done precisely that by means of a cross-reference in article 65.

79. Mr. ROSENNE regretted that he could not regard a cross-reference as sufficient to meet his point.

80. Mr. BARTOS said he would like to make some comments on the substance. First, with regard to the opening words of paragraph 1, "Subject to Article 103 of the Charter", he thought that matter had been settled by article 37¹⁶ of the draft, for he was firmly convinced that the provisions of the Charter were, in general, rules of *jus cogens*.

81. Secondly, there was one situation which, he thought, was not covered by article 65, but which nevertheless often arose in practice and had not been clearly settled either by the authorities or by case-law; that was the case in which two States concluded a treaty, and the question arose whether each of them was entitled to act freely and use its treaty-making capacity to make an independent treaty with a third State on the basis of the first treaty. What happened to the new treaty if the previous treaty was terminated? The relationship established by the first treaty might be recognized in the second treaty, but it might not even be contemplated there. There were several possible solutions: it could be held that it was impossible to apply the second treaty if the first was not in force; the *rebus sic stantibus* principle could be invoked, the termination of the first treaty being regarded as a change in the circumstances; and lastly, it could be argued that every treaty must be understood separately and applied reasonably. That kind of case could be mentioned in the commentary.

¹⁶ Official Records of the General Assembly, Eighteenth Session Supplement No. 9, p. 11.

82. It had been asked during the discussion whether a party to a new treaty made with a third State must have acted in good faith if both treaties were to have effect. He had no wish to encourage States to act in bad faith, but he believed that in order to meet the needs of ordinary political life and facilitate international relations, States should not be obliged to remain bound by vestiges of treaties that were still formally in force, but no longer corresponded to reality. A State must be free to exercise its treaty-making capacity, subject only to the proviso that in doing so it engaged its international responsibility.

83. The CHAIRMAN said that two important problems had been raised during the discussion. The first was the fundamental difference between the cases contemplated in paragraphs 3 and 4. Paragraph 3 dealt with the chronological succession of treaties between the same parties. But paragraph 4 (a) and (c) dealt with an entirely different problem — that which arose when a State had assumed mutually conflicting obligations to two other States. The two treaties might even have been concluded at the same time.

84. The second problem was that raised by the final clause in paragraph 4 (c).

85. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had shown the need for him to obtain some guidance from the Commission on the final proviso of paragraph 4 (c).

86. As to the point raised by the Chairman, article 65 admittedly dealt with two different situations, but it was convenient to cover both in a single article.

The meeting rose at 1 p.m.

743rd MEETING

Thursday, 11 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties (A/CN.4/167) (continued)

[Item 3 of the agenda]

ARTICLE 65 (Priority of conflicting treaty provisions) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 65 in the Special Rapporteur's third report (A/CN.4/167).

2. Mr. RUDA said he approved of the Special Rapporteur's placing of article 65 in the section on the

application of treaties, immediately after the articles on the effects of treaties on third parties. The case of conflict between two successive treaties was a matter of concern to a State that was not a party to the first treaty; it thus followed logically after the provisions on the effect of treaties on third parties.

3. The subject-matter of article 65 was also connected with the revision of treaties; whenever a multilateral treaty effected changes in a prior multilateral treaty, but was not subscribed to by all the parties to the prior treaty, the problem of revision arose.

4. As he had not participated in the discussion of articles 14 and 19 in the Special Rapporteur's second report,¹ he wished to state his position on the doctrinal issues involved. The Special Rapporteur had considered the matter in the context of the application of treaties and had treated it not as a question of nullity, but as one of State responsibility. Analysis of the case-law of international courts and, particularly, of State practice lent support to that approach and he endorsed it. If the solution of the problem of conflicting treaties were sought on the basis of the doctrine of nullity, the effect would be to curtail, implicitly, the capacity of States to enter into treaties. Such a conception would go beyond existing international law, under which the capacity of States to conclude treaties was limited only by rules of *jus cogens*.

5. There was also a practical argument in favour of the Special Rapporteur's approach. The problem of conflicting treaty provisions nearly always arose between two or more successive multilateral treaties. Not infrequently, and mainly for political reasons, the parties to successive multilateral treaties were not the same. If the theory of nullity were adopted, in order to amend a multilateral treaty it would become essential to secure the participation of all the parties. That would make amendment virtually impossible, thereby impairing the flexibility needed to keep abreast of changing international conditions.

6. With regard to the formulation of the article, he disliked the final proviso in paragraph 4 (c). The treaty-making capacity of the second State could hardly be limited merely on the grounds that it had been aware of the existence of the earlier treaty.

7. Sir Humphrey WALDOCK, Special Rapporteur, replying to the objections to paragraph 4 (c) put forward by several members, said he realized that the case which the provision was intended to cover was a difficult one; he himself had an open mind, though he agreed with most members that the problem should be approached from the point of view of State responsibility. The position in the case referred to in paragraph 4 (c) was that, if the second State was really aware that the conclusion of the later treaty by the first State constituted a breach of an earlier treaty, then, although the later treaty was valid, the second State would not be able to compel the first State to apply the later treaty; it would be for the first State

¹ See *Yearbook of the International Law Commission, 1963*: for discussions, Vol. I; for text of articles, Vol. II, document A/CN.4/156 and addenda.

to decide whether it intended to comply with the later treaty or not, and its international responsibility would be engaged in the event of non-performance.

8. Mr. REUTER observed that article 65 contained two kinds of provisions. The first kind, in paragraphs 2 and 3, concerned what was called a "conflict" between treaty provisions agreed between the same parties. That situation was very simple: the Commission was merely laying down rules of interpretation on the subject — not general rules such as those to be included in the section on interpretation, but concrete and specific rules of the same nature as those for the settlement of alleged conflicts between different provisions of the same treaty. It was necessary to ascertain the intention of the parties, in doing which various elements could be taken into account and it could be considered that where there were two successive rules the presumption was that the later rule prevailed. He thought that paragraphs 2 and 3 raised only drafting problems; they could be simplified and condensed.

9. The provisions of paragraph 4 were quite different. Sub-paragraph (c) of that paragraph was both the most original and the most delicate part of the article. He accepted the Special Rapporteur's general conclusions; it would certainly be wrong to lay down a rule of nullity, which would in any case be meaningless because nullity must be determined by a judicial authority and no such authority existed in the international community. The Commission must therefore rely on the concept of responsibility.

10. But it was open to question whether, in dealing with specific situations, it was advisable to lay down so strict a rule and to formulate it in terms that were both precise and incomplete. In the case of conflict between two treaties, he did not think that awareness of the existence of the earlier treaty would be sufficient to establish a State's international responsibility. It would be better to refer to the theory of State responsibility, by replacing the final proviso of sub-paragraph (c), starting with the word "unless", by some form of words such as "subject to the application of the rules concerning international responsibility". In that way the Commission would show its awareness of the fact that there were cases in which the conclusion of the later treaty was a wrong, not only because it infringed an earlier treaty, but because it contravened rules of general conduct. The penalty should then be more severe, in other words, the second treaty should be considered invalid.

11. Mr. TSURUOKA said he had only a few comments to make on the drafting of article 65. In paragraph 1, he thought it would be better to replace the first phrase "Subject to Article 103 of the Charter of the United Nations" by the words "In cases where Article 103 of the Charter of the United Nations does not apply". That wording would have the advantage of not weakening the effect of Article 103, but, on the contrary, showing its precedence over other rules.

12. With regard to paragraphs 2 and 3, he endorsed the comments just made by Mr. Reuter. Strictly speaking there was no conflict in the situations con-

templated, except perhaps, from the practical point of view, in cases of misunderstanding or disputed claims. A simpler and more concise text would doubtless make it possible to avoid the difficulties which had been pointed out.

13. With regard to paragraph 4 (c), he still hesitated to adopt the point of view of the Special Rapporteur, who had himself expressed some doubts on the matter. From the standpoint of rules of general conduct, he supported the idea that the concept of morality in the conduct of States and in their relations with each other should be taken into consideration; but to lay it down as a rule of law would raise unnecessary difficulties. Moreover, it would be difficult to say whether any specific case corresponded to the legal situation referred to in paragraph 4 (c). He therefore agreed with those speakers who had proposed that the final proviso, beginning with the word "unless", should be deleted.

14. As to the connexion between articles 41 and 65, he thought there was no difference or contradiction between the two articles so far as substance was concerned. It might perhaps be advisable to combine them in a single article and to formulate the rules not in the section on termination of treaties, but where article 65 stood at present.

15. Mr. EL-ERIAN said that by orientating article 65 towards the application and revision of treaties, the Special Rapporteur had placed the complex question of the conflict of treaties in force in its right perspective. The article related only to conflicting provisions of treaties in force; cases of nullity and implied termination were outside its scope.

16. Where the conflict between treaty provisions involved infringement of a rule of *jus cogens*, the case was one of invalidity. Where no such infringement was involved, if the parties to two successive treaties were the same and they had intended the second treaty to supersede the first, the case was one of implied termination, covered by article 41. There remained to be covered by article 65 the case in which there was no infringement of a *jus cogens* rule and total termination was not implied. He supported the suggestion in paragraph (20) of the commentary that the words "in whole or in part" in article 41, paragraph 1, should be deleted, so that the question of partial termination would be left to be covered by article 65.

17. With regard to the general tenor of the article, he accepted the Special Rapporteur's treatment of the problem as one of priority and State responsibility.

18. As to the formulation, he did not read paragraph 1 as reserving the Commission's position on Article 103 of the Charter, but rather as preserving the supremacy of the Charter. The Commission should not attempt to interpret Article 103 or go into the question of its application to non-member States, which, with the near-universality of the United Nations, had become largely academic. Any restrictive interpretation of the Charter should be avoided; it could not be viewed merely as a treaty; it was the supreme law of mankind, to borrow the language of article 6 of the United States Constitution, which spoke of "the

supreme law of the land". He supported Mr. Bartos's views on Article 103 with regard to the wide scope of the expression "any other international agreement".

19. He also agreed with Mr. Lachs that, if a treaty between a Member of the United Nations and a non-member State conflicted with the provisions of the Charter, the non-member State was not entitled to invoke the rules of State responsibility against the Member State in support of a charge of violation of the treaty.

20. On one specific problem he had some doubts, where a later treaty superseded certain provisions of an earlier treaty it might happen that the remaining provisions of the earlier treaty could no longer stand alone; and if they were impossible to fulfil in isolation, article 65, as he understood it, would treat the matter as one of implied total termination. He would like to know whether that interpretation was correct.

21. Article 65 was closely connected with the question of the effects of treaties on third States and also with that of revision. He therefore supported Mr. Elias's suggestion that it should be placed at the beginning of the articles on revision, rather than immediately after those dealing with the effects of treaties on third States.

22. The comprehensive, logical and practical approach to the problem of conflicting treaty provisions adopted in article 65 could, however, generate a certain lack of orderliness by encouraging the conclusion of inconsistent treaties. As Mr. Lachs had pointed out, it would therefore be useful to bring the matter to the attention of the General Assembly, which had already given some consideration to it when examining the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, on the basis of Chapter III of the Commission's report on its fifteenth session. The General Assembly had initiated action on the matter by its resolution 1903 (XVIII).

23. One example of conflicting treaty provisions was the case of the Treaty of San Stefano of 1878 between Russia and Turkey,³ which had been inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, to both of which Russia as well as various other States had been parties. The Congress of Berlin of 1878⁴ had been convened to regulate the situation.

24. It was doubtful whether the conclusion of inconsistent treaties could ever be entirely prevented; it was part of the general international situation. But a study by the General Assembly with a view to some measure of regulation of the situation would be useful.

25. Mr. de LUNA pointed out that there was an exception, confirmed by practice, to the rule stated in paragraph 4 (a). When a multilateral treaty contained certain provisions that concerned some, but not all of the parties, the presumption was that the parties

affected by those provisions could amend them by subsequent agreement among themselves, without the consent of the other parties. For example, by their Memorandum on Trieste,⁵ Italy, the United Kingdom, the United States of America and Yugoslavia had changed the regime established by the Treaty of Peace with Italy without even notifying the other contracting States which had not been those mainly concerned with that regime. The Soviet Union had subsequently informed the Security Council of the United Nations that it had taken cognizance of the Memorandum. That was an instance of application of the principle of the separability of treaties stated by the Commission in article 46. Paragraph (6) of the commentary on that article explained that the application of the principle was subject to two conditions: first, the clauses to be dealt with separately must be clearly severable with regard to their operation and, secondly, it must not appear that acceptance of those clauses was an essential condition of the consent of the parties to the treaty as a whole.⁶ He did not suggest that article 65 should be amended in that sense, but the commentary on it should contain a reference to article 46.

26. There was some analogy between the provision in paragraph 4 (c) and article 31, adopted at the previous session,⁷ concerning the international effects of constitutional limitations affecting the exercise of the treaty-making power. As adopted, article 31 represented a compromise to which he had been opposed; it stipulated that a treaty could not be invalidated by reason of such limitations unless the violation of the State's internal law was manifest. He did not believe that there was any rule of international law under which States were required to possess a thorough knowledge of all the instruments in force. Treaties were becoming increasingly numerous and complicated; some matters had been the subject of successive treaties which amended each other without invalidating each other completely. There was thus a danger that, instead of introducing an element of certainty, the Commission might aggravate the confusion. A State could act in perfect good faith and be unaware of the existence of a particular treaty. He therefore agreed with Mr. Lachs's remarks and thought that the provision in paragraph 4 (c) was rather dangerous from the point of view of the security and clarity of international obligations; he did not believe it would contribute to the progressive development of international law.

27. Mr. YASSEEN said he recognized that the final proviso in paragraph 4 (c) raised a question of responsibility, not of nullity; he had said so at the previous meeting.

28. He was not sure, however, that the proviso stated sufficient grounds for responsibility. The case contemplated was that in which States A and B concluded a treaty with each other and State A subsequently concluded a treaty with State C that was incompatible with

² *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9.*

³ *British and Foreign State Papers*, Vol. LXIX, p. 732.

⁴ *Ibid.*, p. 749.

⁵ *United Nations Treaty Series*, Vol. 168, p. 66.

⁶ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 24.

⁷ *Ibid.*, p. 3.

the first treaty, the existence of which was known to State C. The rule proposed in paragraph 4 (c) was that "as between a State party to both treaties and a State party only to the later treaty, the later treaty prevails, unless the second State was aware of the existence of the earlier treaty..." Even the authorities who supported that exception, by whom the Special Rapporteur had been guided in drafting the final proviso, did not seem to be very sure on the matter. For instance, McNair merely said that State C "contracted at its own risk and would probably not be entitled to reparation from A for failure to perform".⁸ In fact, it could hardly be said that State A could plead innocence, for, having been a party to the first treaty, it knew of its existence even better than State C. If the criterion was to be prior knowledge, it must at least be applied to both the States parties to the second treaty. The best course would be to base responsibility on a wrongful attitude of the State, but that might be encroaching on the field of State responsibility. Hence the Commission would do better to drop the provision.

29. Mr. TUNKIN said that he regarded article 65 as dealing with a question of priority and on the whole he could accept it, subject to a few amendments.

30. First, he doubted the correctness of the proposition in paragraph 4 (b), which should be qualified by the inclusion of some proviso such as "unless otherwise specified in the earlier treaty". That would cover cases like the 1963 Vienna Convention on Consular Relations which stated, in article 73, paragraph 1, that "The provisions of the present Convention shall not affect other international agreements in force as between States parties to them".⁹ The purpose of that provision was to make it clear that the Vienna Convention was not intended to abrogate the pre-existing network of bilateral consular conventions.

31. A provision should be included somewhere in the article embodying the rule stated in the opening sentences of paragraph (17) of the commentary, on treaties laying down "integral" or "inter-dependent" obligations. It was essential to state clearly that provisions of that type in the earlier treaty should prevail. Such a statement would reflect the facts of the present international situation. An example was the Declaration on the neutrality of Laos;¹⁰ if one or more of the States parties to that treaty were to conclude with a third State a treaty containing provisions that conflicted with the earlier treaty, the earlier treaty must prevail. The provisions of paragraph 4 (c) might provide some safeguard in such cases, but they were not entirely adequate; moreover, he shared the misgivings of other members regarding the formulation of that paragraph.

32. Finally, he wished to state his position on two further points: first, the article did not imply any interpretation of Article 103 of the Charter; secondly, he doubted whether the terms of the article covered the whole of the intended field.

33. Mr. LIU said that article 65 dealt concisely with a subject of great complexity.

34. He shared the misgivings of other members concerning paragraph 4 (c). It was obviously very difficult to determine whether the existence of a treaty was known. The test was subjective and in a matter in which the element of certainty was of the utmost importance, an objective standard was required. It should be remembered, however, that in practice, the veil of secrecy which had surrounded treaties in the past had been largely removed by the treaty registration provisions contained in the League of Nations Covenant and the United Nations Charter. The provisions of paragraph 4 (c) appeared, to some extent, to introduce the common law concept of contract into the realm of international law.

35. During the discussion of the term "conflict" at the previous meeting, it had been suggested that it should be replaced by the word "incompatibility". There was no great difference in meaning between the two terms, but he would not object to the change if it served to bring the terminology of the various articles into line.

36. Since the subject-matter of article 65 was closely connected with the question of treaty revision and peaceful change, it might be desirable to defer a final judgement on it until the Commission came to consider the articles on revision.

37. Mr. ROSENNE said that after the discussion prompted by the Chairman's remarks at the previous meeting, he had come to the conclusion that while the article was correct in principle, it probably needed fairly substantial redrafting, with particular regard to the importance of integrating it with provisions already adopted by the Commission.

38. He agreed with the Special Rapporteur that the article should be placed squarely in the context of application, and perhaps its title, in contrast to that of article 14 submitted at the previous session with the title "Conflict with a prior treaty", slightly distorted the focus. When treaty provisions apparently in conflict came to be applied, it might well be found that there was no incompatibility, and it therefore seemed preferable to amend the title to read "Application of conflicting treaty provisions", and to amend the article to make it refer to the application of one treaty or the other, rather than to the obligations under the treaty.

39. It seemed that article 41, coupled with article 55 in the new form given it by the Drafting Committee, with the emphasis on performance, provided the answer to the questions raised by paragraphs 2 and 3 of article 65, and that the substance of those two paragraphs could be transferred to the commentary. It should also be remembered that article 41 itself was subject to article 48 as a matter of substance and to article 51 as a matter of procedure.

40. On the point raised by Mr. Tunkin, he suggested that when a general treaty such as the Convention on Consular Relations contained a clause expressly maintaining in force prior agreements between States and

⁸ *Law of Treaties, 1961*, p. 222.

⁹ *United Nations Conference on Consular Relations, 1963, Official Records, Vol. II, p. 187.*

¹⁰ *United Nations Treaty Series, Vol. 456, p. 302.*

giving them priority, there was no real conflict between the two sets of obligations. It would be difficult to draft a residual rule that might have to apply both to the earlier and to the later treaty.

41. With regard to paragraph 4 (c), he considered that as a matter of principle the starting point was that the later treaty was valid and had to be applied in good faith, reasonably and in a manner that would not be in breach of the first treaty; but the same would also hold good for the first treaty in relation to the second, and the provisions of articles 55 and 61 would apply to both instruments. Perhaps too much importance had been attached to the final proviso in paragraph 4 (c) since in modern practice there was in fact widespread publication of treaties both in the various national treaty series and in the United Nations Treaty Series. The Commission did not need to discuss secret treaties, which in any case were on the border line of invalidity and, under Article 102 of the Charter, could not be invoked.

42. Some consideration should be given to the question whether the provisions of article 51 which referred to Article 33 of the Charter could be brought into play to solve the problems that arose in regard to treaty provisions which would be incompatible for purposes of application and which might result in violation of the rights of a State, thus giving rise to an issue of responsibility. Article 51 was already applicable, to a limited extent, where the conclusion of the later treaty could be regarded as a breach of the earlier one.

43. With regard to paragraph 1, he shared the view that the Commission must not prejudice the interpretation or application of Article 103 of the Charter and agreed with Mr. El-Erian that that instrument should not necessarily be regarded as a treaty for the purposes of the general law of treaties. If Article 103 were regarded as an independent rule of contemporary international law, it would be generally applicable to the whole of the law of treaties and not only to article 65.

44. Another question which came to mind was whether Article 103 should be regarded as applicable to all States, whether Members of the United Nations or not. If it were not, the position of parties to a multi-lateral convention on the law of treaties which were Members of the United Nations would not be the same as that of parties which were not Members. It would not be as radical as appeared at first sight to make Article 103 applicable to non-member States, for the provisions of the Charter concerning the registration of treaties had been extended to all States under article 25 of the draft.¹¹

45. In conclusion, he asked whether the Special Rapporteur could re-examine the *Aerial Incident Case*,¹² to which reference was made in the commentary. One of the features of that case was that both parties to the litigation had been Members of the United Nations, so that there had been no question as to the position of a Member *vis-à-vis* a non-member State. The ques-

tion that the Court had examined had been whether an understanding reached at the San Francisco Conference and embodied in the *disposition transitoire* of Article 36, paragraph 5, of the Statute of the Court could be binding on a State that had not been present at the Conference and had not signed the Charter in 1945. Possibly the Special Rapporteur had read too much into that case, in the course of which the rule *pacta tertiis nec nocent nec prosunt* had not been discussed.

46. Mr. JIMÉNEZ de ARÉCHAGA said that in the course of informal discussion with the Special Rapporteur, he had learned that the word "priority" was not being used to mean that the State which had assumed conflicting obligations could only comply with the treaty to which priority was assigned. The formula the Special Rapporteur had in mind was that a State which assumed conflicting obligations always retained an option as to which treaty it would observe and that its responsibility towards the other State would be determined *a posteriori* by reference to the treaty to which it had decided not to give priority. That being so, the word "priority" did not seem particularly well chosen. Such an interpretation also rendered the article rather less acceptable to him than it had been at first sight, but as it seemed to be gaining general support he would not withhold his own.

47. It appeared to him that according to that interpretation the provision contained in paragraph 4 (a) should cover the class of treaty to which Mr. Tunkin had referred at the previous meeting.

48. Mr. Yasseen's observations concerning the final proviso in paragraph 4 (c) were very pertinent and it would indeed be unjust for a State to derive benefit from treaty provisions that violated earlier ones. Moreover, in its present form the proviso might encroach on the realm of State responsibility. It ought to be restricted to a limited function within the law of treaties, operating as a kind of estoppel, whereby a State which was aware that the conclusion of a later treaty violated an earlier one, could not insist on compliance with the later treaty. He therefore proposed that the proviso be redrafted as a separate sentence reading:

"However, the party to the later treaty is not entitled to invoke it against a State party to both treaties if it was aware of the previous obligation and that the later treaty necessarily involves action in direct breach of the other party's obligations under the earlier treaty".

49. The CHAIRMAN, speaking as a member of the Commission, said that the text submitted by the Special Rapporteur fell into two completely different parts, one comprising nearly all the article, and the other only the propositions in paragraph 4 (a) and (c).

50. In the first part, the problem was what the Special Rapporteur himself had defined as a question of priority between instruments concluded successively by the same parties. If, in such a case, the earlier treaty was terminated under the terms of article 41, only the second treaty remained in force and the only problem was one of application. If, on the other hand, the earlier

¹¹ *Yearbook of the International Law Commission, 1962, Vol. II, p. 182.*

¹² *I.C.J. Reports, 1959, p. 127.*

treaty remained in force, there were several possible cases.

51. The first case to which the Special Rapporteur referred in paragraph 2, was that in which the earlier treaty had been so drafted as to make it appear that the parties had not intended that another treaty could be concluded between them derogating from provisions of the earlier one. The later treaty must then be so interpreted as to make its application compatible with the provisions of the earlier treaty. That was a rather exceptional case, since the general rule was that when the same parties had concluded two successive treaties, the second prevailed; but the interpretation of the earlier treaty made it necessary to take that special circumstance into account, for otherwise it was obvious that the earlier treaty could only apply in so far as it was not replaced by the later treaty.

52. Between that case and the case of complete replacement of the first treaty by the second, it could happen that the first treaty continued to apply, but only where its provisions had not been replaced by those of the second treaty.

53. The discussion had shown that the Commission was not divided on a question of principle, but was concerned over the drafting of the article. The simplest and easiest possible wording should be found, and that which best took account of the rules laid down by the Commission at its previous session and of the various points which had been raised during the discussion, whether in connexion with certain provisions of the United Nations Charter or with the problems of interpretation which might arise in regard to certain special treaties.

54. The situation contemplated in paragraph 4 (a) and (c) were quite different, as they did not raise any problem of validity or of priority. The rule in paragraph 4 (a) seemed self-evident. For only one treaty remained in force as between the two parties in question; the other was *res inter alios acta*. At most, it might be said that the existence of the later treaty could not be pleaded by one of the parties as an excuse for not fulfilling its obligations under the earlier treaty, which was the only one governing relations between the two parties in question. Incidentally, that was more an issue of responsibility than of validity or choice between the two treaties: so perhaps it was not essential to deal with it there.

55. Paragraph 4 (c) was not concerned with priority either, for it was obvious that the earlier treaty governed relations between State A and State B, whereas a new treaty was in force between State A and State C. That being so, the clause proposed would amount to saying that where State C had concluded a treaty with State A knowing that State A was already bound by a treaty with State B, State C could not demand performance of the later treaty. In his opinion the later treaty was, on the contrary, perfectly valid. State C which had concluded a treaty with State A, was not in any way at fault, whether it knew of the existence of the earlier treaty or not; it was State A that should be held responsible. If it came to light that State A had concluded the earlier treaty under undue pressure,

a problem of coercion would arise, which might perhaps have to be taken into account. But in themselves neither the existence of the earlier treaty, nor the fact that the third State had been aware of it, could be pleaded as an excuse for not fulfilling an obligation under the later treaty. It would be very dangerous to introduce such a rule into international relations, for it would also be very difficult to prove that the third State had or had not been aware of the earlier treaty when it had negotiated the later one. Besides, he did not see why the earlier treaty should prevail *a priori*.

56. Admittedly, in that case there was a problem of responsibility — not the responsibility of State C, which was not bound by any earlier obligation, but only of State A, on the assumption that the mere fact that State A had negotiated a treaty with State C made State A responsible to State B for having derogated from the earlier treaty. It might be that in the earlier treaty States A and B had undertaken not to conclude another treaty with another party. In other cases, the violation was not in the conclusion, but in the application of the new treaty, whose performance was in itself a breach of the obligation to the first State. But he was sure that the Commission should consider the issue of responsibility which arose in all those cases.

57. The rule which should be stated was that the existence of a treaty between two States could not exempt one of them from fulfilling its international obligations, whether previously or subsequently assumed, towards a third State, just as a State could not plead domestic constitutional provisions to evade undertakings it had entered into in an international treaty. If the Commission thought it necessary to state that rule in the article, it would have to consider where such a rule ought to be placed.

58. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said he largely agreed with what had been said by the Chairman and with his analysis of article 65. All members seemed to think that the provision in paragraph 1 should remain where it stood, so as to give the necessary prominence to Article 103 of the Charter.

59. Paragraph 2 should perhaps be kept more or less in its present form; it was intended to be general in character, covering both clauses contemplating treaties concluded in the past and clauses contemplating treaties to be concluded in the future. Thus it would cover provisions such as those in article 73 of the Vienna Convention on Consular Relations.

60. The drafting of paragraph 3 had in some measure been dictated by the form of article 41, which he regarded as being fairly well conceived, and which was intended to cover cases in which the conclusion of a second treaty by the parties to the first, covering the same subject, implied the supersession of the first treaty. It was also intended to cover the rather more complex situations in which the later treaty only covered part of the same ground as the earlier one, and the provisions of the two were not entirely compatible, though both were intended to survive. The question then arose which of the provisions were really applicable. He agreed with the Chairman that para-

graph 3 (a) was unnecessary and could be dropped, as its substance was already covered in article 41. The provision in paragraph 4 (b) also concerned a situation in which the rule in paragraph 3 (b) was applicable. Paragraph 4 (b) should therefore be worded so as to make that rule applicable there also.

61. With regard to terminology, he said that the Chairman's objection to the word "conflict" might perhaps be due to the fact that he was thinking of the word in terms of conflict of laws in private international law. However, the word had been used in the draft article in the same general sense as in Article 103 of the Charter and in certain other treaties. Its use in that sense was in fact normal in treaty practice, but as it had given rise to criticism he would be prepared to replace it by the word "incompatible". He would have no objection, either, to substituting the word "applies" for the word "prevails" in paragraph 4.

62. Although, on a purely theoretical plane, it was possible to reach the conclusion that the statements in paragraph 4 (a) and (c) were self-evident, in practice it often did not seem so. For example, what would be the position when States A and B had concluded one treaty and States A and C another, and State B invoked its obligations under the second treaty, which might be a general multilateral treaty. The performance by State B of treaty obligations *vis-à-vis* State A might entail violation of the multilateral treaty. Yet, equally, non-performance of State B's obligations towards State A would constitute a violation of the State A's right unless the provisions of the general multilateral treaty were of a *jus cogens* character. Thus it seemed desirable to spell out the legal position of the various parties to the two treaties as in paragraph 4 (a).

63. He agreed with Mr. Rosenne that at some later stage the Commission would have to examine all its draft articles carefully, so as to ensure that they were properly dovetailed and co-ordinated.

64. In view of the concern that had been expressed in the Commission lest the draft should appear to condone, or pass over as normal, the conclusion of treaties which were clearly contrary to earlier obligations, particularly those of the "interdependent" type, perhaps it would be advisable to insert a general provision to the effect that article 65 was without prejudice to any issue of State responsibility that might arise out of the conclusion of the later treaty.

65. With regard to the point raised by Mr. Tunkin about treaties imposing "integral" or "interdependent" obligations, he did not believe it made any difference whether or not they contained an express stipulation forbidding the parties to contract out, because the very object and purpose of the treaty would bring out sufficiently the fact that such contracting out constituted a potential violation. In that connexion the Chairman had rightly distinguished between the conclusion of a treaty and its application. There could be cases in which, if there were an express undertaking not to contract out, it would be a violation to conclude the treaty at all. In such cases the State entering into the second treaty might be doing so for the purpose of cancelling or modifying its obligations under the

earlier instrument, and doing so without prior reference to the other parties to that instrument.

66. He would be glad to follow the suggestion made by Mr. Elias at the previous meeting and mention in the commentary the recent developments concerning the Niger River regime.

67. Article 65 could now be referred to the Drafting Committee for re-drafting more or less on its present lines, but bringing out its relationship with article 41.

68. At some later time the Commission would no doubt wish to discuss the position of the article in the draft. It had been convenient, for purposes of discussion, to consider the question of conflicting treaty provisions in close connexion with the effect of treaties on non-parties and with the revision of treaties. In the same way, it had been convenient to study the invalidity and the termination of treaties in Part II at the previous session, though to deal with the termination of treaties immediately after their conclusion and validity was not altogether logical. At a later stage of its work the Commission would have to go carefully into the whole question of the arrangement and order of the various articles.

69. The CHAIRMAN said the Commission had made definite progress towards solving the difficult problems raised by article 65, which should now be referred to the Drafting Committee to be formulated as concisely as possible, taking the provisions of article 41 and certain other articles into account. The Drafting Committee would also have to consider whether a general reservation on State responsibility should be inserted in the text.

It was so agreed.

The meeting rose at 1 p.m.

744th MEETING

Friday, 12 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167/Add.1)

(continued)

[Item 3 of the agenda]

ARTICLE 67 (Proposals for amending or revising a treaty)

1. The CHAIRMAN invited the Commission to take up section II of Part III in the Special Rapporteur's third report (A/CN.4/167/Add.1).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the section on the amendment and revision

of treaties to some extent broke new ground, though the problem was an old one. So far no very comprehensive attempt had been made to formulate basic rules on the subject, but some recent studies had dealt, in particular, with new forms of revision clause inserted in multilateral treaties. Many authorities regarded amendment and revision mainly as a political matter.

3. As revision was essentially one aspect of the treaty-making process, the provisions in Part I of the draft were in principle applicable to it.

4. Among the questions the Commission should consider was whether a party, by virtue of being a party, had the right to be consulted on revision — an issue which had caused friction in the past. Personally, he did not subscribe to the view held by some authorities that there was no general right to be consulted.

5. Although he had used the two terms “amendment” and “revision” in articles 67 to 69, the distinction between them was not very clear and the legal process was the same for both. It would be helpful if the Commission chose one term or the other as that would simplify the drafting.

6. Mr. VERDROSS said that in principle he approved of the ideas underlying the rules stated in section II; for international life, like all life, was dynamic, and provision should be made for amending or revising international treaties peacefully.

7. With regard more particularly to article 67, however, he thought it was rather dangerous to provide, as in sub-paragraph (a), that a party to a treaty might “at any time” propose its amendment to the other parties. That rule might detract from the value of international treaties, for one of the parties might propose an amendment to the others immediately after a treaty had been concluded. It would therefore be preferable either to delete the words “at any time” or to specify that a party proposing an amendment must give serious reasons why the treaty should not be executed.

8. Mr. LACHS said that section II of Part III of the Special Rapporteur’s report provided a sound basis for discussion. Although there was a theoretical difference between amendment and revision, for practical purposes it might be preferable to speak of amendment.

9. Although it could be argued, as McNair did, that treaty revision was a matter for politics and diplomacy — an argument that could apply to any phase of the treaty-making process from start to finish — the Commission should concern itself with the legal aspects.

10. The statement mentioned in paragraph (8) of the commentary, that the rule requiring the unanimous consent of all the original parties for revision had in the past been honoured more in the breach than in the observance, was not a ground for denying the existence of such a rule; the same could be said of some other rules of international law too. Although there were certainly numerous examples of States not upholding the rule, on closer examination of the facts it became clear that they were made uneasy by their failure to do so. For instance, after the Conference

held in 1928 to revise the convention regulating the status of Tangier, the signatories to the new document¹ had sought the consent of some of the parties to the original treaty *post factum*, and that consent had been given by Belgium, the Netherlands and Portugal. He did not subscribe to the view that the existence of such a principle was in doubt, and he believed that its observance was important for the stability of treaties; he therefore agreed with the statement made by the Special Rapporteur in the last sentence of paragraph (13) of the commentary.

11. If the consent of all the parties could not be secured, however, the procedure for termination of the treaty should be set in motion and a new treaty concluded by the parties which wished to do so. It was extremely important to maintain a clear distinction between the institutions of termination and amendment, lest States should attempt, under the guise of revision, to do away with existing treaties in order to create new treaty obligations.

12. There were, however, certain exceptions to the unanimity rule; for instance, where the treaty made provision for agreements *inter se* concerning revision or where, in the original instrument, the parties had delegated the right to amend to an international organization, to a majority of the parties or to some of them only.

13. Mr. CASTRÉN said that he would confine himself for the time being to answering the preliminary question put by the Special Rapporteur in paragraph (9) of the commentary — whether rules regarding the revision of treaties should or should not be included in the Commission’s draft articles. Some writers, such as Rousseau, held that the revision of treaties was essentially a political matter. And it was true that, apart from some special cases, such as those in which the *rebus sic stantibus* clause applied, there was no right of revision that would enable certain parties to a treaty to amend it against the will of another party. There remained the possibility of revision by an agreement *inter se* among certain parties to the treaty, and it seemed advisable to regulate the details or some aspects of that question.

14. As could be seen from the Special Rapporteur’s commentary, practice had shown the need for revision in that form at least; but the procedure was not uniform, so that one could not speak of a customary right. It was a case for progressive codification, but that should not cause any great anxiety, for the Special Rapporteur had not intended to propose fundamental rules, but only to settle certain procedural matters and draw some conclusions on the effects of a revision *inter se* for the other parties to the treaty.

15. The parties to a treaty should be given a minimum of rights, such as the right to propose a revision or to be consulted about such a proposal; and it was legitimate to require that a party to a treaty should not refuse to negotiate seriously concerning its revision. But States had frequently broken the fundamental rule that a treaty could not be amended without the consent of all the parties, and some authorities had

¹ League of Nations *Treaty Series*, Vol. XXVIII, p. 543.

even defended such irregular proceedings. Consequently, the *pacta sunt servanda* rule should be strengthened in that particular case.

16. The League of Nations Covenant had contained an article on the revision of certain treaties. It was regrettable that the United Nations Charter did not mention the matter expressly, though Article 14 empowered the General Assembly to intervene in certain cases. The fact that certain aspects of treaty revision had already been contemplated in several articles of the Commission's draft was no obstacle to the adoption of new, supplementary provisions if they were considered necessary.

17. With regard to terminology, he agreed with the Special Rapporteur that there was only a difference in degree between the amendment of a treaty and the revision of a treaty. The three articles submitted by the Special Rapporteur settled most of the questions arising in that context, but he thought that perhaps the Commission should also deal with the question of the possible right of third States to participate in the revision of certain treaties. According to the commentary, there had already been several cases in which such participation had been accepted.

18. Mr. LIANG, Secretary to the Commission, said it was not clear whether sub-paragraph (a) meant that a party had a right to notify other parties of a proposal for amendment, or simply that it could initiate action in that regard; personally he doubted whether any such *a priori* right existed.

19. He also doubted whether it was a normal function of a depositary to transmit notifications by a party concerning amendment, unless an express provision to that effect had been inserted in the treaty; no explanation on that point had been offered in the commentary.

20. Although clauses on amendment and revision had been grouped under two different headings in the Handbook of Final Clauses (ST/LEG/6) that had been done merely for convenience and no theoretical distinction was made between the two processes. So far as he could judge, the general usage seemed to be to speak of amending the constitutional instruments of international organizations and of revising bilateral or multilateral treaties, but the distinction seemed somewhat artificial. It would be noted that the term "amendment" was used in Chapter XVIII of the Charter, which seemed to envisage a process of general review prior to deciding whether the review should be followed by amendment. If both terms were used in the Commission's text, a definition of their precise meaning should be included.

21. The CHAIRMAN, speaking as a member of the Commission, said that the question of terminology should be settled first. In practice, the word "revision" had finally acquired a very special meaning; it signified a political necessity, affirmed by some and generally denied by others. Between the two world wars, there had been many examples of that concept—an affirmation of the need to revise treaties in order to adapt them to changes in circumstances said to have occurred in the meantime.

22. From the legal and technical point of view, it would therefore be better to keep to the word "amendment". In the constituent instruments of international organizations, such as the League of Nations Covenant and the United Nations Charter, it was for the authors to decide whether or not they wished to introduce a rule on the periodic revision of treaties, for example. But the Commission, which was performing a technical task, should confine itself to considering the consequences of a possible procedure for amending a treaty; it was not called upon to give an opinion on a purely political question, such as the revision of treaties.

23. He was not sure whether the Special Rapporteur had really considered article 67 necessary in itself, or whether he had regarded it as a sort of introduction to the more necessary provisions of articles 68 and 69. But article 67 raised several problems.

24. The Special Rapporteur had very prudently refrained from saying that a party to a treaty had the right to propose an amendment; he had used the word "may" in English, which had been translated into French by the word "*peut*". Was there really a right? It might be thought so, for the Commission had to formulate rules that prescribed rights and obligations. But the possibility of proposing an amendment to a treaty was more of a faculty, not a right in the sense in which a subjective right was ordinarily understood. If it was a possibility, it might either derive from the article itself or belong normally to every State. That being so, as the Special Rapporteur had clearly noted in his commentary, it might be asked whether a third State should not also be able to propose the conclusion of a new treaty amending a treaty already concluded between other parties, if, for example, it thought that it might thus be able to accede to the treaty.

25. The opening words of article 67, "Subject to the provisions of the treaty", raised another problem. Whatever the provisions of the treaty, a State could always, at least, propose an amendment to the particular provision applicable. Hence it was open to question whether it was really possible to say "Subject to the provisions of the treaty".

26. The Special Rapporteur had tried to counter-balance the possibility of a State's proposing an amendment to a treaty by imposing a sort of corresponding obligation—that of considering in good faith what action should be taken in regard to such a proposal. Mr. Verdross had objected to the words "at any time"; but he (Mr. Ago) did not see any reason for imposing a kind of time-limit and thought that that possibility really did exist at any time. A State might happen to propose some change even immediately after the conclusion of a treaty, not necessarily in order to limit its scope, but perhaps to improve some of its provisions or to achieve subsequent progress. But he feared the possible consequences of such an obligation on another party, even if it were cautiously described as an obligation to consider the proposed amendment "in good faith". It might happen that the other State did not take the proposal of the requesting State into consideration because it thought it had good reasons for not doing so. In that case, could the requesting State claim

that the other State had broken its international obligations? It might perhaps use that excuse for not carrying out the treaty or for terminating it. Thus to speak of an obligation in that context seemed to introduce an element of risk.

27. Mr. ROSENNE said he had very much the same doubts as the Chairman about article 67. The process surely started with a proposal to examine a treaty rather than with a proposal to amend it, and if the provision were worded in that way perhaps some controversial issues would be avoided and Mr. Verdross's point about the phrase "at any time" might be met, at least in part.

28. It was important to strike a balance between the requirements of the *pacta sunt servanda* rule and the need to safeguard the force of treaties against being weakened by too easy a process of revision. Although a strict parallelism between rights and obligations was a concept that was deeply rooted in private law, in the present context it was not really necessary, because the process of amendment was essentially one that was governed by political considerations. It was always open to any State to make a proposal to the other parties concerning a treaty; the problem that arose was whether the parties were obliged to take any action on such a proposal. Perhaps the Commission should also consider whether States which under the terms of the treaty were entitled to become parties to it should not also be given a similar right to be consulted, since they could be expected to be interested in a revision that would enable them to become parties. However, an exception would have to be made for the constituent instruments of international organizations, admission to which was different from participation in a treaty.

29. Finally, he suggested that if a rule of unanimity was to be included it was important to ensure that it did not operate too rigidly, like a veto.

30. Mr. VERDROSS, referring to the point made by Mr. Castrén concerning the existence of a customary right to revise treaties, said that several different situations were possible. The right to propose an amendment to a treaty certainly existed. He agreed with the Chairman that the word "revision" had a political connotation and that it would be preferable to refer only to the modification or amendment of a treaty.

31. His own proposal that it should be provided that a party could only propose an amendment if there were serious grounds for not executing the treaty, related to sub-paragraph (b). If that sub-paragraph were deleted, he would withdraw his proposal, which derived from the idea of good faith being required of the other parties.

32. Mr. de LUNA said that on the whole he approved of the Special Rapporteur's proposals.

33. As to terminology, he thought the three words "revision", "modification" and "amendment" were almost synonymous, even in theory. It was possible to make a distinction between revision and amendment, in that revision applied to the whole treaty; but against

that it could be argued that in some cases a revision had affected only particular articles. The Commission could, of course, find ample documentation on the terminological aspect of the question in the archives of the League of Nations, but the sensible course was to choose a single term and define it clearly in an explanatory note.

34. The term he would prefer was "amendment", which was very widely used in internal public law, where it involved a special procedure. An amendment in fact entailed some degree of value judgment and denoted a change intended to make some improvement. Moreover, the word "amendment" would make it possible to avoid the danger pointed out by Mr. Lachs, that revision might provide a disguised method of terminating a treaty, whereas termination ought to take place by a direct method laid down in other articles of the treaty.

35. He noted that in sub-paragraph (a) the Special Rapporteur had not referred to a right, but that in sub-paragraph (b) he had specified an obligation to negotiate. What usually happened in international practice, however, was that, for compelling political reasons, States were reluctant to start formal negotiations.

36. The CHAIRMAN, speaking as a member of the Commission, said that to make the possibility of proposing an amendment to a treaty contingent upon difficulty of performance might be too restrictive. Even if a treaty was quite easy to perform, there might still be good reasons for amending it. For instance, one of the Parties to the Treaty of Rome establishing the Common Market might propose an amendment which constituted an advance.

37. Sir Humphrey WALDOCK said that there might be some differences in the initiation of the procedure for amendment and the procedure for revision, but that since the process was essentially the same in both cases, it would be convenient to drop the reference to revision in section II.

38. Although, in a sense, the provisions in article 67 might be regarded as self-evident, the problem of revision had exercised the minds of both politicians and lawyers, as had the danger of stagnation in treaty relations. Some treaties contained provisions permitting a proposal for amendment by any one party at any given moment, whereas others laid down that amendments could only be proposed at specified intervals or at the instance of more than one party.

39. If sub-paragraph (b) were dropped, as the majority seemed to think desirable, there would not be much left of the article. He thought that sub-paragraph (b) did deal with a real point in so far as it must be presumed that a proposal to amend would be based on some solid foundation and that, consequently, the other parties were bound to examine the proposal in good faith and give some answer. In the absence of a recognized right to propose revision, or of any international legislative machinery, such a provision should encourage good relations between States.

40. Perhaps if the article were redrafted in the manner suggested by Mr. Rosenne, it could still serve a useful purpose and not be open to the kind of objections mentioned during the discussion.

41. Mr. AMADO said it would be remembered that at the San Francisco Conference, Brazil, Egypt and Mexico had proposed that a provision similar to Article 19 of the League of Nations Covenant² should be included in the United Nations Charter. He himself attached a precise meaning to the word "revision". He was worried by the Special Rapporteur's statement in the first sentence of paragraph (2) of the commentary that the substantive aspects of the revision of treaties were to a large extent covered by previous articles — namely, articles 41, 43, 44, 62, 63 and 65. The Commission's task was to determine the rules which already existed in international law and were confirmed by State practice, and to state them clearly and precisely.

42. Article 67, which had been attacked from the beginning of the discussion, proposed a procedure for the revision of treaties; it tended to confirm dubious principles such as *rebus sic stantibus*. In his opinion, the Commission should adopt quite a different approach, stressing the inviolability of the instrument and increasing the stability of treaties.

43. He was inclined to give a negative answer to the question put by the Special Rapporteur in paragraph (9) of the commentary. For the time being, he was opposing article 67, but he thought that the three articles were linked.

44. Mr. ELIAS said that the brief discussion on article 67 had already given rise to at least five controversial issues. First, the problem raised by the words "at any time" in sub-paragraph (a); secondly the reference to the depositary in the same sub-paragraph; thirdly, the concept of obligation in sub-paragraph (b); fourthly, the difficulties caused by the expression "in good faith"; and fifthly, the obligation to consult the party concerned, laid down in sub-paragraph (b). In view of the many difficulties it involved, he suggested that article 67 should be dropped, especially as its essential idea was already expressed in article 68, paragraph 1. He would leave aside for the time being the problems raised by the words "to amend or revise" and Mr. Rosenne's suggestion of the term "to review".

45. The right of a party to a treaty to set in motion the machinery for its revision would be better assumed than expressed. There was nothing in customary international law to prevent a party from calling upon the other parties to set that machinery in motion. Article 67 could therefore be deleted, and that would avoid all the doctrinal problems that had been raised. As the Special Rapporteur had pointed out, it would be very difficult to substitute a satisfactory formulation which

said anything not already contained in article 68, paragraph 1, or in various articles in Parts I and II.

46. Sir Humphrey WALDOCK, Special Rapporteur, said that there were two alternatives before the Commission. The first was to delete article 67, in which case the idea embodied in sub-paragraph (a) could be incorporated in article 68 in the form of a new opening paragraph which might read: "Subject to the provisions of the treaty a party may propose its amendment to the other parties" or "Subject to the provisions of the treaty, a party may notify the other parties of a proposal for its amendment". The word "amendment" could be replaced by the word "modification" if desired.

47. The second alternative was to retain the idea expressed in sub-paragraph (b), though the Commission seemed to be against that course. What was suggested in sub-paragraph (b) was that the treaty relationship involved the modest obligation to give proper consideration to any proposal to amend or improve the treaty.

48. There was some value in the idea expressed in sub-paragraph (a), and since many treaties at present included provisions regulating the faculty of the parties to propose amendments, the opening words of the article, "Subject to the provisions of the treaty", should be retained.

49. Mr. BRIGGS said he was surprised that there should be so much objection to what seemed to him innocuous provisions. The intention of article 67 was to state that a party to a treaty could make a proposal for revision and that the other parties should consider that proposal. With the passage of time and changes in circumstances, the problem of the revision of treaties was becoming more acute. The Commission could make a useful contribution to its solution by adopting a set of articles on the lines proposed by the Special Rapporteur.

50. There was no rule of international law which prevented a party from proposing an amendment to a treaty; that was true even if amendments were excluded by a clause in the treaty, for clearly it was open to a party to propose the amendment of that particular clause. As he read sub-paragraph (a), it merely stated the obvious fact that a party to a treaty could make a proposal for its amendment to the other parties. He had no objection to the words "or through the depositary"; if the party concerned could make a proposal direct, the notification of the proposal could surely be made through the depositary.

51. In sub-paragraph (b), the words "in good faith" could be dropped; it was true that the other parties should consider the proposal in good faith, but it was equally true that the proposal itself should be made in good faith, and those words did not appear in sub-paragraph (a). The concept of good faith could be taken for granted in both cases. The words "and in consultation with the party concerned" could also be dropped if it was thought that they implied a duty to negotiate with the proposing party.

52. The words "if any" which qualified the provisions of sub-paragraph (b) were very important. The other

² "The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."

parties were not obliged to take action, but merely to consider what action, if any, should be taken in regard to the proposal.

53. He could accept article 67 if it were redrafted so as to meet some of the objections made to the wording. If it were decided to delete the article it was possible, as Mr. Elias had suggested, that article 68 would suffice to express the essential idea it contained.

54. Mr. TUNKIN said he agreed with Mr. Briggs that there was no rule of international law preventing any party from making a proposal to amend a treaty. But that did not always mean that a party had a right to make such a proposal.

55. The real question was not whether there was a right to propose the amendment of the treaty. If a proposal for amendment was in fact made by a party, there arose the problem of determining its legal consequences. That problem would arise even if the treaty contained a revision clause. For example, if a bilateral treaty specified that a proposal for its revision could not be made before a certain period had elapsed, there was nothing to prevent one of the parties from proposing to the other that the revision clause be amended, so as to permit the amendment of other provisions of the treaty before the end of the stipulated period.

56. Consequently, while he did not consider the provisions of sub-paragraph (a) necessary, he believed that the idea expressed in sub-paragraph (b) should be retained in some form; perhaps it could be included in article 68, so that article 67 could be deleted.

57. Mr. LACHS said he shared the doubts expressed by other members regarding the usefulness of article 67: its contents were largely self-evident, but it had connotations which raised some difficulties. He therefore supported the suggestion that it should be deleted and its essential idea included in article 68.

58. If that were done, it would be advisable to introduce a reference to the point raised by Mr. Rosenne, namely, that it might be open to some States not parties to the treaty, but entitled to accede to it, to propose its revision in certain cases precisely for the purpose of facilitating their accession to the treaty. Some of the ideas contained in article 67 should be transferred to the commentary.

59. Mr. BARTOŠ said that in his opinion the wording of article 67 was not contrary to the rule *pacta sunt servanda*. If a treaty was to be faithfully executed, it must be executable. From time to time, however, the parties might wish to improve not only the treaty itself, but their mutual relations. States were constantly trying to improve on existing arrangements, and the progressive development of international law called for recognition of that dynamic process. Every State party to a contractual legal relationship had the right to try to improve that relationship. In his view — and there he differed from Mr. Tunkin — States had an actual right to propose, but not of course to impose, an amendment.

60. Parallel with the right of a contracting State to propose an amendment, the other parties to the treaty

had a corresponding obligation to consider the proposal seriously and to examine it with the party making it. There was nothing more in sub-paragraph (b); in particular, there was no suggestion that the proposal itself imposed a choice between the existing situation under the treaty and the situation that would result from adoption of the proposal.

61. The Commission should confirm both the right and the obligation. It should state clearly that the exercise of that right must not be automatically regarded *a priori* as a delaying manoeuvre or an attempt to impede the normal application of a treaty. The submission of the proposal did not affect the validity of the contractual provisions. They remained in force until the proposal had been disposed of. It was accordingly necessary to distinguish between two ideas: on the one hand the rule giving the right to submit the proposal (the sole purpose of the draft article); on the other hand the idea (not in the draft) that the proposing State, by making its proposal, acquired the right to challenge the obligations deriving from the treaty. For the reasons indicated, he thought that the rules proposed by the Special Rapporteur were necessary rules of conduct in international society; he approved of them as a whole, and thought they should be raised to the rank of positive rules of international law.

62. The opening clause of article 67, "Subject to the provisions of the treaty", was not acceptable if it referred to a treaty provision barring all revision; such a provision would conflict with *jus cogens*, for every State was free to hold its own opinion on the development of international relations. On the other hand, the opening clause was acceptable and justified if it referred to cases in which the treaty itself laid down procedure for revision; the parties must then follow that procedure when exercising the right accorded to them in sub-paragraph (a). Whether notification was made direct or through the depositary of the treaty was a question of form rather than of substance.

63. To stipulate the need for formal consultation with the party proposing the amendment, as was done in sub-paragraph (b), might perhaps complicate matters unnecessarily. The essential was that the party's arguments should be considered. Consultations were obviously useless when a State was convinced in good faith that any change would be contrary to its own interests and to the common interest. He agreed with Mr. Tunkin that the question was rather abstract; it really involved situations in which the parties could exercise their discretionary power to take a decision on the proposal. As a matter of courtesy, at least, a State party to a treaty should not arbitrarily reject out of hand a request made by another party. Article 67 should leave the door open for negotiation and give parties wishing to amend a treaty legal authority to propose its amendment under a rule of international conduct; and that rule should be recognized as having legal effect also in positive international law.

64. There was a technical distinction between amendment and revision. An amendment related to a particular provision, not to the basic idea of a treaty, whereas revision involved reconsideration of its whole

foundation. A request for revision was thus a much more serious matter; it must be based not only on valid grounds, but also on a radical change in the material basis on which the treaty had been concluded.

65. Mr. TUNKIN said that the attempt to define the situation contemplated in sub-paragraph (a) as a matter of right reflected an unduly rigid attitude to a very flexible situation in international relations. To define the situation in that way was absolutely unnecessary. Of course, there was a theoretical problem. Some claimed that all actions of human beings or States were based on rights or obligations. According to that theory — an erroneous one, as had been demonstrated by Karl Marx — society was based on law. But according to another theory, law was a system of rules — legal rules — for the regulation of social relations. There was, however, no need to discuss that theoretical problem. All the Commission had to do was to develop those principles which were essential in practice, in other words, to deal with the practical problem of the legal consequences of a proposal to amend a treaty.

66. There were two possibilities. Either the treaty contained provisions concerning its amendment, in which case, if the treaty was valid, it must be assumed that those provisions would prevail; or the treaty contained no provisions concerning its amendment, in which case the question to be considered was what the legal position would be when an amendment was proposed. The matter dealt with in sub-paragraph (b) should be viewed in the light of those two possible situations.

67. Mr. PAL said he had the impression that there was little objection to the substance of the articles in section II; the main problem was the formulation of the ideas expressed in them.

68. As he saw it, the main significance of article 67 lay in the initial proviso "Subject to the provisions of the treaty", which qualified both the right or faculty conferred in sub-paragraph (a) and the obligation imposed in sub-paragraph (b). In fact, the discussion had shown that, even if the faculty to seek amendment of a treaty were limited by an amendment clause in the treaty, it was permissible for one of the parties to propose the revision of, precisely, that amendment clause. The provisions of sub-paragraph (a), subject as they were to the initial proviso, therefore seemed pointless.

69. Perhaps the proper subject of sub-paragraph (a), and the most material point in its provisions, should be the obligation to notify all the parties to a treaty of any proposal that might be made for its amendment. As pointed out by Mr. Elias, that idea was already contained in article 68, paragraph 1. The obligation "to consider in good faith" imposed in sub-paragraph (b) would be of no real use as a norm of law. He would therefore agree to the deletion of article 67 and to the introduction of the residue of the idea it embodied into article 68.

70. Mr. ROSENNE said that although Mr. Elias's suggestion had the advantage of enabling the Com-

mission to avoid doctrinal controversy, the important opening words "Subject to the provisions of the treaty" would disappear. But as Mr. Tunkin had said, if a treaty contained provisions concerning its amendment or revision, those provisions should prevail; that was implicit in the *pacta sunt servanda* rule. Revision of a treaty could not be independent of the treaty itself.

71. The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone contained a revision clause (article 30), which read:

"1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

"2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request".

Identical clauses were to be found in the 1958 Geneva Conventions on the High Seas (article 35), Fishing and Conservation of the Living Resources of the High Seas (article 20) and the Continental Shelf (article 13).³ The approach adopted in that revision clause was different from the approach in article 67, in that the decision on any action to be taken was left to the General Assembly. There were other examples of multilateral treaties which left that decision to an international organ, thereby covering the question of consultation with the other interested parties.

72. It was essential to retain the idea of the opening proviso of article 67. Any attempt to introduce an element of *jus cogens* into the revision of treaties would lead to undesirable fluidity and undermine the stability provided by the draft articles on the law of treaties.

73. The CHAIRMAN noted that opinion in the Commission was divided. Disagreement on the use of the word "right", in particular, was more serious than it appeared.

74. Speaking as a member of the Commission, he said that the term "right" could be understood either in the usual, broad sense of the faculty to carry out any lawful action, or in the technical sense of a subjective right, in other words the faculty to demand of another a certain service or conduct. If sub-paragraph (a) was understood as giving any party an actual right to propose the amendment of the treaty, that right must be accompanied by an obligation on the other parties, such as was stipulated in sub-paragraph (b). If that obligation did not exist, sub-paragraph (a) would provide not for a right, but merely for a faculty.

75. He did not believe, however, that any obligation of the kind envisaged in sub-paragraph (b) existed in customary law. Besides, what exactly would that obligation be? If it was the obligation to enter into consultation, it would be objected that the mere fact of agreeing to discuss a proposal for amendment amounted

³ For these conventions see *United Nations Conference on the Law of the Sea, 1958, Official Records*, Vol. II, pp. 132 et seq.

to accepting, to some extent, the idea that amendment was advisable. If the Commission was obliged to confine itself to such a vague expression as "to take the proposal seriously", the provision would not have much meaning but could none the less have unfortunate effects. In international practice, States which were preparing for an act of aggression, for example, began by proposing the amendment of a treaty: such a proposal could not be taken seriously. A State was bound to take cognizance of any proposal for revision, but it should be free to react as it saw fit, and the Commission would be wrong to limit that freedom.

76. If the Commission decided not to impose an obligation in sub-paragraph (b), sub-paragraph (a) would only provide for a faculty. But the question then arose whether that faculty should be unrestricted. It was then that the initial clause, "Subject to the provisions of the treaty", became really important. It would be useful to retain that proviso if, as the Special Rapporteur had suggested, the Commission decided to incorporate the basic idea of article 67 in article 68, paragraph 1.

77. Mr. AMADO said that, instead of proposing arrangements to facilitate the revision of treaties, the Commission would do better to provide for a sanction in the event of denunciation of a treaty.

78. Mr. BARTOS said he was still firmly convinced that present practice showed that certain States needed to be legally entitled to request the amendment of a treaty without being suspected of trying to evade their obligations. As a counterpart to that right, the obligation of the other parties to consider the request already existed in practice as an embryonic legal duty. Consequently, he thought it was the Commission's duty to draft legal rules in that sense, so as to further the progressive development of international law.

79. Mr. de LUNA said he well understood Mr. Bartos's concern. A happy medium had to be found between the static character of the treaty and the dynamic character of international life; anarchy should not be condoned, but neither should a treaty be preserved at all costs when it had become unjust because it no longer corresponded to the existing situation.

80. As Mr. Amado had rightly pointed out, the question under consideration was connected with the denunciation and termination of treaties, which had been dealt with in other articles.

81. No matter how it was drafted, the provision in sub-paragraph (b) would change nothing in practice and would in no way facilitate the peaceful development of international relations. The Commission should propose clearer and more definite rules which conferred not only a faculty, but a right.

82. Mr. RUDA said he agreed with the Chairman. Sub-paragraph (b) provided that there was an obligation to consider in good faith, and in consultation with the party concerned, not merely the proposal for amendment, but what action should be taken in regard to that proposal. It thus suggested that there was an

obligation to negotiate, and he found that suggestion very dangerous. Circumstances could and frequently did arise, in which it was better not to negotiate at all than to negotiate under unsatisfactory conditions.

83. With regard to sub-paragraph (a), he endorsed the distinction that had been made between a right and a faculty.

84. If the Commission decided to drop article 67, it should include in article 68 the idea expressed in paragraph (10) of the commentary, that in the case of a multilateral treaty, it could be open not only to the parties, but also to States which had taken part in the adoption of the treaty to make a proposal for its amendment.

85. Mr. TUNKIN suggested that the Special Rapporteur should consider approaching the whole subject of revision in the same way as the Commission had approached that of termination. In article 38 the Commission had dealt with the termination of treaties through the operation of their own provisions, in article 39 with treaties containing no provisions regarding their termination and in article 40 with the termination or suspension of the operation of treaties by agreement.⁴ Article 40 provided that "A treaty may be terminated at any time by agreement of all the parties." It had not been considered necessary to provide that a party to a treaty had a right to propose its termination. A similar system could be adopted for the articles on revision.

86. Sir Humphrey WALDOCK, Special Rapporteur, said he had already given some thought to that possibility, but it raised extremely difficult problems. One was the application of the procedural provisions, and another was that such an approach would involve treating the subject of revision like that of the *rebus sic stantibus* clause, whereas the two notions should be kept separate.

The meeting rose at 1 p.m.

745th MEETING

Monday, 15 June 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Co-operation with other Bodies

[Item 8 of the agenda]

1. The CHAIRMAN invited Mr. Sabek, Observer for the Asian-African Legal Consultative Committee, to address the Commission.

2. Mr. SABEK (Observer for the Asia-African Legal Consultative Committee) said that the Committee had

⁴ Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, pp. 12-15.

greatly appreciated the presence at its fourth, fifth and sixth sessions of observers from the International Law Commission. It had also welcomed the Commission's discussion at its fifteenth session on co-operation between the two bodies,¹ which had stressed the need for a more regular and complete exchange of documents.

3. The progressive development of international law was of particular interest to Asian and African countries, which in the past had been unable to make their views known, having long suffered under imperialism and inequitable treaties concluded without regard to their interests and needs. They were anxious to eradicate all vestiges of colonialism and foreign domination. One of the functions of the Asian-African Legal Consultative Committee was to consider questions under examination by the Commission and to assist in the development of law and its adjustment to the requirements of a world-wide community. The Committee appreciated the way in which the Commission took account of the views of Asian and African countries.

4. At its last session the Committee had held a general discussion on the law of treaties and had decided to take up the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations. It had also considered the problem of refugees and hoped that its recommendations would prove to be a practical contribution towards the legal protection of their rights. That subject was to be taken up again at the next session, together with the right of asylum, repatriation and compensation.

5. When discussing the United Nations Charter, the Committee had noted with satisfaction the resolutions adopted by the General Assembly in 1963 on the question of equitable representation on the Security Council and the Economic and Social Council.² It believed, however, that the time had come to review the Charter in accordance with article 109, since many new States had not taken part in its negotiation, so that it could not reflect the consensus of opinion of the present members of the United Nations.

6. The Asian-African Legal Consultative Committee had completed its report on the legality of nuclear weapon tests and had unanimously decided that, by reason of their scientifically established harmful effects, whether carried out by a State in its own territory, in trust or non-self-governing territories, on the high seas or in the air space above them, such tests constituted an international wrong for which the State concerned was absolutely liable. The Committee considered that tests carried out in trust or non-self-governing territories constituted a breach of the principles of the Charter and of the Universal Declaration of Human Rights.

7. The Committee would also be discussing at its next session the status of aliens, including the question of diplomatic protection by their home States and the

responsibility of States arising out of their maltreatment; the law of the territorial sea; and the recognition and enforcement of foreign judgments, together with the question of process serving and the recording of evidence in civil and criminal cases.

8. The Secretariat of the Committee had been instructed to make studies and collect material on State succession and the legal aspects of outer space, both of which topics would probably also be included on the agenda.

9. He had been asked to extend a standing invitation to the Commission to send an observer to all future sessions of the Committee.

10. The CHAIRMAN, thanking Mr. Sabek for the information he had given on the work being done by his Committee, said that the Commission attached great importance to collaboration with bodies working in the same field as itself and welcomed the Committee's decision to include on its agenda certain topics to which the Commission had given priority. The Commission thanked the Committee for the standing invitation to be represented at its sessions.

Law of Treaties

(A/CN.4/167/Add.1)

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 67 (Proposals for amending or revising a treaty) (*continued*),

ARTICLE 68 (Right of a party to be consulted in regard to the amendment or revision of a treaty) and

ARTICLE 69 (Effect of an amending or revising instrument on the rights and obligations of the parties)

11. The CHAIRMAN invited the Commission to resume consideration of section II of Part III in the Special Rapporteur's third report (A/CN.4/167/Add.1).

12. Mr. TUNKIN suggested that, as articles 67-69 were closely linked, members should be allowed to comment on them together, if they so wished.

It was so agreed.

13. Mr. PAREDES said he thought it was his duty to state his position on what he considered to be the main questions discussed by the Commission and he would do so with regard to the matters under study at present. A right was the power or faculty of a person protected by the law, but it did not immediately require a particular person to assume the corresponding obligation — the passive subject — nor was it necessarily a right in being, since it might be a potential right. Real rights, as opposed to personal rights, availed against everyone without distinction, though not at all times, but only when the circumstances required. Every free act of a subject did not involve a right in the strict technical sense, but a right could come into

¹ *Yearbook of the International Law Commission, 1963, Vol. I, 715th meeting, pp. 283 et seq.*

² *Official Records of the General Assembly, Eighteenth Session, Supplement No. 15, Resolution 1991 (XVIII), pp. 21-22.*

being if obstacles were placed in the way of the act. If anyone obstructed a lawful act by a person, that person could apply to the competent authorities to have the obstruction removed.

14. It was therefore necessary to ask in respect of every action, whether the agent had the faculty to perform it, who was affected or bound by it and whether he could oppose it or must accept and complete it. To answer those questions with certainty it was necessary to distinguish between the various types of treaty and their effects with regard to the matter under discussion. That was all the more necessary because the reason why many problems could not be solved was that unlike things were lumped together in one mental compartment. The differences must be examined.

15. A contract was the expression of the will of the parties on one or more matters, and that will might be extinguished and terminated when the object of the contract was finally settled by drawing up a dispositive treaty to regulate the question and stabilize it by creating a definitely established right. That was not a matter of amending or revising a treaty, but of signing a new treaty. The same did not apply when the treaty imposed obligations on the parties to perform, or refrain from, certain acts in the future. There was then a continuous will in operation and duties to perform. But such perpetual obligations, which bound a free will to situations that could not be liquidated however much the circumstances had changed, were being rejected throughout the legal order. In municipal law the contracting of services for life was prohibited and in international law the way was being opened for rights of revision and amendment. He accordingly believed that the parties had a right to ask for the revision or propose the amendment of a treaty. They could do so by a peaceful proposal to negotiate or by application to the competent authority when the principle of *rebus sic stantibus* applied. The parties notified of the proposal had a duty to reply, accepting or rejecting it, and that was not a mere act of courtesy. He therefore agreed that, when a treaty imposed certain future conduct on the parties, they were legally entitled to propose its revision or amendment as provided in article 67.

16. As to the use of the terms "revision" and "amendment", he thought there were real differences in legal content: to "revise" was to reconsider the basic elements of the treaty with a view to deciding whether they should be retained or not, in whole or in part; whereas "amendment" applied to points of detail or to additions or deletions to be made to the original text.

17. The first sentence of article 67 did not even seem to correspond to the Special Rapporteur's idea, for the words "subject to the provisions of the treaty" suggested that the parties were prohibited from exercising their right with respect to those provisions; thus the proviso must refer only to the form of the proposal or to procedure, as could be gathered from the commentary. To avoid misunderstandings, he suggested that those words should be deleted. Nor did he approve

of the reference to good faith, which in that context seemed to be merely an empty admonition.

18. Paragraph 1 of article 68 should, in his opinion, be removed from that article and embodied in article 67 for the following reasons: first, the right to have a proposal for revision or amendment considered by the other parties to the treaty had its logical counterpart in the right of the other parties to be notified of the proposal; secondly, the considerations that followed in article 68 were of a different order, in that some of the parties separated themselves from the rest to make a separate complementary or additional agreement between themselves alone.

19. Mr. CASTRÉN said that he had expressed his opinion on articles 67 to 69 as a whole at the previous meeting.

20. Both the substance and the form of the Special Rapporteur's proposals for article 67 were, in general, acceptable. He agreed with Mr. Briggs that article 67 was useful and cautiously worded. The obligations and rights it provided for were very modest. States were required to act in good faith and to observe the rules of good conduct in the international community. As Mr. Bartoš had pointed out at the previous meeting, there was a great difference between the denunciation of a treaty and a mere proposal to amend it. If the Commission decided to delete the words "and in consultation with the party concerned" in sub-paragraph (b) — and he thought those words could be dropped — the other party's only obligation would be to consider the proposal for amendment in good faith. True, all obligations based on good faith were weak; they were *lex imperfecta*, for it was very hard to judge whether a party had violated such an obligation, and the effective sanction, which would be to authorize a party to denounce the treaty if the other party had acted in bad faith, could not be adopted. The expression "in good faith" already appeared in article 55, as redrafted by the Drafting Committee, and in article 17, paragraph 1, adopted at the fourteenth session.³

21. He was prepared to accept sub-paragraph (a) as it stood. Like Mr. Bartoš and Mr. Briggs, he considered that a party to a treaty could always propose amendments to the other parties even if it was stipulated in the treaty that it could not be amended before a certain period of time had elapsed. But the other parties were not bound to negotiate in such circumstances. Hence the proviso in the opening words of the article had its full force so far as sub-paragraph (b) was concerned, but applied to sub-paragraph (a) only in the sense indicated by the Special Rapporteur in paragraph (11) of his commentary, namely, that the submission of a proposal to amend a treaty might be subject to procedural requirements prescribed by the treaty itself.

22. The words "or through the depositary" could be retained in sub-paragraph (a), for paragraph 3 (d) of article 29 on the functions of a depositary, adopted at the fourteenth session,⁴ gave some support to the view

³ *Yearbook of the International Law Commission, 1962, Vol. II, p. 175.*

⁴ *Ibid.*, p. 185.

that a State could address the proposal to the depositary. If that provision of article 29 was not sufficiently clear on the point, it could be amended on second reading.

23. It had been said that the whole of sub-paragraph (a) was unnecessary because it stated an obvious fact and because the same principle was implied in article 68. Sub-paragraph (a) did, however, specify certain details about the right in question and prescribe certain procedures.

24. If the Commission decided to delete article 67, the obligation in sub-paragraph (b) should certainly be embodied in the following article.

25. Paragraph 1 of article 68 stated a rule at least as obvious as that stated in sub-paragraph (a) of article 67; it was a rule to which there should be no exceptions.

26. Paragraph 2, however, provided for an exception where certain of the parties to a treaty wished to modify its application as between themselves. Such a modification was certainly quite legitimate, provided that the rules laid down in the paragraph were complied with; but he thought that in that case too all the parties to the treaty should be consulted. If some of the parties to the treaty wished to exclude the others, on the ground that they were not amending the treaty but concluding a new treaty, the matter should be settled by interpretation, with due regard to the requirement of good faith. Participation in a treaty created common interests and solidarity between the parties. All the States parties to the treaty should have an opportunity of stating their opinion on whether the special arrangements *inter se* contemplated by some of the parties were compatible with the treaty as a whole and did not prevent the other parties from enjoying the rights conferred on them by the treaty. He therefore proposed that paragraph 2 should be deleted and that the substance of sub-paragraphs (a), (b) and (c) should be transferred to article 69, paragraph 2.

27. Paragraphs 1 and 3 of article 69 were acceptable, but paragraph 2 should be supplemented by the provisions of article 68, paragraph 2, sub-paragraphs (a), (b) and (c). Those three sub-paragraphs referred, negatively, to cases in which the amendment of the treaty manifestly violated the rights of the parties which had not taken part in amending it. Those three objective criteria should be mentioned for the first time in article 69, paragraph 2. It might be added that the States parties to the treaty which had taken part in adopting the amending instrument, or which had not raised any objection to the proposal to amend after being consulted in accordance with the provisions of article 68, were debarred from invoking the violations referred to.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that as the Commission had now embarked on a wider discussion of articles 68 and 69, he would have to make some further remarks by way of introduction. Those two articles posed the important problem of unanimity in the special context of revision. As far as the adoption of the text of the amending or revising

instrument was concerned, the rules laid down in article 6⁵ would apply.

29. Under article 68, paragraph 3, the rules for entry into force stated in article 23⁶ would be applicable.

30. The fundamental rule expressed in article 69 was that an amending or revising instrument was not binding on States that had not become parties to it.

31. He was anxious for the Commission to pronounce on whether he had adopted the right approach in those articles, which were of a tentative character. The alternative would have been to treat revision as somewhat analogous to termination and it would be remembered that, under article 40, termination required the agreement of all the parties. But it seemed to him that the two situations were radically different, because termination put an end to the treaty whereas revision did not, though it might in certain cases render it unworkable.

32. The possibility of extending to non-parties the right to be consulted on a proposal to amend had been mooted at the previous meeting. It had been suggested that a provision on the lines of article 40, paragraph 2,⁷ should be included. But he wondered whether that might not introduce an undesirable complication.

33. Mr. BRIGGS said that for too long there had been too much room for arbitrary action in matters of revision and it would be a real contribution to the progressive development of international law if the Commission could provide firm rules for the guidance of States.

34. As he had already said, he was in favour of retaining the whole of article 67.

35. Article 68 should consist of paragraph 1 alone, with suitable drafting changes. That paragraph stated the sound principle that all the parties had an absolute right to be notified of any proposal for amendment or revision. Its scope should be limited to the parties, as there was no ground for extending such a right to non-parties; that might put a premium on delay in the ratification of treaties. It had been considerations of a different kind that had prompted the Commission to insert the provision in article 40, paragraph 2, in its draft.

36. Paragraph 2 should be dropped. It did not prohibit *inter se* amendments contrary to the conditions laid down in sub-paragraphs (a), (b) and (c), but made them subject to the obligation to notify. No such obligation was laid down for *inter se* amendments which were not contrary to those conditions. Moreover, the question whether an amendment deprived other parties of their rights, prevented the effective execution of the treaty or was prohibited, could lead to disputes. Another, more forceful reason for deleting paragraph 2 was its relationship with article 69, paragraph 2, according to which failure to object to an amending or revising instrument

⁵ *Ibid.*, p. 166.

⁶ *Ibid.*, p. 182.

⁷ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 15.

would debar a State from considering it as a violation of rights under the treaty — a provision that went too far. Nor did article 69, paragraph 2, indicate what would be the legal effects of a timely objection. If it would permit any party to veto an *inter se* amendment, he would oppose such a stipulation as contrary to State practice and inimical to progressive development. Indeed, it would constitute one of the most objectionable manifestations of the unanimity principle, which the Commission had condemned when discussing reservations to multilateral treaties. Since the provision in article 69, paragraph 1, denied effect to *inter se* amendments in relation to non-parties to the amending instrument, no further clause on the subject was necessary. That paragraph set out an acceptable principle.

37. Thus he was in favour of retaining article 68, paragraph 1, and article 69, paragraph 1. Article 68, paragraph 2, should be re-drafted as a separate article, which might read :

“ An amendment by which certain of the parties modify the application of the treaty as between themselves alone is permissible, if such amendment

“(a) does not affect the enjoyment by the other parties of their rights under the treaty ;

“(b) does not relate to a provision, derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole ; and

“(c) is not prohibited by the treaty. ”

38. There should then follow two separate articles embodying the principles contained in article 69, paragraph 3, and article 68, paragraph 3. His proposals would thus lay down the absolute right of every party to a treaty to be notified of any proposal for amendment, and would provide that an amending instrument was without legal effect on the rights and obligations of non-parties to that instrument, and that there was a right to make certain *inter se* agreements.

39. Article 69, paragraph 3 (b), was undesirable and he would have some comments to make on it at a later stage.

40. Mr. YASSEEN thought it essential that the Commission, in its draft general convention on the law of treaties, should propose solutions to the problems arising out of the amendment and revision of treaties. Treaties were the fundamental source of the international legal order. Because of the sovereign equality of States, there was still no other means of amending or revising treaties than the unanimous agreement of the parties. But that gave rise to many difficulties and sometimes to disputes. Accordingly, solutions should be offered which did not attack the fundamental principles on which the law of treaties was based — the rule *pacta sunt servanda* and the rule that a treaty could not be invoked against third States. The three articles proposed by the Special Rapporteur reconciled the demands of a dynamic international order with respect for the fundamental principles ; their general structure was acceptable.

41. With regard to article 67, more particularly sub-paragraph (a), it was certain that any party to a treaty

had the right, or the faculty, to propose an amendment to it. That right or faculty was actually based on *ius cogens*, for as Mr. Bartoš had pointed out, it could not be stipulated in a treaty that the parties could not propose amendments to it. But since the Commission was dealing with a new subject and with a question not governed by any general rule, it would be useful to mention that right in an article of the draft. Nevertheless, he agreed with Mr. Verdross that the words “ at any time ” should be deleted.

42. He approved of the wording of sub-paragraph (b), except for the words “ and in consultation with the party concerned ”, for the time had not yet come to impose such an obligation.

43. With regard to article 68, he stressed that a treaty could not be a matter of indifference to any of the contracting parties. Any proposal for its amendment concerned all the parties and should therefore be communicated to all the parties. Moreover, the machinery of *inter se* amendment should be able to function in spite of the opposition of another party which had been duly notified and had refused to take part in the consultations. *Inter se* revision did not violate the *pacta sunt servanda* rule, since the amending instrument could not be invoked against parties which did not accept it. He did not believe that the obligation to notify all the parties of any proposed amendment was calculated to cause stagnation in international law ; but to require all the parties to take part in the consultations on revision might introduce an element of stagnation.

44. Some treaties, by their nature, did not admit derogations. The Commission should provide for that case, but in rather less detail than in article 68, paragraph 2. It would be sufficient to refer to the provisions of the treaty itself, and in that connexion he suggested that the words “ expressly or implicitly ” should be added before the word “ prohibited ” in paragraph 2 (c).

45. Like Mr. Castrén and Mr. Briggs, he thought that article 68, paragraph 3, should form a separate article.

46. Article 69 was acceptable as a whole. Paragraph 1 stated an existing right ; its wording was correct and in accordance with practice.

47. He had some doubts about paragraph 2, however, under which a party to the original treaty might find itself debarred from claiming that the new treaty violated the original treaty. He could accept the Special Rapporteur's text as far as sub-paragraph (a), for a State which had taken part in the adoption of an amending instrument had made its position clearly known and should be considered as having admitted that that instrument was not a violation of the original treaty. But sub-paragraph (b) went too far ; the fact that a party had made no objection was not sufficient reason for debarring it from claiming its rights under the original treaty.

48. Lastly, the effects of a fundamental change of circumstances in regard to revision which did not involve the termination of the treaty but only the amendment of some of its clauses, should be provided for in another article, which would be based more on article 44 of the section on termination of treaties adopted at the

fifteenth session⁸ and would refer back to the procedure provided for in article 46.⁹

49. Mr. EL-ERIAN said that the Special Rapporteur had made a courageous attempt to provide the Commission with a basis for working out rules on a matter which many writers regarded as political rather than legal. The importance of the subject needed no emphasis; it involved reconciling the need to safeguard the stability of treaties with the requirements of peaceful change. As the Chairman of the United States delegation had aptly said in his report to the President on the results of the San Francisco Conference: "Those who seek to develop procedures for the peaceful settlement of international disputes always confront the hard task of striking a balance between the necessity of assuring stability and security on the one hand and of providing room for growth and adaptation on the other."¹⁰

50. The Commission was faced with the task described by Rousseau in the words "Le problème posé — est le problème fondamental du droit international, celui de la revision des règles juridiques conventionnelles. La loi de l'évolution gouverne, en effet, les traités comme les autres actes de la vie sociale; le juriste ne connaît pas d'actes intangibles, que ce soit dans l'ordre interne ou dans l'ordre inter-étatique".¹¹ ("The problem raised — is the fundamental problem of international law, that of the revision of conventional legal rules. For the law of evolution governs treaties just as it governs the other instruments of social relations; the jurist recognizes no immutable instruments, whether in internal or in inter-State relations".)

51. The problems created by revision differed according to the type of treaty: it might be a bilateral treaty, a contractual multilateral treaty that really consisted of a series of interlocking bilateral treaties, a normative multilateral treaty in the sense defined in article 1 (c) of the draft, or a general convention. The process of revision also varied: apart from ordinary amendment by negotiation between the parties, there was revision by a duly authorized organ of an international organization or by judicial decision.

52. With regard to article 67, it was difficult to subscribe to the view of Lord McNair, quoted in paragraph (3) of the commentary, that as a matter of principle, no State had a legal right to demand the revision of a treaty in the absence of some provision to that effect contained in the treaty. Personally, he would have thought that whether there was such an express clause or not, any party was entitled to initiate the procedure for amendment or revision, but of course no other party was forced to accept the proposed change. After the First World War instances of provisions governing revision, which had previously been rare, had become much more common and were to

be found in, among other instruments, the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws,¹² the 1930 Agreement concerning Maritime Signals,¹³ the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs,¹⁴ the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,¹⁵ the 1951 Convention relating to the Status of Refugees¹⁶ and the 1958 Conventions on the Law of the Sea.¹⁷

53. Recognition of the need for peaceful change was a fundamental feature of the system which the San Francisco Conference had aimed to create, and with that in mind the Egyptian delegation had proposed an addition to chapter II of the Dumbarton Oaks proposals that read "All members of the Organization undertake to respect agreements and treaties to which they have become contracting parties without prejudice to the right of revision". A more general formulation had been adopted at the San Francisco Conference and embodied in Article 14 of the United Nations Charter. The reason for that had been explained by certain writers in the words: "Since the objective was not solely the revision of treaties, but rather the consideration of any situation or condition which might impair the general welfare or friendly relations among nations, without regard to whether it has relation to a treaty or not, the more general phraseology was introduced".¹⁸ It was equally important to ensure that arbitrary obstacles were not allowed to impede the process of change. There had been many instances in the past of States, by their stubborn refusal to consider modifying a treaty, forcing others to denounce it.

54. The proviso at the beginning of article 67 must be understood in the sense that the treaty could regulate the process of revision by, for example, stipulating a time-limit; it could not be understood as in any way derogating from the right of revision itself. The obligation on other parties to consider in good faith any proposal to amend or revise was essential, and it was parallel to the obligation already provided for in articles 17 and 55. The provision in article 67, subparagraph (b) must therefore be retained as a safeguard against wilful frustration of amendment or revision by a party.

55. He was in general agreement with the way article 67 had been framed; he would comment on articles 68 and 69 later.

56. Mr. TUNKIN said it was essential to include in the draft articles some provisions on the amendment of treaties, and for that purpose a distinction must be made between bilateral and multilateral treaties.

¹² League of Nations *Treaty Series*, Vol. CLXXIX, p. 91

¹³ League of Nations *Treaty Series*, Vol. CXXV, p. 97.

¹⁴ League of Nations *Treaty Series*, Vol. CXXXIX, p. 303.

¹⁵ United Nations *Treaty Series*, Vol. 78, p. 278.

¹⁶ United Nations *Treaty Series*, Vol. 189, p. 150.

¹⁷ United Nations Conference on the Law of the Sea, 1958, *Official Records*, Vol. II, pp. 132 *et seq.*

¹⁸ Goodrich, L. M., and Hambro, E., *Charter of the United Nations*, 2nd edition, 1949, p. 179.

⁸ *Ibid.*, p. 20.

⁹ *Ibid.*, p. 23.

¹⁰ Department of State *Publication 2349, Conference Series 71* (1945), p. 166.

¹¹ Rousseau, C. *Principes généraux du droit international public*, 1944, Tome 1, p. 616.

57. Where multilateral treaties were concerned, the position was that if the treaty itself contained a revision clause, the provisions of that clause must apply. The Commission had adopted that principle for the termination of treaties and it was logical to adopt the same principle for their amendment. It was usual for a multilateral treaty to specify a period after which any of the parties could make to the others a proposal for its amendment. For instance, the four Geneva Conventions of 1958 on the law of the sea specified a period of five years; clearly, before the expiry of that period, the States parties to those conventions could not propose their amendment. Occasionally treaties, especially those of a technical nature, specified a simplified procedure. Very often an amendment clause provided that any State party could present an amendment to the depositary. The depositary circulated the proposed amendment to all the States parties and if a specified number of them agreed, the amendment entered into force as between the accepting States.

58. Where a treaty was silent with regard to its amendment, the parties should be able to amend it by agreement at any time. That rule was laid in article 40 for termination and it was obviously appropriate for amendment as well. But article 40 provided that the termination of a multilateral treaty containing no termination clause would require, in addition to the agreement of all the parties, the consent of not less than two-thirds of all the States which had drawn up the treaty. He was inclined to agree with the Special Rapporteur that, in the case of amendment, it was probably desirable to limit the right to the actual parties to the treaty.

59. The amendment of a treaty involved problems both of procedure and of substance. But where a State took the initiative for the amendment of a treaty, it would often not only propose the convening of a Conference, but actually suggest specific amendments. That situation, which arose in practice, should be covered by the draft articles. In his opinion, if the treaty was silent on the subject, it was better to adhere to the unanimity rule and to require the consent of all the States parties for convening the Conference.

60. Much had been said about the so-called *inter se* revision of treaties. On that matter, he agreed with Mr. Lachs on the need to draw a clear distinction between the amendment or revision of a treaty and the conclusion of a new treaty. The revision of a treaty was a process whereby a new or revised text was substituted for the original text, which was then dropped, and the revised treaty took the place of the original treaty. In the case of an *inter se* agreement, the original treaty subsisted, but some of the States parties concluded a supplementary agreement containing different provisions. Such a situation was permissible if the treaty itself did not preclude it, but the original treaty continued in force and the new agreement constituted an additional treaty binding only on the parties thereto. The problem which arose was not that of revision, but that of conflicting treaty provisions, which was dealt with in article 65.

61. Viewed in that light, it was clear that articles 68 and 69 did not, in fact, deal with the amendment or

revision of treaties but with the conclusion of new treaties, a problem which was outside the scope of the present discussion.

62. In the articles on revision, the Commission should deal with the procedure for adopting a new or revised text of a treaty. It should be provided that the consent of all the parties to the treaty was required for convening a conference—he was, of course, referring to multilateral treaties, since bilateral treaties required separate treatment. States which had taken part in drawing up the treaty should be given the right to be invited to the conference, but their consent should not be necessary for convening it. The conference would decide on its own rules of procedure; it was customary in such cases to require a two-thirds majority for amendments. The problem of the entry into force of any amendments adopted would then arise and the draft articles could specify that ratification by two-thirds of the parties was required. The amendments would then be binding on the States which had ratified them, but it remained to be determined what would be the position of the other parties. One possible solution would be to provide that States which did not wish to ratify the amendments had the right to withdraw from the treaty. Such a right of withdrawal would appear to be logical.

63. If the approach he suggested were adopted by the Commission, the provisions of article 67 would apply only to bilateral treaties.

64. Mr. de LUNA said that the problem was to reconcile the need for stability of treaties with the dynamic needs of international relations. In addition to the exceptional remedy provided by the *rebus sic stantibus* rule, the draft articles should contain provisions on the amendment of treaties which would minimize the chances of international conflict.

65. He agreed with the Chairman on the desirability of dropping the term “revision”, which had certain political connotations and which harked back to the period between the two world wars when there had been so much discussion on the application of article 19 of the League of Nations Covenant and the whole question of peaceful change.

66. In formulating the draft articles on the amendment of treaties, the Commission should be careful to remain within the field of law and to lay down clear procedural rules that would facilitate amendment without leading to anarchy. At the same time, it should avoid prejudicing the rule in article 65, which dealt with the problem of conflicting treaty provisions in terms not of nullity, but of priority and State responsibility. The essential principles in the matter of amendment were those of unanimity and *inter se* agreements; where a new treaty was concluded, the matter was covered by article 65.

67. With regard to terminology, it was essential to bring the language of paragraph 2 of article 68 into line with that of paragraph 3 (b) of article 42, on the termination of a treaty as a consequence of its breach. That paragraph referred to the “violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty”. Since the situa-

tion envisaged in paragraph 2 of article 68 was similar, the same terms should be used. It was also necessary to bear in mind the language used in paragraph 2 of article 46, on the separability of treaty provisions. In paragraph 2 of article 69, the terminology used throughout Part I of the draft article¹⁹ should be followed.

68. When speaking earlier, he had opposed the inclusion in article 67 of the obligation to consult the party concerned, but in the case of article 68, paragraph 1, he was prepared to accept the right of consultation of the other parties to the treaty. There was no contradiction between those two positions. The parties to a treaty were not obliged to enter into consultations with any party making a proposal to amend the treaty. But should a proposal for revision be made, all the parties were entitled to be notified of the proposal and, if any negotiations actually took place, all the parties were entitled to be consulted and to participate in them.

69. It had also been asked whether other States concerned in the treaty should not also be invited to take part in the negotiations for its amendment. In principle, there was much to be said for inviting them, especially in view of the contemporary trend towards universality in international law; but he feared it might open the way for unduly wide participation in the amendment of treaties. The wisest course would be to adopt a well-defined criterion, by providing that all States which had taken part in drawing up the original treaty could participate in the negotiations for its amendment.

70. In article 69, the provisions of paragraph 3 (b) seemed premature, in that they anticipated a violation where none might take place. As he had pointed out during the discussion of article 65, the text of a treaty could be apparently incompatible with that of another treaty without any actual conflict arising. The second treaty could remain a dead letter or be applied in such a way as not to give rise to any conflict in the application of the two treaties. The Special Rapporteur had forestalled that objection by beginning paragraph 3 (b) with the word "If", but its provisions should be clarified.

71. He could not support the opening proviso of article 67. A treaty could contain an absolute prohibition of all amendments. There were treaties which specifically stated that they were laying down the law for all time; one example was the Peace of Westphalia of 1648. But clearly, even if a treaty contained such a clause, it was still open to amendment.

72. A treaty could also contain a clause which laid down a time limit, or specified the procedure, for its amendment. Provisions of that type were permissible, since they did not constitute an obstacle in perpetuity to the adaptation of the treaty to changing circumstances. Nevertheless, even where such provisions existed, there could be no doubt that, with the unanimous agreement of all the parties to the treaty, it was possible to override the time limit and any other procedural conditions that might be laid down in it.

73. He would speak later on the distinction between the conclusion of a new treaty and the revision of an existing one.

The meeting rose at 6 p.m.

746th MEETING

Tuesday, 16 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167/Add.1)

(continued)

[Item 3 of the agenda]

ARTICLE 67 (Proposals for amending or revising a treaty) (continued),

ARTICLE 68 (Right of a party to be consulted in regard to the amendment or revision of a treaty) (continued) and

ARTICLE 69 (Effect of an amending or revising instrument on the rights and obligations of the parties) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 67 to 69 in the Special Rapporteur's third report (A/CN.4/167/Add.1).

2. Mr. PAL said it was vitally important to provide for the revision of treaties, in recognition of the inevitable evolution in relations between States. Treaties were significant devices of States in their mutual relations; they were instruments of stability as well as of change in international community relations. They were catalysts and moderators of political forces in the international arena. Treaties had gained special significance because they called for conscious and voluntary action founded on explicit consent and free will, binding States solely through the manifestation of their consensus based on complete and unabridged sovereignty.

3. The world was already witnessing a loosening of the former rigidity in international community conduct. Barring unforeseen disturbances, that trend could be expected to continue in its essentials, which would mean considerable variations and developments in treaty relations. Existing treaty relations would certainly need re-adjustment and extension; an example was provided by regional arrangements, which would require readjustment in many respects to provide for their extension to much wider regions, of which no area could be excluded except by its own choice. Any regional arrangement which had not hitherto included

¹⁹ Yearbook of the International Law Commission, Vol. II, pp. 161 et seq.

that feature, either expressly or in spirit, would in due course need revision, at least to remove the impression that whatever might be the future of the arrangement, some particular group of States was not to have a place in it.

4. Commenting on the drafting of article 68 he said that paragraph 2, though requiring substantial amendment, should be retained. It should be expressly stated that the conditions laid down in sub-paragraphs (a), (b) and (c) must be fulfilled before an *inter se* amendment could be valid; that provision would constitute an additional safeguard for third States which might be affected. He suggested that *inter se* amendments without the concurrence of the interested third States might be prohibited.

5. Mr. LACHS, expressing his satisfaction that the discussion had turned to basic problems, said that treaties, like other international institutions, could become obsolete; when that happened they should be replaced by new instruments rather than touched up in an effort to adapt them to new circumstances.

6. In considering how the articles should be drafted, the Commission should take into account some of the practical problems which revision might create. In the case of a bilateral treaty, if one of the parties, on being notified of a proposal to amend the treaty, refused to entertain it, the other would presumably initiate the procedure for termination. In the case of a multilateral treaty, the parties wishing to amend could do so either by bilateral or by multilateral agreement among themselves; many treaties, e.g. the Universal Postal Convention of 1878,¹ the annexes to the Convention of 1919 relating to the Regulation of Aerial Navigation² and the International Sugar Agreement of 1953,³ expressly allowed amendment even if the consent of all the parties could not be obtained.

7. A treaty might provide for the possibility of *inter se* arrangements, but practice showed that such arrangements were not amendments in the true sense of the term: they were really separate instruments. A clause permitting *inter se* arrangements had been inserted in the International Conventions of 1883 for the Protection of Industrial Property.⁴ Such arrangements should not be covered in the draft. It was essential to provide a rule that would regulate the situation arising in the event of a dispute concerning the admissibility of amendments. Although the requirement of unanimity was a fundamental one, it should not enable a single party to frustrate change by the exercise of a veto. Clearly, if agreement could not be reached on the amendment of a treaty, the parties in favour of amendment would seek to terminate the treaty and conclude a new one. Alternatively, provision could be made for the convening of a conference which, by a specified majority, could adopt an amendment that would enter into force as an integral part of the original treaty;

but in such cases the consent of the parties would be necessary. If such practical considerations were borne in mind the drafting of the three articles should present no real difficulty.

8. Mr. ROSENNE said that the Commission should endeavour to formulate clear rules on the revision of treaties, so as to forestall abuses of the kind that had occurred in the past. The Special Rapporteur had asked for guidance on whether the point of departure should be an absolute unanimity rule, on the lines of that contained in article 40, paragraph 2,⁵ or the absolute right of all the parties to be notified of a proposal to amend or revise a treaty, with the proviso that none of them would have a right of veto and that no amendment would become binding on States which had not consented to it. Personally he fully subscribed to the second alternative and regarded the provisions contained in articles 67, 68, paragraphs 1 and 3, and 69 as the essential elements of such a rule. His reasons for taking that stand were very much the same as those put forward by the Special Rapporteur in his commentary. The articles should cover the main procedural stages of revision, namely, the initiation of the process, the adoption of the amendment, its entry into force and its effects in so far as they were not covered in the general articles of the draft. It would be clearer if each stage were dealt with separately, and some of the provisions might need review in the light of article 65. The articles concerning revision would be no less significant than those relating to reservations and they would play an important part in placing the law of treaties on secure foundations.

9. After further reflection he had concluded that, with various drafting changes, article 67 would serve a useful purpose. It was necessary to bring out the primacy of the treaty itself with special reference to the obligation in sub-paragraph (b). That might be achieved by replacing the opening phrase by the words "Unless the treaty otherwise provides".

10. He agreed with the Special Rapporteur that in law there was no significant difference between modification, amendment and revision, but the parties themselves were free to attach a special meaning to any of those terms, and indeed some of the examples cited in the *Handbook of Final Clauses* (ST/LEG/6) showed that they sometimes did so.

11. Article 68, paragraph 1, was acceptable as far as it went, but since it was limited to the rights of the parties to the original treaty, it did not cover the ground entirely; for the treaty itself, or the constitution of an international organization within which the treaty had been concluded, might confer rights on other States besides the parties. Consequently, article 68, paragraph 1, should also refer in some way to the primacy of the treaty and should allow for the fact that the standing rules made under the constituent instruments of certain international organizations provided for the amendment of treaties concluded within

¹ *British and Foreign State Papers*, Vol. LXIX, p. 210.

² *League of Nations Treaty Series*, Vol. XI, p. 174.

³ *United Nations Treaty Series*, Vol. 258, p. 154.

⁴ *British and Foreign State Papers*, Vol. LXXIV, p. 44.

⁵ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 15.

them; that was true of the International Labour Organisation though not of the United Nations.

12. He could accept the Special Rapporteur's suggestion, though it had been rather lukewarm, that at least for the initial stages of the revision procedure provisions modelled on those of article 9, paragraph 1,⁶ and article 40, paragraph 2, should apply.

13. Mr. Tunkin's suggestion that the procedure to be followed at a conference convened for the purpose of revising a treaty should be regulated in greater detail, appeared to imply that any of the parties might be entitled to exercise a right of veto during the opening stages. He could not agree with that view, which was inconsistent with the whole philosophy of the draft and was not justified by contemporary practice as reflected in revision clauses in treaties and in cases in which revision was undertaken in the absence of such clauses. What was significant was the consequences of an amending conference, and they were correctly set out in article 69, paragraph 1.

14. The suggestion that it might be necessary to deal separately with bilateral and multilateral treaties could be examined, but he remained unconvinced that there were any real legal differences between them so far as revision was concerned. Bearing in mind the general characteristics of bilateral treaty relationships, he thought that the provisions already adopted concerning the termination of treaties would be adequate; implicit in those provisions was the idea that their purpose was to establish a regulated system for re-negotiating treaties found to be unsatisfactory.

15. After hearing the comments made by Mr. Tunkin he thought that perhaps the Commission should consider a firmer unanimity rule for treaties concluded among a small group of States, though such treaties were admittedly an ill-defined category. Article 9, paragraph 2 and article 20, paragraph 3 could be relevant.

16. A distinction should be drawn between *inter se* proposals for revision and a revision that was adopted after consultation with all the parties but came into effect only on an *inter se* basis. Article 68, paragraph 2, seemed to be concerned with the former, not with proposals to revise in the strict sense, and thus interrupted the sequence of the three articles. However, he was not certain that the substance of the paragraph should be dropped altogether: perhaps it might be incorporated in a separate article or dealt with in connexion with article 65.

17. He agreed with Mr. Castrén that article 68, paragraph 3, should be redrafted as a separate article stressing the cardinal importance of the adoption of the amendment or revision, but the words "the conclusion and entry into force" should be deleted, as they might be open to misconstruction and did not correspond to any of the section headings in Part I of the draft, all of which from article 4 onwards would be applicable.

18. In view of the modern practice of embodying amendments to treaties in resolutions of the competent

organs of international organizations, he agreed with the Special Rapporteur's use of the word "instrument". For the purposes of the law of treaties such documents were deemed to be treaties.

19. He reserved his position on article 69 and wished to put two questions to the Special Rapporteur concerning the text. First, what was the meaning of the phrase "took part in the adoption of" in paragraph 2 (a)? What would be the position, for example, of a State which took part in a session of the General Assembly, but remained silent during the discussion on an item concerning the revision of an international instrument and did not take part in the voting on the revision? Secondly, in view of paragraph (19) of the commentary, should not article 40 be referred to in paragraph 3 (a)?

20. It had been suggested at the previous meeting that States which did not accept the revision of a treaty should be entitled to withdraw from the original treaty without any implication that such action constituted a breach. If that proposition were accepted, the right should exist side by side with the right of any State to regard itself and others as still bound by the original treaty. Article 40 would then protect States against termination in the guise of revision.

21. Mr. RUDA said that he would confine his remarks to a few general comments on articles 67 to 69. Mr. El-Erian and Mr. Yasseen had stressed two fundamental requirements of the law; first, the need for stability of legal rules, to provide security for international transactions; second, the need to adapt legal rules to a changing reality—an adaptation sometimes called for in the interests of justice. The need for stability explained why unanimity of the parties was required for the revision of a treaty. The need for adaptation to change explained the emergence of certain techniques, in particular treaty clauses which permitted revision by a specified majority or within the framework of the constitution of an international organization.

22. In the Special Rapporteur's draft, the system of *inter se* treaties appeared to be the basic technique for revision. Paragraph (7) of the commentary on articles 67 to 69 stated that "the use of *inter se* agreements now appears to be an established technique for the amendment and revision of multilateral treaties". Mr. Tunkin and Mr. Lachs had pointed out that *inter se* treaties did not really constitute amendments, and he supported that view since the original treaty subsisted notwithstanding the *inter se* agreement; the latter in fact constituted a new treaty, which could of course be complementary or supplementary to the original treaty. The *inter se* agreement was distinct from the original treaty both in its content and in its regulations. The existence of two treaties on the same subject gave rise to a problem of conflicting obligations, dealt with in article 65; it was not a problem of revision or amendment. He was not opposed to *inter se* treaties; a treaty of that type was valid, but might engage a State's responsibility if its conclusion constituted a breach of an earlier treaty. From the point of view of legal technique, however, the conclusion of an *inter se* treaty did not constitute an amendment or revision procedure,

⁶ Yearbook of the International Law Commission, 1962, Vol. II, p. 168.

unless the terms "amendment" and "revision" were construed very broadly.

23. In the absence of an international legislative authority which could impose its decisions on all the parties to a treaty, the Commission had two alternatives. The first was to deal with revision, as distinct from the effects of revision, by laying down a procedure in three stages: (i) the proposal for amendment made by one of the parties (article 67, sub-paragraph (a)); (ii) notification of and consultation with all the parties to the treaty (article 68, paragraph 1); (iii) entry into force of the amendment in accordance with the rules laid down in Part I (article 68, paragraph 3). That approach would reflect the traditional procedure under existing general international law.

24. The second alternative was to establish a system for the future, as suggested by Mr. Tunkin at the previous meeting. That system would also involve rules governing three procedural stages: (i) rules for convening a conference for the revision of the treaty; (ii) rules for the adoption of amendments, such as the two-thirds majority rule; (iii) rules governing the entry into force of amendments. In drafting such rules for the future, the Commission should endeavour to balance the need for stability with the need for change and adaptation and thereby contribute to the progressive development of international law.

25. He would speak on the individual articles later.

26. Mr. VERDROSS said he had a few additional remarks to make concerning article 67, on which he had already spoken at the 744th meeting. In his opinion any contracting party to a bilateral or multilateral treaty could propose an amendment to the treaty, even if it contained a provision to the effect that no amendment could be proposed until after a certain time had elapsed, for that provision itself could be amended. He was accordingly in favour of deleting the opening clause of article 67, but not for the reason given by Mr. Bartos that it would be contrary to *jus cogens* for a treaty to contain such a provision.

27. With regard to sub-paragraph (b) of article 67, he shared Mr. Ago's opinion⁷ and doubted whether any such obligation as was there laid down really existed. It was more out of respect for a rule of international courtesy that the other parties ought to consider the proposal for amendment. Nevertheless, as the Commission should contribute to the progressive development of international law, he was not opposed to retaining that sub-paragraph, provided that the words "and in consultation with the party concerned" were deleted.

28. Whereas article 67 applied both to bilateral and to multilateral treaties, articles 68 and 69 applied only to multilateral treaties. That distinction should be reflected in the titles of the articles. The Commission might devote one or two articles to the procedure for amending multilateral treaties. In those articles, it would first state that if a treaty, or the constituent instrument of an international organization, contained rules on amend-

ment procedure, that procedure must be followed; it would then say that in the absence of such rules the treaty could be amended by a conference or by some other procedure agreed upon between the parties. There would follow an article concerning the effects of amendment of a treaty on States which had not accepted the amendment.

29. At first glance, it might be thought that the problem of the amendment of a multilateral treaty by a few States *inter se* had no connexion with the problem of the amendment of multilateral treaties. And yet, amendment by agreement of several parties *inter se* was so closely related to the problem of the amendment of treaties that it should certainly be regulated by those articles. In paragraph 2 of article 68, the Special Rapporteur had very well stated the conditions that must be fulfilled for amendment *inter se*; but he did not wish, in that case, to oblige the contracting parties concerned to notify the other parties of their intention to amend the treaty *inter se*. Such an obligation was necessary, however, even if the *inter se* agreement did not affect the rights of the other parties, but only injured their interests. It was possible, for example, that several States parties to the Vienna Convention on Diplomatic Relations might wish to amend that Convention *inter se* in order to grant more privileges to their respective diplomats; such a project might affect the interests of the other parties without affecting their rights. He therefore agreed with Mr. Castren and Mr. Yasseen that when a group of States wished to amend a treaty *inter se*, even if they did not intend to violate the rights of the other parties, they should nevertheless consult with all the other parties.

30. With regard to the effects of *inter se* amendment on States which had not accepted the amendment, he approved of the provisions proposed by the Special Rapporteur. He feared, however, that paragraph 2 (a) of article 69 was not very clear. What exactly was the meaning of the expression "took part in the adoption" of the instrument? Did it mean having taken part in the conference or having signed the instrument? No doubt that was only a matter of drafting.

31. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the suggestion that the term "revision" should not be used either in the titles or in the body of the articles, since for many people it had a special connotation that was best avoided; the Commission should steer clear of the shifting sands of peaceful change and should not get involved in the political problems of the revision of treaties — not merely revision by agreement of the parties, but revision by decision or recommendation of a political authority such as the General Assembly. He preferred the French term "modification": it appeared somewhat broader in meaning than "amendment", which conveyed the idea of changes of detail. He was certainly in favour of the revision of unjust treaties, but the present discussion was not the occasion to raise that question.

32. He supported the deletion of article 67, for it raised numerous difficulties. The main substance of that article could be incorporated in paragraph 1 of article 68.

⁷ 744th meeting, para. 75.

With regard to articles 68 and 69, he agreed, on the whole, with Mr. Briggs and also, to some extent, with Mr. Tunkin, for he thought they differed less on substance than in their approach. Mr. Briggs had discussed the proposed articles from the point of view of drafting and rearrangement, while Mr. Tunkin had dealt with the basic notions involved. Thus while he supported Mr. Briggs' suggestion that the provisions on treaty amendment proper should be separated from those on *inter se* agreements, he agreed with Mr. Tunkin that the articles on amendment should begin with a statement that they were intended to supplement the will of the parties as expressed in the treaty; the provisions of the treaty should always take precedence. In that connexion, the Chairman had pointed out that it was always possible to amend the treaty provisions on amendment procedure; but the procedure for amendment established in the treaty would also apply in that case. Thus the treaty provisions on amendment would always take precedence. The fact was, as the Special Rapporteur had pointed out, that treaties did not often cover the subject and, when they did, not fully. The draft articles should therefore include some rules to supplement the stated will of the parties.

33. He also agreed with Mr. Tunkin on the need for a certain symmetry with the provisions on termination; that could be achieved by a cross-reference to article 40, for example. He did not agree, however, that the amendment procedure must be strictly formal or that a conference was always necessary for amending a treaty. An agreement to terminate a treaty could be made by less formal procedures, as shown by article 40, paragraph 1 (*b*).

34. As to the arrangement of the draft articles on the amendment of treaties, he favoured a separate article, prominently placed, to express the right to be consulted at present embodied in article 68, paragraph 1. Another separate article would cover the adoption of the amending instrument in conformity with the rules laid down in Part I, as provided in article 68, paragraph 3. Those provisions would be followed by one or two articles on the effects of the amending instrument. Separate provision would be made for its negative effects on States which did not ratify the amendment, as in paragraph 1 of article 69, and for its positive effects, as proposed by the Special Rapporteur in paragraph 3 (*a*) of that article, with the cross-reference to articles 41 and 65. The right of withdrawal, provision for which had been suggested by Mr. Tunkin should, however, be carefully considered, taking into account the rules applicable in international organizations.

35. The most serious problem was that of *inter se* agreements. He fully agreed with Mr. Tunkin that it was different from the problem of revision, but that did not justify deletion of the provisions on the subject. Complementary or supplementary *inter se* agreements had, in practice, become an essential technique, and a necessary safety valve, for the adjustment of treaties to the dynamic needs of international society. If such a technique had not existed, there would have been stagnation in many treaty relations, particularly after the Second World War, when treaties had had to be

adjusted to new conditions, but when it had been out of the question to invite enemy States to a conference on the subject or to give them a right to veto any alteration of the treaties. The *inter se* procedure had been the means resorted to for that necessary evolution. The Commission should take that experience into account and make provision for the *inter se* procedure so as to avoid the stagnation that would result from the *liberum veto* of a single party. In that respect, the Commission should bear in mind the progressive recommendations made to the General Assembly concerning extended participation in general multilateral treaties concluded under the auspices of the League of Nations.

36. The provisions drafted on the subject by the Special Rapporteur seemed to contain the necessary safeguards against abuse. He suggested, however, that those provisions should be rearranged as three separate articles in the following order: first, a statement of the possibility of concluding *inter se* agreements, at the moment embodied in article 68, paragraph 2; second, a provision dealing with the effect of such agreements, as in article 69, paragraph 3 (*b*); third, the rule of estoppel in article 69, paragraph 2.

37. He proposed that the first of those provisions should begin with the words:

"Notwithstanding the provisions of the previous articles, certain of the parties may modify...".

The remainder would reflect the present contents of article 68, paragraph 2; sub-paragraph (*a*) would not be deleted as suggested by Mr. Yasseen, since it contained an essential guarantee.

38. With regard to paragraph 2 (*a*) of article 69, he shared the doubts expressed by other members regarding the expression "took part in the adoption". The rule of estoppel should apply only to a State which had actually voted in favour of the amendment. He supported Mr. Yasseen's suggestion that paragraph 2 (*b*) should be deleted.

39. Mr. REUTER said he thought that articles 67 to 69 dealt with two questions which differed both in importance and in kind.

40. The first question — or the first to arise in chronological order — was dealt with in article 67 and in article 68, paragraph 1: it concerned the position of a State party to a treaty in the revision process, that State being considered individually. The question seemed to have been raised as touching a fundamental right of States. It was considered from two points of view in the draft: first, the right of initiative, in article 67, and then the right of participation, article 68, paragraph 1.

41. Although he accepted the general idea expressed in article 67, he did not approve of the drafting, which, to his mind, was both too precise and not precise enough. It was too precise in that the wording was almost provocative and the expression "notify... of a proposal" applied to an extreme case; the idea would be better expressed in more general terms. But, the text also lacked precision, for it should leave no doubt that the party which took the initiative only had the right

to ask whether negotiations should take place; it did not have the initiative in negotiation or the right to start negotiations. He would therefore prefer some such wording as: "may enter into consultation with the other party or parties to the treaty on the desirability or necessity of undertaking the amendment or revision of the treaty". There were indeed cases in which a change in circumstances made the amendment of a treaty really necessary. What should be guaranteed was that a party wishing to invoke the change in circumstances should be able to enter into consultation with the other parties.

42. Article 68 dealt with a much broader right: not merely the right to be consulted, but the right to participate in the negotiations if they were properly initiated. It might perhaps be advisable, therefore, to combine article 67 and article 68, paragraph 1, in a single provision that was both simpler and more precise, drawing the distinction between consultation and negotiation. To say that the other parties were bound to consider the proposal in good faith did not add much, but he was not opposed to that stipulation.

43. He agreed with several other members of the Commission that article 68, paragraph 3, might be made a separate article.

44. The second, more important, question was the actual right to amend or revise treaties. Article 69 dealt with that question and article 68, paragraph 2, would probably be better placed in article 69. The only reason why the Commission was considering the problem was the lack of express provisions on amendment and revision in treaties themselves.

45. Mr. Tunkin had raised the preliminary question of defining the term "revision". If the Commission did not provide a definition, there might be some confusion between articles 69 and 65.

46. Mr. Tunkin, supported by Mr. Lachs, apparently proposed that revision should be defined by its effects: there would be revision only where a treaty disappeared and was replaced by another treaty. If the initial treaty subsisted, the case would be governed by other articles, in particular article 65.

47. If the Commission accepted that definition, which was a logical and reasonable one, little would remain to be said in article 69. Revision thus understood could only take place either by the unanimous decision of the parties, or by a majority decision if the treaty contained a clause permitting it and prescribing a procedure for terminating the treaty. The procedure might be more or less radical, depending on whether the minority parties were bound by the revision voted by the majority (which was perhaps the case in certain international organizations) or whether, on the contrary, they could withdraw from the initial treaty if they did not accept the revision, and the original treaty could be reduced to nothing (the case of the postal conventions). He did not think the Commission could go so far as to propose such strict quasi-legislative clauses applicable to all future treaties — still less to existing treaties. As Mr. Rosenne had pointed out, the problem of revision was connected with that of reser-

vations. Although the Commission had made provision for reservations and accepted that States could protect their will up to a point at the time of concluding a treaty, it could not lay down a general rule that the minority States would be obliged to renounce the advantage of membership of the revision committee.

48. The Commission might decide to adopt another definition of revision. It might treat revision either as an agreement the main object and intention of which was to revise a treaty, or as recourse to a special supplementary procedure applicable only to treaties whose terms did not preclude revision — which would involve setting up conference machinery. It was clear that the Commission was hesitating between the unanimity rule, which would preclude the possibility of a conference, and a rule fixing an arbitrary number of accessions. As to proposals for revision, every treaty provided definite information in its final clause prescribing the conditions for entry into force. If the terms of the treaty provided that it should not enter into force unless ratified by all the parties, the logical inference was that a proposal for revision must also be accepted unanimously. If, on the other hand, the entry into force of the treaty was contingent on ratification by a certain number of States only, whether specified or not, then perhaps a parallel formula should be adopted at any revision conference that might be convened.

49. Mr. YASSEEN agreed with those who saw only a difference in degree between "amendment" and "revision". With regard to the articles under consideration, he saw no reason why, once the rules fixed by a treaty had been overtaken by events, the possibility of general amendment — in other words, revision — should be ruled out. In his opinion, therefore, the term "revision" should be retained and the scope of the articles should not be confined to minor changes.

50. In that context, two kinds of *inter se* agreements should be distinguished: those having a particular object and those with a general object. Agreements of the first kind were those concluded by virtue, or within the framework, of certain multilateral treaties, between a certain number of the parties to the exclusion of the rest. They were intended to co-exist with the treaties. For instance, certain parties to the Vienna Convention on Diplomatic Relations, which were united by particular interests, might agree to give their diplomats more privileges. Such an agreement, limited to a certain number of States, was not a revision treaty; its purpose was merely to supplement the general treaty as between certain parties to it.

51. It was rather the second kind of *inter se* agreements that were of interest to the Commission, namely, agreements whose purpose was to amend or revise an earlier treaty which no longer corresponded to the existing situation. In such cases a number of the parties agreed to put forward proposals for the revision of the treaty and, on meeting with opposition from other parties, in order to break the deadlock of the unanimity principle, resorted to the palliative of an *inter se* agreement, the original treaty remaining in force for the objecting States. In his opinion, it was essential to

deal with that case in the context of the draft articles under consideration, for the purpose of such agreements was in fact to amend the original treaty or replace it.

52. Mr. TUNKIN noted that some members had spoken in favour of dealing with *inter se* agreements. In that connexion, he wished to stress that, in his statement at the previous meeting, he had not opposed that idea. He had emphasized that *inter se* treaties, which could be perfectly valid within the framework of the original treaty, should be treated as distinct from revision. The expression "*inter se* revision", could create considerable confusion.

53. In fact, an *inter se* agreement was not a agreement revising the earlier treaty, but constituted a separate treaty. Admittedly, the practical results could occasionally be similar, but it was essential to make a distinction between two separate legal institutions. So long as that distinction was made and the provisions on each institution were kept separate, he could agree, in general, to the substance of article 68, paragraph 2, provided that its provisions were suitably completed.

54. The basic rule for amendment of a treaty was that the provisions of the treaty itself should apply; the primacy of the treaty provisions was in keeping with the *pacta sunt servanda* rule. Where the treaty did not contain any provisions on amendment, the problem of procedure arose. He had not advocated the need for a conference in every case, but the agreement of all the parties to the treaty was necessary to convene a conference. The parties could, of course, agree on a simpler procedure if they wished; for example, the proposed amendment could be circulated to all of them by the depositary and, if approved, could be ratified. On the other hand, a proposal could be made to convene a conference, and the suggestion made by Mr. Reuter concerning the procedure to be followed in those circumstances was extremely valuable.

55. The question of the legal effects of amendments could be settled by the texts of the amendments themselves. The conference which adopted the amendments could decide on the number of ratifications required for their entry into force and also on their consequences for States which did not ratify them. The draft articles should specify that the matter could be decided by the conference, and lay down a residual rule along the lines of article 69, paragraph 1, for application failing such decision.

56. He would not object if some provisions on *inter se* agreements were included in the draft articles, but a clear distinction should be made between such agreements and the revision of treaties.

57. Sir Humphrey WALDOCK, Special Rapporteur, said that the differences of opinion which had arisen during the discussion were perhaps not as great as they might appear at first sight; it was true that there was substantial disagreement on one point, but he hoped it would still be possible for the Commission to produce acceptable draft articles on amendment and revision. While he would be prepared to accept a greater separation between the provisions on *inter se* agreements

and those on revision, which also might result in *inter se* amendment of a treaty, he would strongly oppose the exclusion of the former subject. The *inter se* procedure constituted the crux of the whole problem of the amendment of multilateral treaties and without a reference to that procedure, articles 67 and 69 would become meaningless.

The meeting rose at 12.50 p.m.

747th MEETING

Wednesday, 17 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167 and Add.1 and 2)

(continued)

[Item 3 of the agenda]

ARTICLE 67 (Proposals for amending or revising a treaty) (continued),

ARTICLE 68 (Right of a party to be consulted in regard to the amendment or revision of a treaty) (continued) and

ARTICLE 69 (Effect of an amending or revising instrument on the rights and obligations of the parties) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 67 to 69 in the Special Rapporteur's third report (A/CN.4/167/Add.1).

2. Mr. El-Erian said that, as he had dealt only with article 67 in his previous statement, he now wished to make some general comments on articles 68 and 69. The debate had shown that a distinction should be made between the partial alteration of the provisions of a treaty and its total replacement by a new treaty. Total replacement was already covered by article 41 (Termination implied from entering into a subsequent treaty).¹ It was therefore his understanding that articles 68 and 69 dealt with the partial alteration of a treaty.

3. Mr. Tunkin and Mr. Lachs had stressed that an *inter se* agreement did not involve a material revision of the body of the treaty; but since it introduced a new element into the general regime of the treaty, certain safeguards should be provided to ensure that it did not affect the enjoyment by the other parties of their

¹ Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 16.

rights under the original treaty or prevent the effective achievement of the objects and purposes of that treaty as a whole. He accordingly supported the idea of treating an *inter se* agreement as a *cas d'espèce* in a separate article, with the necessary safeguards.

4. He agreed with Mr. Yasseen that it would be desirable to keep both of the terms "amendment" and "revision"; but a distinction should be drawn between the process and the results. An alteration which resulted in partial changes in the treaty was an amendment, whereas one which resulted in its complete replacement constituted a new treaty. In Chapter XVIII of the Charter entitled "Amendments", the terms "amendment" and "review" were used. However, when the parties to a treaty reviewed its provisions, they could decide on any of three courses: they could either take no action at all, or make partial changes (i.e. amend the treaty) or else replace the whole of the treaty as indicated in article 41 of the draft. He therefore agreed that the word "amendment" should be used in the draft articles under consideration — a solution which would avoid doctrinal difficulties.

5. Mr. AMADO said he agreed with McNair and some other writers in considering the revision of treaties as essentially a political matter. That view was based on practice. The term "revision" had indeed proved unfortunate in use.

6. The Commission was engaged in work which might be described as "bourgeois". The problem was to preserve the old treaties. If the Commission wished to follow the Special Rapporteur and lay the foundations of a technique for treaty revision, why go beyond the rules already stated in the earlier articles?

7. There was one obvious result of amendment *inter se*; if it did not affect the basis of a treaty, the treaty remained intact and that was what mattered. The Commission should adhere to the principle of stability and the *pacta sunt servanda* rule, which represented honour in international law.

8. Mr. TSURUOKA said he recognized that, in order to preserve justice and facilitate international co-operation, it was sometimes useful and even necessary to adapt the law to the new demands of real life. It must not be forgotten, however, that for the achievement of that purpose the stability of the legal order was equally important, necessary and fundamental. A clear distinction should be drawn between adapting the law to the demands of society and subordinating it to the claims of certain countries or groups of countries. It could hardly be maintained that the law should give way to certain claims, even if they emanated from very great Powers.

9. Customary rules gradually formed around matters governed by treaties. That process was calculated to temper the rigidity of conventional rules, so that the need to adapt the law to reality diminished as customary rules evolved. No member of the Commission had yet referred to that idea, which was no doubt self-evident, but to which the Commission should nevertheless give weight.

10. He agreed with Mr. Amado that history provided distressing examples of abuse. The Commission should concentrate on the need to prevent abuses.

11. The articles on the amendment and revision of treaties proposed by the Special Rapporteur were very wise and very moderate. They dealt mainly with the situation that arose when a treaty was followed by another treaty dealing with the same subject-matter in a different way. The problems which then arose were quite easy to solve if the terms of the first treaty allowed the conclusion of the second and if the parties to both treaties were the same; for that case, the solution was already provided in article 41, adopted at the fifteenth session, and article 65. Nor were there any insurmountable difficulties if the first treaty had been concluded within an international organization which had customs or conventional rules on the subject. The problem was more difficult if the parties to the second treaty did not include all the parties to the first and if the first treaty did not contain a clause permitting the conclusion of the second. It might then be asked why some of the parties to the first treaty should be entitled to conclude a second treaty conflicting with the first. The criteria were very vague and were open to abuses. Thus it would be better not to formulate rules on the amendment of treaties, since most of the situations that might arise were already covered by other articles, in particular articles 40 and 41, adopted at the fifteenth session, and article 65.

12. He was not opposed to the Commission's formulating a technique for the amendment of treaties, provided that that technique was consistent with the unanimity principle, or with its corollary that the consent of all the parties to the original treaty was required before some of the parties could conclude a new treaty amending it.

13. Mr. de LUNA said that since the unanimous agreement of the parties to a treaty was necessary for its amendment, the question whether it should be revised or not depended on the success of the negotiations undertaken to that end. If the negotiations failed and a second treaty conflicting with the first was concluded, the situation contemplated in article 65 would arise. The problem, however, was that when a party to a treaty proposed its revision, it could not foresee the reaction of the other parties or know whether the negotiations would be successful or not. Moreover, as Mr. Yasseen had pointed out, there were cases in which an amendment adopted by some of the parties *inter se* did not bring the situation within the terms of article 65, because it was in fact a revision of the treaty; thus the decisive criterion in every case was the intention of the parties.

14. So long as the outcome of the proposal for revision was not known, the only significant element was the intention of the parties. If their intention at that time was to enter into a treaty having the same purpose as the previous treaty and constituting a revised version of it, the process would be one of amendment. That would be so even if, for instance, a hundred States took part in the revision conference, but only ninety ratified the amendments it adopted. In such cases the new treaty

concluded at the conference was a revised treaty and not a second treaty different from the first.

15. The *inter se* procedure provided for in articles 68 and 69 was the most usual method of revising treaties. However, the approach adopted in paragraph 2 of article 68 amounted to treating the amending instrument as a second treaty conflicting with the first. In the first place, that paragraph did not stipulate the obligation to notify all the other parties of the proposal for amendment; since it was stipulated that paragraph 1 of article 68 did not apply to the case referred to in paragraph 2, that case was not treated as one of revision. In fact, article 68 offered a solution similar to that provided by article 65 for conflicting treaties.

16. He reiterated the need to use the same terminology in article 68, as the Commission had adopted in the earlier articles on reservations and on termination. The object, in all cases, was to prevent any action which might affect the other parties' enjoyment of their rights (or fulfilment of their obligations) under the treaty or might hinder the effective execution of any of the objects or purposes of the treaty.

17. Before the text of articles 67 to 69 had been before the Commission, he had given an example of an exception to the rule in article 65, paragraph 4 (a) — a case in which the later treaty prevailed over the earlier one, even though it did not include all the parties to the earlier treaty. It was the case of a new treaty having localized effects, namely, the treaty revising the regime of Trieste.²

18. He agreed that it would be better to avoid the term "revision", which had political connotations. The whole problem of "peaceful change" was really a legislative one. It was the problem of introducing new norms of international law through progressive development, sometimes of a revolutionary character. A good example was provided by decolonization in United Nations practice, on which a *jus cogens* rule was emerging.

19. Sir Humphrey WALDOCK, Special Rapporteur, said that it had not been his intention to lay down a code of techniques for treaty revision in the general sense of the word. A number of techniques had been developed in practice and the use of them was largely a political question, which he had endeavoured to avoid. His purpose had been rather to analyse existing practice with regard to the amendment of treaty provisions, in order to ascertain whether there were any elements which deserved or needed formalization in the draft articles on the law of treaties. One example of such an element was the very important point embodied in article 68, paragraph 1: the right of all the parties to a treaty to be consulted concerning any agreement intended to modify its provisions. Cases could be mentioned, some of them quite recent, in which certain of the parties to a treaty had negotiated its revision without consulting the others.

20. He did not believe that the Commission should attempt to control techniques of revision as expressed in the clauses commonly included in treaties to govern

their future revision. States clearly wished to retain great freedom of action in the matter. Moreover, clauses of that type differed very widely and hence did not provide an adequate basis for the formulation of a general rule.

21. Reference had been made to the distinction between bilateral and multilateral treaties for purposes of drafting provisions on amendment. In fact, only the provisions of article 67 and of article 68, paragraph 3, were capable of application to bilateral treaties, and those were not the more important provisions in the articles under discussion.

22. For his part, he would resist any suggestion to introduce the question of the termination of treaties or that of the *rebus sic stantibus* rule into the discussion of the revision of bilateral treaties. Circumstances arose in which, without having any legal basis for demanding the revision of a treaty, a State nevertheless desired its amendment: that was the type of case envisaged in articles 67 to 69. In the case of bilateral treaties, that type of situation tended to find its own solution, being simply a matter for negotiation between the two States; the real difficulty arose in connexion with multilateral treaties.

23. He did not believe that the sharp distinction between the amendment of a treaty and the conclusion of a new treaty, on which some members insisted, could in fact be made. The technique used for revision was, precisely, the conclusion of a new treaty. Even a short protocol additional to an earlier treaty might have the effect of transforming it into a completely new treaty for the States which were parties to the protocol. International treaty-making practice showed a definite tendency to maintain old treaties in being as far as possible, so as not to lose the benefit of the ratifications slowly accumulated over the years. As a result, a complex situation arose when only some of the parties to an earlier treaty ratified a new or revised version: the old treaty alone applied to those of the original parties which had not ratified the new one, while both the old and the new treaty applied to the others. Sometimes also, where a matter was regulated by a series of treaties that did not all have the same contracting parties, a new treaty was concluded which consolidated the provisions of all the earlier ones. That process was commendable, but unfortunately it also had its dangers, since it might lead to a situation in which some of the original parties to the older treaties remained subject to them, because they had not ratified the consolidating instrument. That complication was inevitable because of the basic rule that a treaty was not binding upon a State which was not a party to it, and the frequent failure of States to ratify treaties which they had signed. In the circumstances, it seemed somewhat unrealistic to try to draw a sharp distinction between an amending treaty and a new treaty creating an *inter se* arrangement between some of the parties only.

24. The purpose of article 68, paragraph 2, was to deal with the case in which, because of the localized interest involved or for some other reason, some of the parties decided to supplement or vary the pro-

² See 743rd meeting, para. 25.

visions of the treaty in a manner that concerned them alone. He stressed the importance of the words "as between themselves alone", in the opening sentence of that paragraph. As far as the parties to the *inter se* agreement were concerned, however, that agreement constituted a revision of the earlier treaty. The relationship to which it gave rise was in no way different from that which resulted for States ratifying an amendment left unratified by some of the other States that had participated in the negotiations for revision.

25. The provisions of article 68, paragraph 2, were not concerned merely with the technique of revision. Their purpose was to lay down, by implication, certain limitations upon the power to conclude *inter se* agreements without the consent of the other parties. Agreements of that type constituted a common means of modifying the obligations of a treaty. In some cases, the agreement would be legitimate, but in others it might constitute a violation of the rights of the other parties to the original treaty; the purpose of paragraph 2 was to distinguish between those two possibilities. He agreed, however, that the provision was perhaps not very well placed, since it concerned not so much the right to be notified provided for in article 68, paragraph 1, as the subject-matter of article 69.

26. There appeared to be some measure of agreement in the Commission on a number of points which could be included in the draft articles for submission to governments. However, he did not think that the Commission should try to formulate an elaborate code of rules for the revision of treaties; for the problem of reconciling the need for stability with the need for change was one with regard to which States tended to assert considerable freedom in making their own decisions.

27. Article 67 was intended to be introductory. The opening proviso was important because it took into account the fact that many modern treaties imposed certain restrictions not only on revision, but even on the making of proposals for revision. For example, a periodical review process was often prescribed. Of course, if all the parties so agreed they could ignore such conventional limitations, but in view of the need to uphold the *pacta sunt servanda* rule the Commission should not lightly disregard them. The initial proviso of article 67 was especially relevant to the obligation, stipulated in sub-paragraph (b), to consider in good faith a proposal for revision. If the proposal was made at the end of a specific period laid down in the treaty itself, the obligation of good faith applied; but if the proposal was made before the expiry of the specified period, no such obligation could be said to exist.

28. He could be prepared to drop sub-paragraph (a) of article 67, but some members appeared to think that the provisions of sub-paragraph (b) should be retained in some form. Perhaps they could be introduced into article 68 in a manner that would prove generally acceptable.

29. The question arose what action was to be taken in consequence of the proposal for revision. A conference might be convened or, if the number of States concerned was small, the diplomatic channel could be

used for revising the treaty. Some members had advocated the unanimity rule, which would give every State party to the original treaty a right of veto over the calling of a conference for its amendment. He did not think the Commission should go beyond a statement of the right to be consulted; in particular, it should not lay down any rules regarding the choice between a conference and the diplomatic channel. He was opposed to the suggestion that the draft articles should make provision for a right of veto over the convening of a conference. Any provision having that effect would conflict with modern practice and would have the most unfortunate results, particularly for law-making treaties.

30. One possibility might be to try to set out in the draft the rules to be followed in convening a conference. Mr. Reuter had suggested that the Commission should be guided by the clause of the treaty governing its entry into force. That idea might not provide a workable rule, however, for some treaties specified that they would enter into force on being ratified by a small number of States. Moreover, there was no essential relationship between the number of ratifications required for a treaty's entry into force and the proportion of the States parties whose consent was necessary for the convening of a conference to revise the treaty. Another possibility would be for the Commission to take as a basis the revision clauses included in many multilateral treaties. Unfortunately, those clauses varied very widely and it was difficult to find in them an adequate basis for general rules. In the circumstances, the Commission should confine itself to a clear statement of the right of all the parties to a treaty to be notified of any proposals for revision and to be consulted with regard to the conclusion of any amending instrument, leaving other questions to be decided by the interested States.

31. The actual conclusion of the amending instrument should, as stated in article 68, paragraph 3, be governed by the provisions of Part I of the draft. The reference was to all the provisions of Part I, including in particular article 6 on the adoption of the text of a treaty,³ which contained a substantial safeguard for the unanimity rule. Sub-paragraph (a) of that article specified that in the case of a treaty drawn up at an international conference, the adoption of the text would take place by the vote of two-thirds of the participating States, unless the Conference adopted another voting rule by the same majority. Sub-paragraph (b) specified that, in the case of a treaty drawn up within an organization, the voting rule applicable would be that of the competent organ of the organization in question. In all other cases, however, "the mutual agreement of the States participating in the negotiations" was required, as specified in sub-paragraph (c). That requirement safeguarded the position where a treaty was concluded by a small group of States — a type of treaty which had already given rise to serious problems in connexion with other articles of the draft.

32. With regard to the amending treaty, the basic rule was that, like all treaties, it was not binding on

³ *Yearbook of the International Law Commission, 1962, Vol. II, p. 166.*

a State that was not a party to it. Exceptions to that rule were very rare. One exception was the case in which the treaty itself provided that a minority of the parties could be overruled by the majority, so that an amendment adopted by a majority vote would become binding upon all the parties. Another exception was the case in which a majority rule was laid down in the constitution of an international organization for treaties concluded within the organization. The purpose of article 69, paragraph 1, was to set out the rule and exceptions in question. However, the opening sentence of that paragraph formulated a rule containing an *inter se* element, because the revision instrument, like all treaties, was binding on by upon the parties, and would therefore often result in an *inter se* situation, even if that result had not been intended.

33. Paragraph 2 of article 69 dealt with a situation which needed to be covered: the frequent case in which the revising instrument was in force in respect of only some of the original parties, while the unamended treaty continued to apply with respect to the other parties. In that case, a State which had been duly invited to the negotiations for revision and had not raised any objections should not, merely because it had not ratified the revising instrument, be able to complain that that instrument constituted a violation of its rights under the original treaty.

34. In conclusion, he suggested that, in view of the suggestions made for the rearrangement of the provisions of articles 67 to 69, he should himself prepare a revised version of those articles in the light of the discussion. The new draft articles would be submitted to the Commission for consideration before being referred to the Drafting Committee.

35. The CHAIRMAN, speaking as a member of the Commission, pressed for the deletion of sub-paragraph (b) of article 67. It would not be fair to impose an obligation of good faith on the parties receiving a proposal for amendment if the party making the proposal was not likewise required to act in good faith.

36. Moreover, although he usually preferred the Commission to reserve anything touching on State responsibility, he thought it would be dangerous only to say, as in article 69, paragraph 3 (b), that on the entry into force of an amendment or revision of a treaty *inter se* which constituted a violation of the treaty *vis-à-vis* the other parties, those parties had the right to terminate the earlier treaty. The Commission should also provide for the possibility of those parties invoking the responsibility of the States which had made amendment *inter se*.

37. Mr. BRIGGS, referring to article 69, asked why, if it was stated in paragraph 1 that an amending instrument did not affect the rights of any party to the treaty which did not become a party to that instrument, it should be necessary to state in paragraph 2 that the bringing into force of the amending instrument could not be considered by any such party as a violation of its rights under the treaty.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that the word "affect" was perhaps not very

satisfactory. What the provision in question meant was that the amending instrument did not derogate from rights under the treaty. The bringing into force of an amending instrument *inter se* might violate the right of a party to the original treaty which had declined to participate in the revision, but a party which had participated in the revision could not afterwards maintain that its rights had been violated or that the original treaty applied as between itself and the parties to the new agreement. In other words, he had introduced a rule based on estoppel, which reflected what seemed to happen in actual practice, as States did not challenge the bringing into force of an amending treaty that they had failed to ratify. In practice such a situation was not very likely to arise.

39. Mr. BRIGGS, observing that article 69, paragraph 3 (b), referred to article 42, asked whether the Special Rapporteur had intended to equate revision with material breach. He would hardly have thought that revision came within the definition of "breach", which was the unfounded repudiation of a treaty or the violation of a provision essential to the effective execution of any of its objects. He also questioned whether revision would allow of the termination of a treaty by the unilateral withdrawal of one of the parties.

40. Sir Humphrey WALDOCK, Special Rapporteur, explained that if the bringing into force of an amendment or a revision amounted to a material breach, termination or suspension could only be brought about if all the conditions laid down in article 42 were fulfilled.

41. It was not easy to see what rule could be devised to cover withdrawal. Some treaties, in particular the constituent instruments of some international organizations, provided a right of withdrawal for a party which had voted against an amendment, but in the ordinary case of a revision resulting in *inter se* agreements two sets of interests came into existence: those of the parties which had accepted the amendment and those of the parties which had not accepted it. He did not think that any automatic right of withdrawal could be conferred on the parties which did not ratify the amendment.

42. Mr. LIU said that article 67 fulfilled a useful purpose and should be retained as a separate article. It was particularly important to lay down the principle it contained because in the past many inequitable treaties had been concluded under duress. The need to reconcile respect for treaties with evolution and change had been recognized in Article 19 of the Covenant of the League of Nations, which provided for the reconsideration of treaties that had become inapplicable, and a similar idea might be said to have been incorporated in Article 14 of the United Nations Charter.

43. He was not altogether convinced that it was desirable to retain article 68, paragraph 2, as he was inclined to regard *inter se* agreements as separate treaties. At all events, if that paragraph was retained it would need considerable modification, as would article 69, paragraph 2.

44. The CHAIRMAN, speaking as a member of the Commission, said, with regard to Mr. Briggs's first question, that he recognized that there were certain reasons for treating participation in a conference for the amendment or revision of a treaty as amounting to a kind of estoppel. But the Commission should carefully consider the danger of such a provision; for a State might agree to participate, and then become aware, during or even after the Conference, that the proposed instrument would be prejudicial to its rights and obligations. Article 69, paragraph 2 (a), was ambiguous and might deter States from taking part in a revision Conference for fear that the mere fact of having done so would subsequently debar them from claiming that their rights had been violated.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that article 69, paragraph 2 (a), was intended to refer to the process of voting the text of the amendment. Once a party had, by an affirmative vote, given its approval to the amending instrument the adoption of which would put the final clauses into operation, it seemed reasonable to stipulate that that party could not claim that the instrument violated the original treaty.

46. Mr. YASSEEN thought that paragraph 2 (a) should be understood to mean that the State concerned had taken a positive attitude when the instrument had been adopted. Abstention could not be regarded as a positive attitude. If a State "took part in the adoption of the . . . instrument" in that sense, the normal inference would be that it could not thereafter claim that that instrument violated its rights.

47. The CHAIRMAN, speaking as a member of the Commission, said that the adoption of the final act of a conference—which simply affirmed that the text in question was the result of the conference's proceedings—in no way constituted an undertaking to approve that text as a contractual instrument.

48. Mr. TSURUOKA said that the meticulous jurists of Japan, for example, might take part in a conference in order to observe the proceedings, but would probably abstain from voting on the adoption of the instrument in order to reserve the right to reject it on further consideration.

49. The CHAIRMAN suggested that the Commission should accept the Special Rapporteur's offer to redraft articles 67 to 69.

It was so decided.

ARTICLE 65 A (The effect of breach of diplomatic relations on the application of treaties)

50. The CHAIRMAN invited the Commission to consider article 65 A in the Special Rapporteur's third report (A/CN.4/167/Add.2).

51. Sir Humphrey WALDOCK, Special Rapporteur, said that after the discussion at the fifteenth session on the effects of a breach of diplomatic relations,⁴ he

⁴ *Yearbook of the International Law Commission, 1963, Vol. I, 697th meeting, paras. 54 et seq.*

had prepared the article now before the Commission. In accordance with the Commission's policy, he had left aside the question of the effect of hostilities on treaties and also the consequences of non-recognition, which belonged to the topic of State succession. Thus the proposed article dealt with the effect of the severance of diplomatic relations and with the withdrawal of diplomatic missions simply as such. The cardinal rule was that the legal relations established by the treaty would not be affected, which was also true of relations established by customary rules of international law.

52. On the other hand, the absence of diplomatic relations might result in difficulties in executing certain types of treaty. He had discussed in the commentary the possibility of a treaty providing for its execution through the diplomatic channel, in which event it might be possible to proceed with the performance of the treaty though the intermediary of a representing third State; but it was not certain how far such a third State could act, and impossibility of performance might ensue which could result in suspension of the operation of certain clauses. It was for that reason that he had inserted a reference in the article to the provisions of article 43. The Commission might think it unnecessary also to refer to the obligation under article 55.

53. The CHAIRMAN, speaking as a member of the Commission, said that generally speaking he shared the Special Rapporteur's views. In the case of certain types of treaty the severance of diplomatic relations made it materially impossible to apply the treaty provisions. He wondered what, for example, would be the consequences of the severance of diplomatic relations between two States which were bound by a treaty—say a treaty for the pacific settlement of disputes—stipulating that diplomatic remedies must have been exhausted before recourse could be had to the procedure provided for in the treaty itself.

54. Sir Humphrey WALDOCK, Special Rapporteur, replying to the Chairman, said that such a rule had been invoked as a basis for preliminary objections in cases brought before the International Court, but never successfully. He would have thought that something might depend on the circumstances and on which State was responsible for breaking off diplomatic relations. In any event, if a State broke off diplomatic relations it would not be able to plead that diplomatic processes had not been exhausted by the other party to the dispute.

55. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the rule enunciated in article 65 A, but not with its presentation, because the reference to article 43 might cause confusion and wrongly imply that a breach of diplomatic relations could lead to the termination of a treaty, whereas in fact it could only result in the suspension of its operation in certain cases. He therefore considered that the article should be redrafted to read:

"The severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty. However, if

the application of the treaty is dependent upon the uninterrupted maintenance of diplomatic relations between the parties thereto, and it is not possible to execute the treaty through a representing State, or such a representation has not been established, then the application of the treaty is suspended as between any parties upon the severance of their diplomatic relations."

56. Sir Humphrey WALDOCK, Special Rapporteur, asked whether Mr. Jiménez de Aréchaga wished it to be understood that on the severance of diplomatic relations there was an obligation to appoint a representing State.

57. Mr. JIMÉNEZ de ARÉCHAGA replied in the negative. It was to cover that point that he had inserted the phrase "or such a representation has not been established".

58. Mr. BARTOŠ said that he fully supported the wording proposed by the Special Rapporteur. An example of what could occur was to be found in the relations between the Federal Republic of Germany and Yugoslavia: the unilateral severance of diplomatic relations had not prevented the Federal Republic of Germany from fulfilling certain obligations to Yugoslavia. It was obvious that if diplomatic relations between two States were severed because of political differences, there could be no genuine co-operation between them: that was a case of impossibility of performance which it would be better not to mention expressly. The Special Rapporteur had adopted that course and the Commission should adhere to it.

59. Mr. VERDROSS thought it would be going too far to say that the severance of diplomatic relations did not affect the relations established between States by a treaty. It would be more realistic to say that "the obligations arising out of a treaty are not affected insofar as they are not incompatible with the situation created by the severance of diplomatic relations".

60. Mr. ROSENNE, thanking the Special Rapporteur for complying with his suggestion at the fifteenth session,⁵ said that article 65 A was acceptable to him. He partly agreed with Mr. Jiménez de Aréchaga, however, that to make the operation of the article subject to the whole of article 43 might introduce unforeseen complications. The article could be redrafted to state the general principle at the beginning and make such reference to article 43 as was necessary at the end.

61. Referring to a point made by the Chairman, he said that where a treaty stipulated that diplomatic remedies must be exhausted before recourse to other proceedings, once diplomatic relations had been severed it would be impossible to comply with that stipulation any longer.

62. It was important to include in the draft an article stating the rule of international law on the effect of the severance of diplomatic relations on treaties, because

in the event of severance a municipal tribunal might have to apply rules of international law.

63. Mr. de LUNA considered that the Special Rapporteur had adopted the right approach. No State could divest itself of treaty obligations by breaking off diplomatic relations. In fact, the result of a breach of diplomatic relations was only a temporary impossibility of performance, so that not all the elements in article 43 would be applicable.

64. Mr. TUNKIN said that although article 65 A was likely to be generally acceptable, the Drafting Committee would doubtless need some guidance on certain points, in particular the relevance of article 43.

The meeting rose at 12.50 p.m.

748th MEETING

Thursday, 18 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167/Add.2)

(continued)

[Item 3 of the agenda]

ARTICLE 65 A (The effect of breach of diplomatic relations on the application of treaties) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 65 A in the Special Rapporteur's third report (A/CN.4/167/Add.2).

2. Mr. YASSEEN said it seemed certain that the severance of diplomatic relations did not affect the validity of treaties and did not terminate them. Nevertheless, it resulted in the absence of diplomatic representatives and reflected an abnormal state of relations between two States. The latter point should be stressed as much as the former.

3. There were treaties whose application required action by diplomatic organs. If those organs ceased to exist, it was no longer possible to implement the treaty. That applied, for example, to treaties on extradition, trade, navigation and judicial assistance. It was true that there was an institution of international law under which a State's interests could be protected by the representatives of another State during the period of breach of diplomatic relations. But it was doubtful whether all questions could be settled through the representatives of a third State, and whether there might not be treaties whose execution required some

⁵ *Ibid.*, 696th meeting, para. 21.

action by the representatives of the contracting State itself.

4. There were other types of treaty whose provisions could only be applied when relations between the States concerned were normal: for instance, treaties of friendship and treaties providing for assistance or co-operation in certain spheres, including the political sphere. It was difficult to see how an instrument like the Treaty of Zürich, which provided for consultation on political matters between Greece, Turkey and the United Kingdom, could be executed while diplomatic relations between the parties were severed. The Commission should stress the practical aspect of the nature of the treaty, and seek solutions appropriate to it.

5. Thus it might be provided that, in certain cases and for certain types of treaty, the severance of diplomatic relations would lead to the suspension of the treaty, but would not terminate or invalidate it. When diplomatic relations were resumed, the application of the treaty would resume its normal course unless otherwise decided by agreement between the parties.

6. Mr. Jiménez de Aréchaga's text¹ appeared to be more realistic than the Special Rapporteur's, though the expression "the uninterrupted maintenance of diplomatic relations" was perhaps not very felicitous; it would be better to state the condition in the words "if the application of the treaty necessitates the existence of diplomatic relations..."

7. Mr. CASTRÉN said he approved of the ideas expressed in the Special Rapporteur's article 65 A, but like Mr. Jiménez de Aréchaga and Mr. de Luna, he thought that reference should not be made to the whole of article 43,² but only to paragraphs 2 and 3 of that article. He also thought that the last clause "and, in particular, their obligation under article 55" should be deleted.

8. The formula proposed by Mr. Jiménez de Aréchaga was acceptable as to substance, but perhaps it was too detailed. He therefore preferred the Special Rapporteur's text with the amendments he had just suggested.

9. Mr. VERDROSS said he thought that Mr. Jiménez de Aréchaga's text was in conformity with existing law. In order to remove an apparent contradiction between the first and second sentences, however, it would be better to say in the first sentence that the severance of diplomatic relations between the parties to a treaty did not terminate the treaty; it would then be logical to state in the second sentence that, in certain specified cases, the application of the treaty might be suspended.

10. The CHAIRMAN observed that the members of the Commission were agreed on two points: first, that as a general rule the severance of diplomatic relations did not terminate a treaty; and secondly, that there were certain treaties which became impossible to apply when diplomatic relations were severed. It remained

to be decided whether the Commission should deal with such impossibility of performance expressly in article 65 A, or consider that impossibility of performance was fully covered in article 43.

11. Speaking as a member of the Commission, he said he preferred the more prudent wording proposed by the Special Rapporteur. It would be better not to put in black and white that the severance of diplomatic relations could result in suspension of the application of a treaty, for States might be encouraged to use that means to secure the suspension of a treaty.

12. Mr. TUNKIN said that, although the Chairman had drawn attention to a very real risk, he considered that Mr. Jiménez de Aréchaga's text more clearly expressed the idea on which members of the Commission had reached agreement.

13. If reference was to be made to article 43, only paragraphs 2 and 3 should be mentioned.

14. Mr. TSURUOKA said that if the Commission decided to mention in the article that the parties to a treaty could execute it through the States representing their interests, it should explain in the commentary that when diplomatic relations between two States were broken off, those States could still have contacts at an international conference. Such contacts might be useful, not only where diplomatic relations had been severed, but also where one of two States did not recognize the other.

15. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the Chairman to a great extent. If there were several parties to a treaty, it would hardly be proper for one of them to rely on the severance of diplomatic relations with another to free itself from the obligation to perform certain actions required by the treaty.

16. One of the difficulties which had troubled him when examining the text proposed by Mr. Jiménez de Aréchaga, was that it was impossible to form an objective opinion on what ought to be the consequences of a severance of diplomatic relations without knowing the reason for it: the severance might be a gratuitous action by a State or a sanction against some grave step taken by another State. If the provision were based on impossibility of performance, that would leave certain elements to be appreciated in the light of the circumstances of each case.

17. He had left open the question of total impossibility of performance, which he thought unlikely to arise. There was, however, a special category of treaty of an immediate character, the application of which would be limited in time, and which might have to lapse if severance of diplomatic relations made performance impossible.

18. On re-examining article 43 and its relationship to article 65 A, he had begun to wonder whether article 43 was not too stringent. The language used had, of course, been prompted by the Commission's anxiety not to leave too many loopholes for the avoidance of treaty

¹ See 747th meeting, para. 55.

² *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 19.*

obligations, but article 65 A was concerned with the absence of machinery for the execution of obligations rather than with the permanent disappearance or destruction of the subject-matter of the treaty. If article 43 could be modified, a reference to it in article 65 A would still be the best solution. Clearly, what was essential was to stress the fact that treaty relations continued even if diplomatic relations were broken off.

19. The text proposed by Mr. Jiménez de Aréchaga would certainly need to be examined by the Drafting Committee, but it might be held to go too far and was open to certain drafting objections, notably in regard to the phrase "the uninterrupted maintenance of diplomatic relations".

20. The CHAIRMAN, speaking as a member of the Commission, said that the Commission should clearly specify that the severance of diplomatic relations did not itself entail either the termination or the suspension of treaties. True, the suspension of a treaty did become necessary in some cases, but that was for the indirect reason that severance of diplomatic relations had made performance impossible. It would be both dangerous and incorrect in law to imply that the severance itself could have the suspension of a treaty as its direct effect.

21. Mr. BRIGGS said that even if article 43 were modified, it still included too much for the purposes of article 65 A and the reference to it should therefore be dropped. For the reasons given by Mr. Jiménez de Aréchaga, he considered it inadvisable to refer to article 43.

22. With certain drafting changes, Mr. Jiménez de Aréchaga's text would be acceptable, once the contradiction mentioned by Mr. Verdross was removed. The reference to a representing State should also be dropped, since there was no obligation to appoint a representing State if impossibility of performance supervened.

23. Mr. PESSOU said he endorsed the Chairman's remarks. It would be remembered that when Nigeria had severed diplomatic relations with France in consequence of the French nuclear weapons tests in the Sahara, the resulting tension had been such that France could, if it had wished, have withdrawn the scholarships of fifty-seven Nigerian students; but France had preferred to honour its commitments. That example showed that in stating the principle which was the subject of article 65 A, the Commission should use very cautious and discreet language so as to safeguard relations between States as far as possible.

24. Mr. RUDA said he thought there was unanimous agreement in the Commission that severance of diplomatic relations did not affect the legal relations established between the parties by a treaty. Severance did not lead to termination, but it might lead to suspension through removal of the machinery to execute the provisions of the treaty or for reasons of the kind mentioned by Mr. Yasseen in connexion with treaties of friendship and mutual assistance, when the treaty

became incompatible with the situation between the two States. Possibly Mr. Jiménez de Aréchaga's formulation, with the changes suggested by Mr. Verdross, might adequately cover the two cases.

25. Mr. PAL said he was inclined to prefer the form in which the Special Rapporteur had formulated the article. He suggested that the text should be amended by inserting the words "by itself" after the word "severance" and by deleting the final clause after the words "established by the treaty". The objection to the opening words "subject to article 43" was, in his view, ill conceived. That proviso did not necessarily mean that all the cases covered by article 43 were involved. It would be perfectly legitimate to have such a qualifying provision if all the cases within the scope of article 65 A were covered by the article referred to, Article 43, paragraphs 2 and 3, covered cases of partial impossibility of performance.

26. His objection to the text proposed by Mr. Jiménez de Aréchaga was that the exception it provided for was not comprehensive enough. Such a formulation would always have the defect of being too narrow.

27. Mr. CASTRÉN said that on reflection he realized that Mr. Jiménez de Aréchaga's proposal had many advantages; but he shared Mr. Pal's misgivings: if the Commission tried to go into detail, it might overlook something, and the consequences might be unfortunate if the article were interpreted restrictively. States which had severed diplomatic relations could resort to methods other than representation by third States. Consequently, he still preferred the Special Rapporteur's text, with minor amendments.

28. Mr. ROSENNE endorsed Mr. Pal's remarks.

29. Mr. TUNKIN said there was general agreement that severance *ipso facto* did not lead to the lapse of a treaty or to its becoming inapplicable.

30. It would be unwise to make special mention of the nature of the treaty or to go into too much detail. Perhaps agreement could be reached on an article consisting of the first sentence of Mr. Jiménez de Aréchaga's text, followed by a statement that the provision was subject to article 43, paragraphs 2 and 3.

31. Mr. JIMÉNEZ de ARÉCHAGA said that drafting points should be left to the Drafting Committee. He still thought it was inappropriate to refer to article 43, because the definition in paragraph 1 of that article governed the provisions in paragraphs 2 and 3.

32. With regard to the point of substance raised by Mr. Yasseen, it was doubtful whether there were any treaties of such a nature that severance would automatically lead to their extinction or suspension, though some provisions of a treaty might become inoperable as a result of severance and have to be suspended. Suspension might be only an incidental result of severance. Clearly the Drafting Committee would be faced with the task of formulating the exceptions to the general rule on which the Commission agreed.

33. Mr. de LUNA said he agreed with those speakers who had criticized the use of the words "Subject to article 43" to cover the exceptions to the rule that the severance of diplomatic relations did not, as such, affect treaty relations. Article 43 dealt solely with impossibility of performance on objective grounds; in paragraph 1, the impossibility envisaged was permanent, in paragraph 2 it was temporary, and in paragraph 3 it was partial, but the grounds were always objective. In the case covered by article 65 A, on the other hand, the impossibility of performance was based not on objective, but on purely subjective grounds.

34. In fact, two kinds of exceptions must be covered in article 65 A. The first was that dealt with in the draft submitted by Mr. Jiménez de Aréchaga, where the machinery for applying the treaty was lacking. The second was that mentioned by Mr. Yasseen, where severance of diplomatic relations and the lack of friendly relations which it implied, resulted in moral impossibility of performance.

35. The nature of the treaty would not provide much guidance in the matter. The question whether the treaty relationship would be affected by the severance of diplomatic relations did not depend on the nature of the treaty, but on the spirit in which diplomatic relations had been broken. Ultimately, it was a purely subjective matter and depended on the States concerned.

36. He could not accept the opening proviso "Subject to article 43" because the provisions of article 43 were not only too strict, but also covered different ground from article 65 A. The reference to article 43 should be replaced by a statement of the exceptions. Unfortunately, while it was possible to formulate the exceptions resulting from the absence of machinery, it would be extremely difficult to formulate those which resulted from moral impossibility of performance.

37. Mr. LIU said that he entirely agreed with the principle laid down in article 65A but wondered whether, in addition to being subject to the provisions of article 43, it ought not also to be made subject to those of article 44.

38. He agreed with Mr. Verdross that it would be inconsistent to state that severance of diplomatic relations did not affect the legal relations established by a treaty; the important point was that it did not lead to termination.

39. He doubted whether it was necessary to make any reference to article 55, since that article governed the whole draft.

40. The CHAIRMAN, speaking as a member of the Commission, suggested that in the case of treaties whose application required the intervention of diplomatic organs, it could be said that if those organs disappeared, the application of the treaty became impossible except through organs of a third State; that was the situation contemplated in Mr. Jiménez de Aréchaga's text.

41. But it had been said that there were treaties which by their nature required a certain atmosphere of agree-

ment for their application, such as treaties of friendship and treaties of political collaboration. It would be dangerous to mention that class of treaty expressly in the draft; it was not referred to in Mr. Jiménez de Aréchaga's text, but it could be regarded as implicitly included in the Special Rapporteur's text, since the latter referred to article 43, and impossibility of performance due to the state of relations between the parties might come within the scope of paragraph 2 of that article.

42. Moreover, under the terms of article 43 a party could invoke the event in question as a ground for pleading that a treaty was impossible to perform and should consequently be suspended. Mr. Jiménez de Aréchaga's text went further, for it established the suspension of the treaty objectively. That was an important difference. In that respect, the Special Rapporteur's text was the more prudent.

43. Mr. AMADO stressed that the object of the article was to safeguard legal relations between States and ensure their continuity. Consequently, if a reference was made to article 43, it should be specified that paragraph 2 of that article was meant, not paragraph 1, which dealt with an entirely different case.

44. Mr. de LUNA said that, if the language of paragraph 2 of article 43 were used instead of referring to the article itself, that would go a long way towards solving the problem that had arisen. A sentence could be introduced reading, approximately:

"Should impossibility of performance result therefrom such impossibility may be invoked only as a ground for suspending the operation of the treaty".

45. Mr. ROSENNE said that the discussion had convinced him of the need to link article 65 A with article 43 and not to introduce other criteria which might have unforeseen consequences: but article 43 would in all probability require some modification. For example, the wording of paragraph 2 was a little odd. He would have thought that it should read "If it is not clear that the disappearance or destruction of the subject-matter will be permanent...".

46. The CHAIRMAN said that the Commission was not called upon to interpret article 43 at that stage. In his opinion, however, article 43, paragraph 2, referred to a temporary impossibility of performance, not a permanent impossibility resulting from the total and permanent disappearance of the subject-matter of the rights and objections stipulated in the treaty.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that article 43, which was subject to the separability provisions laid down in article 46, would cover cases in which treaties could be performed only in part as the result of the severance of diplomatic relations.

48. He suggested that article 65 A should be referred to the Drafting Committee for examination, together with Mr. Jiménez de Aréchaga's text and Mr. Verdross's comments. Some thought should also be given to the possibility of modifying article 43.

It was so agreed.

49. Mr. YASSEEN explained that when he had spoken of the impossibility of performing certain treaties while diplomatic relations were severed, he had not meant to exclude partial impossibility, for not all the provisions of a treaty would necessarily be impossible to apply. In that context the principle of separability of treaty provisions should be followed.

50. Mr. TUNKIN pointed out that the Drafting Committee would have to consider two different situations: one in which a State that had broken off diplomatic relations took steps to suspend or terminate a treaty, and one in which a State considered a severance of diplomatic relations as justification for suspending a treaty because the breach was incompatible with its performance.

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

51. The CHAIRMAN invited the Commission to consider the text of article 55 proposed by the Drafting Committee.

Article 55 (*Pacta sunt servanda*)

52. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Committee had agreed to propose the following text for article 55:

“A treaty in force is binding upon the parties to it and must be performed by them in good faith. [Every party shall abstain from any act incompatible with the object and purpose of the treaty.]”

It had decided to retain the original title and had reached unanimous agreement on the first sentence. Opinion had been divided as to whether the sentence in brackets should be retained. Some members believed that the principles was implicit in the first sentence and that such an addition would only weaken the force of the article, whereas others regarded the two sentences as complementary and believed it would be advisable to stipulate that States must refrain from acts not expressly prohibited by the terms of the treaty, but incompatible with its object and purpose.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that in accordance with the Commission's wishes, the Drafting Committee had reduced article 55 to a simple statement of the fundamental principle.

54. Mr. LACHS said he had no objection to the first sentence, which was clear and concise, but he would like to know what interpretation the Drafting Committee placed on the phrase “the object and purpose of the treaty” in the second sentence.

55. Sir Humphrey WALDOCK, Special Rapporteur, replied that the phrase was used with the same meaning as in paragraph 1 (d) of article 18, on reservations. It had been taken from the advisory opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.³ The purpose of the second sentence was

to deal with the problem of certain acts which, although not prohibited by the letter of the treaty, would, if accomplished, render its performance much more difficult. It was meant to strengthen the first sentence by going beyond its literal provisions.

56. Mr. PAREDES said that the first sentence of the new article 55 merely reproduced the universal principle *pacta sunt servanda* — a principle so obvious and so much in the nature of things that it hardly needed stating: anyone giving an undertaking was required to honour it.

57. The incorporation of that principle in international legal doctrine and its very frequent use could only be explained by the need to fight against the rigidity of the old concept of sovereignty, which gave the sovereign unlimited powers of decision, to which no obstacle was admitted. The maxim *pacta sunt servanda* had come to limit those powers.

58. The sentence stating the principle was in no way improved by adding that the parties must perform the treaty “in good faith”, since that expression, which was more moral than legal in character, only amounted to an admonition to be of good behaviour. Besides being imprecise and fluid, the concept of good faith was very difficult to apply in practice, since it originated in a psychological process of the person deciding on the act in question.

59. Nevertheless, he thought it possible to speak of good faith if both the negative and the positive consequences were extracted from the concept: that meant prohibiting whatever hindered the performance of the treaty and prescribing the acts necessary to give it full effect. In other words, as he had maintained on another occasion, the parties should be bound by whatever followed from the nature and object of their agreement, even if it was not expressly stated in the treaty.⁴ However, the prohibiting clause in brackets did no more than urge the duty to fulfil the treaty.

60. He would therefore be obliged to vote against the draft article.

61. Mr. AMADO said that the principle of good faith was one of the basic concepts of law. Its scope was very wide and included an obligation to refrain from certain acts. By stating that obligation in terms, the sentence in brackets tended to restrict the scope of the general principle. It might perhaps be better to leave it to the international courts to determine the limits of good faith.

62. Mr. ROSENNE said that while he had no objection in principle to the use of Latin, he was opposed to the title *pacta sunt servanda*. He would have preferred the title to be in English, French and Spanish, like the titles of articles 37 and 45 dealing with *jus cogens* and article 44 dealing with the *rebus sic stantibus* clause. If the title was voted on separately, he would vote against it.

63. The second sentence of article 55 embodied a phrase which had been used originally by the Inter-

³ I.C.J. Reports, 1951, p. 24.

⁴ 726th meeting, paras. 61 *et seq.*

national Court of Justice; he himself had suggested its introduction during the Commission's discussion of article 55. On reflection, however, he had reached the conclusion that, since it referred to only one aspect of the principle of good faith, it would be better to drop it for the time being and to limit article 55 to the clear statement of principle contained in the first sentence; the concept of good faith already covered the idea expressed in the second sentence. He suggested that the second sentence be transferred to the commentary, where it could serve as an illustration of the concept of good faith.

64. Mr. TSURUOKA said he was in favour of deleting the sentence in brackets; the article would be simpler and more vigorous without it.

65. Mr. BARTOŠ was in favour of retaining the Drafting Committee's text, including the sentence in brackets. He reminded the Commission of the arguments he had advanced during the discussion of the original draft of article 55.⁵

66. Mr. LACHS, after thanking the Special Rapporteur for his explanation, said that the fact that the wording of the second sentence had been taken from an advisory opinion of the International Court of Justice in a particular case was an additional argument for deleting it. He could not agree that there was any analogy with the provisions on reservations, which dealt with a totally different subject. Furthermore, the sentence only illustrated the passive aspect of the *pacta sunt servanda* rule, which also had its active aspects.

67. With regard to Mr. Rosenne's objection to the use of the Latin expression "*pacta sunt servanda*", he observed that, in the title of article 37, the Commission had translated the term "*jus cogens*" into English, French and Spanish and left the Latin in brackets because the concept was a novel one. In article 44, the Commission had avoided the expression "*rebus sic stantibus*" not out of any reluctance to use a Latin phrase, but because misuse of that expression had brought it into discredit. The position was different in the case of the maxim "*pacta sunt servanda*", which could fittingly be given prominence.

68. Mr. CASTRÉN said that he was prepared to accept the Drafting Committee's text. He thought the second sentence was of some use and strengthened the statement of the principle.

69. Mr. de LUNA said that Latin had the advantage of conciseness. It would be difficult, if not impossible, to express the concept "*pacta sunt servanda*" in three words in English or Spanish. The use of a Latin formula of that kind could be compared with the use of terms of Greek origin in medicine; the meaning was clear to all scholars, whatever their native tongue. Even in treaties, it was quite common for Latin expressions to be used because of their universality. The use of a dead language also had the advantage that, precisely

because it was not spoken, the meaning of the words was not liable to change with time as a result of usage. He therefore strongly advocated retaining the title "*pacta sunt servanda*".

70. He could not agree with Mr. Paredes on the question of good faith and, like Mr. Amado, strongly supported the reference to it in article 55. In fact, he regarded the principle of good faith as even more important than the *pacta sunt servanda* rule, which was one of the consequences of good faith in international relations.

71. He was in favour of deleting the second sentence which, far from strengthening the first, tended to weaken it. The fact that the wording was drawn from an advisory opinion of the International Court of Justice on a specific question was a strong argument against it. The case dealt with in that opinion was merely one instance of the obligations arising from the duty to perform the treaty in good faith.

72. Mr. TUNKIN said he would have preferred the title to be in the working languages, but he was bound to admit that a satisfactory equivalent was hard to find. In any case, as it was very probable that the titles would be dropped at future conferences, the point was of minor importance.

73. The second sentence was not only unnecessary, but weakened the principle stated in the first, as it might be taken to be an interpretation. Nevertheless, he could accept the second sentence if the words "In particular" were added at the beginning.

74. Mr. YASSEEN said he conceded that the phrase "*pacta sunt servanda*" could be used in certain European languages deriving, in varying degrees, from Latin; but the same did not apply to languages of different origin, such as Arabic, in which there were maxims, well defined in Islamic law, expressing the same concept.

75. In his opinion, the first sentence of article 55 should be retained and the second deleted, for the substance of the second sentence was implicit in the first, and it would be inadvisable to stress one of the applications of the principle to the exclusion of the others.

76. Mr. REUTER agreed with Mr. Tunkin. He suggested that a full stop should be placed after the words "binding upon the parties to it" in the first sentence, and that the second sentence should read: "It must be performed by them in good faith and in particular the parties to the treaty must abstain...". That would emphasize the importance of the principle of good faith.

77. The CHAIRMAN, speaking as a member of the Commission, said that the maxim "*pacta sunt servanda*" was not only a convenient Latin expression, but also stated a principle which, since the time of Grotius, had represented the very essence of international law. It would be a pity to translate it, especially as it would be hard to find an equally satisfactory formula.

⁵ *Ibid.* paras. 65 et seq.

78. The first sentence would be clearer and more correct if it read: "Every treaty is binding upon the parties among which it is in force". The second sentence seemed to be a source of misunderstanding. Its original purpose had been to strengthen the statement of the principle, but most members had expressed the opinion that it was more inclined to weaken it. That being so, it would probably be better to delete it.

79. Mr. VERDROSS endorsed the Chairman's remarks.

80. Mr. EL-ERIAN said he was in favour of retaining the title *pacta sunt servanda*, which was useful because of its universality.

81. The Drafting Committee had perhaps over-simplified article 55, but he supported the proposed text, particularly the reference to good faith. The Commission had already introduced that concept in article 17 and, by cross-reference, in a number of other articles which referred back to article 17.⁶

82. The second sentence of article 55 elaborated on the obligation to perform the treaty in good faith. Its purpose was to state that the application of the treaty was not confined to performance of the letter of its provisions. He supported the inclusion of that sentence and the insertion of the words "In particular", proposed by Mr. Tunkin, which would strengthen it by showing that the case mentioned was only one example of the obligations arising from the duty to perform the treaty in good faith.

83. Mr. ROSENNE pointed out that the titles used in the Commission's drafts in the past had not always disappeared; the codification conventions ultimately signed had sometimes retained the titles of the articles.

84. Of course, the principle *pacta sunt servanda* existed in all legal systems; but he could not accept the idea that universality must be equated with the use of Latin and he had therefore expressed reservations regarding the use of a Latin formula to express a universal idea. However, in view of the Chairman's appeal associating the *pacta sunt servanda* rule with the founders of international law and in particular with Grotius, he was prepared to withdraw his reservation.

85. Mr. BRIGGS said he was in favour of retaining the title of article 55, which embodied a universal maxim.

86. With regard to the Chairman's second remark, he pointed out that it was only in the French text that the difficulty arose; in the English text the words "to it" after the words "the parties" made the meaning clear.

87. He supported the reference to good faith and was in favour of retaining the second sentence, as he was not at all convinced that it in any way weakened the rule stated in the first. The concept it embodied was perhaps implicit in the first sentence, but would be even clearer if stated explicitly.

88. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Briggs that the second sentence did not in any way weaken the first. The first sentence expressed in absolute terms the obligation to perform the treaty in good faith; its formulation could perhaps be strengthened by replacing the words "is binding" by the words "shall be binding". It was true that the contents of the second sentence were included in the concept of good faith contained in the first sentence. However, he could not agree with Mr. Amado that the matter should be left to judicial interpretation; the very purpose of the second sentence was to facilitate the interpretation of the requirements of good faith in the present context, by the States which would have to apply the treaty. It seemed to him desirable to state the fact that the treaty relationship implied certain negative obligations.

89. Mr. AMADO said he still thought that some latitude should be left for interpretation. In any case, he thought it inadvisable to provide an interpretative instance immediately after the statement of a principle.

The meeting rose at 1 p.m.

749th MEETING

Monday, 22 June 1964, at 4.30 p.m.

Chairman: Mr. Roberto AGO

Organization of Future Sessions

[Item 6 of the agenda]

1. The CHAIRMAN announced that the Commission had considered item 6 of its agenda at a private meeting and reached the following decisions.
2. In 1965 and 1966, the Commission intended to complete its drafts on the law of treaties and on special missions, and to continue its work on relations between States and inter-governmental organizations and on succession of States in respect of treaties.
3. The Secretariat would try to obtain from governments as early as possible their comments on the two drafts to be completed, namely, those on the law of treaties and special missions.
4. In 1965, the Commission intended to complete Part I of its draft on the law of treaties and as many articles as possible of Part II, depending on the proposals submitted to it by the Special Rapporteur. It also intended to work on its draft on special missions.
5. In 1966, the Commission hoped to complete the whole of the draft on the law of treaties and the whole of the draft on special missions, and would

⁶ Yearbook of the International Law Commission, 1962, Vol. II, p. 175.

also deal with the topics of relations between States and inter-governmental organizations and of succession of States in respect of treaties.

6. The Commission would propose to the General Assembly that a session of four weeks be held during the winter of 1966, in addition to the summer session, which would last ten weeks. If necessary it would also propose, at the appropriate time, a winter session in 1967.

Law of Treaties

(resumed from the previous meeting)

[Item 3 of the agenda]

Articles submitted by the Drafting Committee

7. The CHAIRMAN invited the Commission to continue consideration of the text of article 55 proposed by the Drafting Committee.¹

ARTICLE 55 (*Pacta sunt servanda*) (continued)

8. Sir Humphrey WALDOCK, Special Rapporteur, said he understood that the majority of the Commission was in favour of deleting the second sentence of the text proposed by the Drafting Committee; he would agree to that course.

9. The CHAIRMAN said he had suggested at the previous meeting that article 55 would be clearer and more correct if it read: "Every treaty is binding upon the parties among which it is in force". Another difficulty of the text proposed was the use of the words "must be performed"; perhaps it would be more correct to say that the treaty "must be observed" by the parties in good faith. What the article was intended to convey was obviously that a treaty must be observed in good faith by the parties for which it was in force.

10. Mr. TUNKIN said that article 55 expressed a very important principle and it was extremely desirable to retain the short text prepared by the Drafting Committee. As the article stood, it was clear that the expression "the parties to it" meant those parties for which the treaty was in force.

11. The CHAIRMAN said that, in view of Mr. Tunkin's explanation, he was prepared to accept article 55 as it stood.

12. In reply to a question by the Chairman, Sir Humphrey WALDOCK, Special Rapporteur, said he was not in favour of dividing the first sentence into two separate sentences. That suggestion had been made by Mr. Reuter, who thought the second part of the first sentence should be combined with the second sentence, but now that the second sentence was to be dropped, his suggestion no longer applied.

13. The CHAIRMAN said that as there were no further comments he took it that the Commission agreed

to adopt, as article 55, the first sentence proposed by the Drafting Committee; the second sentence would be deleted.

It was so agreed.

14. Mr. BARTOS, Mr. EL-ERIAN, Mr. CASTRÉN and Mr. BRIGGS explained that, for the reasons given at the previous meeting, they were opposed to the deletion of the second sentence.

15. Mr. PAREDES and Mr. REUTER explained that for the reasons given at the previous meeting they did not support article 55.

ARTICLE 57 (Application of treaties in point of time)

16. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 57:

"Application of treaties in point of time"

"A treaty applies to a party only in relation to facts or situations existing while the treaty is in force with respect to that party, unless a contrary intention appears from the treaty or the circumstances of its conclusion."

17. The CHAIRMAN speaking as a member of the Commission, said that the meaning of the text proposed was not very clear. The source of the difficulty was that there were two kinds of treaty: those which related to facts and situations — and it was in connexion with them that the problem arose — and those regarding which that problem did not arise.

18. Mr. REUTER agreed that the proposed text did not mean very much; that was precisely what the Drafting Committee had intended.

19. Mr. BRIGGS, speaking as a member of the Commission, said he had misgivings about the language used in article 57, particularly the words "facts or situations". Language of that kind could lead to considerable difficulty especially with regard to treaties containing jurisdictional clauses. The article was designed to be applicable to all treaties, but it was with respect to treaties containing jurisdictional clauses that the proposed wording was likely to cause most damage. For example, a denial of justice could arise and the fact might not be clearly established at the time when the treaty with a jurisdictional clause was concluded. The text submitted might go too far in excluding prior facts.

20. Mr. de LUNA said that the Drafting Committee had merely carried out the instructions it had received from the Commission. The purpose of article 57 was simply to state that, unless a contrary intention appeared from a treaty or from the circumstances of its conclusion, the treaty did not have retroactive effect.

21. Mr. JIMÉNEZ de ARÉCHAGA suggested that article 57 should be referred back to the Drafting Committee, with instructions to reformulate it in a negative form, along the following lines:

¹ Previous meeting, para. 52.

"A treaty does not apply to a party in relation to facts or situations which had ceased to exist before the entry into force of the treaty with respect to that party, unless a contrary intention appears from the treaty or the circumstances of its conclusion."

22. Mr. YASSEEN said that the idea underlying the article was clear; the object was to affirm that conventional rules were not retroactive. But the text proposed did not appear to say what it should.

23. He had approved, in principle, of the text originally submitted by the Special Rapporteur, which had dealt with the different periods in respect of which a conventional rule was applicable. A concise way of wording the article might be: "The provisions of a treaty do not have retroactive effect unless the treaty provides otherwise".

24. Sir Humphrey WALDOCK, Special Rapporteur, said it would probably be necessary to draft article 57 in greater detail in order to deal with the difficult point raised by Mr. Briggs. In that connexion, he drew attention to the commentary on article 57 in his third report (A/CN.4/167), paragraphs (4 and (5) of which referred to the difficulties that had arisen with regard to the application of the European Convention on Human Rights.²

25. Article 57 was intended to express the idea that a treaty applied to a party with respect to matters that arose, existed or continued to exist while the treaty was in force.

26. He agreed with the suggestion that the article should be referred back to the Drafting Committee.

27. The CHAIRMAN, speaking as a member of the Commission, said that article 57 was one of the most difficult to draft.

28. Perhaps the words "which refers to facts and situations" should be added after the words "A treaty" at the beginning of the article.

29. The wording suggested by Mr. Yasseen might not be consistent with State practice; for many treaties contained jurisdictional clauses, and if a treaty did not specify that it applied only to disputes concerning facts subsequent to its entry into force, such clauses were normally interpreted as having retroactive effect.

30. Mr. AMADO thought that the confusion came from the words "facts" and "situations", which were intended to be explicit, but were not clear. It would be better to use a formula such as that in the second sentence of paragraph (2) of the Special Rapporteur's commentary on the original article 57: "There is nothing to prevent the parties from giving a treaty or some of its provisions retroactive effects".

31. Mr. JIMÉNEZ de ARÉCHAGA said it would not be adequate merely to state in article 57 that treaties did not have retroactive effect. An elliptical formula of that kind did not mean very much, for it gave

no indication of what was meant by "retroactive effect".

32. He urged that the Drafting Committee should consider the negative formulation he had suggested, which had been prompted by the problems raised by the application of the European Convention on Human Rights explained by the Special Rapporteur in his commentary.

33. Mr. BRIGGS said his objection to article 57 was that it might be inconsistent with the finding of the Permanent Court in the *Mavrommatis Palestine Concessions* case³ and might appear to endorse the double exclusion clause formulated in the Belgian Government's declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice, according to which not only past disputes, but also past facts and situations leading to disputes arising subsequent to that declaration were excluded. The original article submitted by the Special Rapporteur had not been specifically directed to treaties containing jurisdictional clauses, but to all treaties. The Drafting Committee's formulation might be more damaging than it appeared to treaties containing jurisdictional clauses, because of its emphasis on the exclusion of past facts as well as situations existing prior to the entry into force of the treaty.

34. The CHAIRMAN, speaking as a member of the Commission, said that the Drafting Committee had a choice of two solutions. It might wish to retain the words "facts or situations", in which case Mr. Jiménez de Aréchaga's proposal would definitely improve the text. It would also be better to speak of "the provisions of a treaty" than "a treaty". Personally, he preferred the other solution, suggested by Mr. Yasseen, which was clearer, simpler and more complete and would amount to stating that "the provisions of a treaty do not have a retroactive effect unless...", for the effect might not be linked with facts or situations.

35. Mr. REUTER thought it doubtful whether the Commission could settle the text of article 57 without knowing what was to be done with article 56, which was also to be reconsidered.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that the real problem in regard to article 57 was whether an obligation under a treaty was only applicable to facts arising after it had come into force. Perhaps the problem would have been simpler but for the fact that treaty provisions concerning disputes were open to alternative interpretations, particularly where treaties contained jurisdictional clauses, because the disputes might relate to matters that had been in existence before the treaty had come into force. Possibly a complication had been caused by the rather vague phrase "unless a contrary intention appears from the treaty" and by insufficient stress on the question whether the treaty contained provisions giving it retroactive effect without explicitly subjecting it to the retroactivity principle, like the treaty which had given rise

² United Nations *Treaty Series*, Vol. 213, p. 222.

³ *P.C.I.J.*, 1924, Series A, No. 2.

to the *Mavrommatis Palestine Concessions* dispute. To forestall that kind of problem, an express clause would be necessary to prevent the application of the treaty to disputes concerning facts or matters arising before the treaty had entered into force.

37. Nothing much would be gained by framing the article as a statement of the principle of non-retroactivity, for the meaning of such a statement was unclear.

38. Mr. CASTRÉN said that, in his opinion, a negative formulation would be preferable for article 57. It was necessary to think not only of the past, but also of the future, when the treaty would no longer be in force.

39. Mr. LACHS said he agreed with Mr. Reuter that articles 56 and 57 should be considered together.

40. The CHAIRMAN said that if, as seemed likely, article 57 was referred back to the Drafting Committee, the Committee would certainly bear in mind the point raised by Mr. Reuter and Mr. Lachs.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 56 and 57 dealt with two entirely separate issues, as article 56 was concerned with the interpretation of a treaty by reference to the law in force at a particular time.

42. Mr. ROSENNE thought that some of the difficulties that had arisen over article 57 were partly due to the Commission's decision to reserve paragraph 2 of the Special Rapporteur's original article 57 for consideration on second reading in connexion with article 53 (legal consequences of the termination of a treaty).⁴ If the Drafting Committee's text of article 57 was to be referred back to the Committee, it should be asked to consider the original paragraph 2, which dealt with the application of a treaty after it had ceased to be in force.

43. The Commission should not complicate its task by allowing itself to be unduly influenced by considerations connected with the interpretation of particular disputes, or provisions concerning disputes, by the International Court. For the most part, it was the disputes that were interpreted rather than treaties themselves, in other words the question to be decided was whether the disputes came within the application of the treaty.

Article 57 was referred back to the Drafting Committee for reconsideration in the light of the discussion.

ARTICLE 58 (The territorial application of a treaty)

44. Mr. BRIGGS, Chairman of the Drafting Committee, proposed the following title and text for article 58:

"The territorial application of a treaty

"A treaty applies to each party with respect to its entire territory unless a contrary intention appears

from the treaty or the circumstances of its conclusion."

45. Mr. TABIBI said that the new text of article 58 met all the objections to the Special Rapporteur's original draft and was entirely acceptable, except for the final phrase "or the circumstances of its conclusion", which might be open to conflicting interpretations by the parties. Reference to the circumstances of a treaty's conclusion was certainly liable to introduce an element of confusion, and reliance should be placed solely on the intentions of the parties as clearly manifested in the treaty itself. He proposed that the final phrase should be deleted.

46. Mr. TUNKIN supported Mr. Tabibi's proposal, and added that the Commission should perhaps be more cautious in referring to the circumstances of the conclusion of treaties in other articles of the draft.

47. The CHAIRMAN, speaking as a member of the Commission, said he was not satisfied with the drafting of the article. Since all treaties were not susceptible of territorial application, the Commission should not generalise. If a State undertook in a treaty to make certain money payments, what would be the meaning of the provision that the treaty applied "with respect to its entire territory"? Perhaps a negative formulation should also be used for article 58.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that the meaning of the text as it stood was that the treaty was binding on each party with respect to its entire territory.

49. Mr. TUNKIN agreed with the Chairman. As he had said before, a treaty applied to the parties as subjects of law and not directly to their territory.

50. Mr. YASSEEN observed that the French Text of the article did not exactly correspond to the English. He agreed with the Chairman that there were treaties which had no direct connexion with the territories of the contracting States.

51. Mr. de LUNA supported the Chairman's remarks. Some treaties, such as those dealing with customs matters, clearly had a territorial application. All other treaties created an obligation for the State as a subject of international law, irrespective of its territory. It might be advisable to adopt a negative form of words for article 58.

52. As to the "circumstances" referred to in the final phrase of the article, they would no doubt be significant when it came to interpreting the treaty; but for the time being it would be better to delete that ambiguous expression and draft an article that was as clear as possible.

53. Mr. REUTER suggested that certain misgivings would be allayed by some such wording as "the rules laid down in a treaty apply to the whole of the territory of each of the parties".

54. Sir Humphrey WALDOCK, Special Rapporteur, said that a formula on the lines proposed by the Chair-

⁴ See 730th meeting, paras. 66 *et seq.*

man was hardly likely to meet with acceptance, as the discussion had clearly shown that the majority of the Commission was firmly of the opinion that a treaty was applicable to the entire territory of each of the parties. The Chairman's point was purely one of logic and did not affect the substance of the article.

55. Mr. BRIGGS said that article 58 should be expressed in positive form as its purpose was to lay down that a State becoming a party to a treaty must apply it throughout its whole territory unless the treaty provided otherwise.

56. Mr. TUNKIN pointed out that some treaties had no application to State territories at all; for example, those concerned with the high seas or outer space. The text should probably be drafted in more explicit terms and should state that it referred only to provisions capable of being applied territorially.

57. Mr. PAL said that article 58 would be acceptable to him in positive form if the last phrase was omitted. He would have thought that Mr. Tunkin's point was covered by implication, but even if it had to be expressly stated that the provision dealt with treaties having territorial application, the article would still be better formulated in positive terms.

58. Sir Humphrey WALDOCK, Special Rapporteur, said he would have thought it obvious that the article could not apply to a treaty that had no territorial application: the particular examples mentioned by Mr. Tunkin were not altogether appropriate, for ships bound for the high seas might sail from ports in the territory of a party and rockets could be launched from its territory into outer space.

59. He still thought the Chairman's criticism was unfounded, because the article, as redrafted, began with the words "A treaty applies to each party".

60. The CHAIRMAN, speaking as a member of the Commission, said he would not press for the adoption of a negative formulation, but the present text, particularly the French version which began with the words "Tout traité", was not acceptable.

61. Mr. TUNKIN said that the French text of article 57 did not exactly correspond to the English and should be brought into line with it.

62. Mr. LACHS supported Mr. Tabibi's proposal that the last phrase should be deleted.

63. On the main point of disagreement, he said that perhaps the difficulty arose from the use of the word "applies", which might be replaced by some such expression as "has binding force on". The Chairman was correct in maintaining that, for material reasons, a treaty might be applicable to only part of the territory of a party.

64. He was dissatisfied with the word "contrary" and suggested that it be replaced by the word "different". With those changes, the Drafting Committee should be in a position to work out an acceptable text.

65. Mr. BARTOŠ said that he could not accept the new text of article 58. In the first place, as Mr. Tunkin and the Special Rapporteur had pointed out, treaties concluded by States could apply elsewhere than in their territory: as examples, he need only refer to treaties dealing with the high seas or with outer space and the treaty by which Poland had agreed to take part in a mission to Laos. Secondly, while it was true that the developing countries preferred to avoid such expressions as "territories for which the parties are internationally responsible" (used in the Special Rapporteur's original draft), the phrase "with respect to its entire territory", proposed by the Drafting Committee, might, in his opinion, have still more undesirable consequences, for a State might claim that a treaty did not apply to territories for which it was responsible on the ground that they were not part of "its territory". It was difficult for the Commission to escape from that dilemma, and it would be better to refer article 58 back to the Drafting Committee.

66. Mr. TABIBI fully agreed with Mr. Lachs. He thought that most of the points made during the discussion could be adequately covered by explanations in the commentary showing the meaning and purposes of the article.

67. The CHAIRMAN, speaking as a member of the Commission, said he did not consider it sound practice to draft articles that were not clear and then explain them in commentaries which would eventually disappear.

68. Sir Humphrey WALDOCK, Special Rapporteur, said that some of the objections made to article 58 might be met by substituting the words "is binding on" for the words "applies to". The substitution of the word "different" for the word "contrary" was acceptable.

69. He was somewhat perturbed to note that the Commission seemed inclined to drop the reference to the circumstances of the conclusion of the treaty in some articles and not in others. The purpose of that reference was to cover cases in which certain matters were mentioned in the *travaux préparatoires*, but not in the treaty itself; perhaps the point could be dealt with in the articles on the interpretation of treaties.

70. The CHAIRMAN, speaking as a member of the Commission, asked the Special Rapporteur whether, if the United Kingdom concluded a treaty that did not mention the Channel Islands—which were normally excluded from treaties concluded by the United Kingdom—the treaty would apply to those Islands.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that article 58, as drafted would be consistent with United Kingdom practice in respect of the Channel Islands, Northern Ireland and the Isle of Man. If the intention was to exclude those territories from the application of a particular treaty, it was the invariable practice to state that intention expressly.

72. Mr. TUNKIN said it would be preferable to replace the words "unless a contrary intention appears

from the treaty” by the words “unless the treaty provides otherwise”, which were used elsewhere in the draft. The reference to the intention of the parties was too vague and might give rise to difficulties of interpretation.

73. Sir Humphrey WALDOCK, Special Rapporteur, said that that change would be acceptable.

Article 58 was referred back to the Drafting Committee for revision in the light of the discussion.

The meeting rose at 5.45 p.m.

750th MEETING

Tuesday, 23 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(continued)

[Item 3 of the agenda]

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to continue consideration of the articles submitted by the Drafting Committee.

ADDITIONAL ARTICLE FOR PART I (FORMER ARTICLE 60)
(Authorization to act on behalf of another State in the conclusion of a treaty)

2. Sir Humphrey WALDOCK, Special Rapporteur, said it would be remembered that after discussing his drafts of article 59 (Extension of a treaty to the territory of a State with its authorization) and article 60 (Application of a treaty concluded by one State on behalf of another),¹ the Commission had decided to omit article 59 and to invite the Drafting Committee to examine article 60 and consider whether the right context for its subject-matter was Part I of the draft on the law of treaties (Conclusion, entry into force and registration of treaties). The Drafting Committee had reached the conclusion that the subject matter of article 60 belonged in Part I and had prepared the following tentative draft of an article.

“Authorization to act on behalf of another State in the conclusion of a treaty

“A State may authorize another State to perform on its behalf any act necessary for the conclusion of a treaty provided that the other States participating

in the adoption of the text of the treaty agree thereto.”

3. Although the intention was to introduce that provision in Part I, it would nevertheless be included in the report on the current session, in order to bring it to the notice of governments and to invite their comments.

4. Mr. VERDROSS proposed that the last part of the text, beginning with the words “provided that” be deleted, as such a proviso was not consistent with existing law; other States could not refuse to recognize that Switzerland, for example, was authorized to conclude international treaties on behalf of Liechtenstein. The case in which one State authorized another State to act on its behalf was quite different from that in which a State designated a diplomatic agent to represent it permanently in the territory of another State; in the latter case the consent of the receiving State was necessary.

5. Mr. PESSOU said he supported Mr. Verdross’s proposal. Furthermore, the word “empower” (*donner pouvoir à*) would be better than “authorize”, for it showed more clearly that every State was sovereign.

6. Mr. CASTRÉN also supported Mr. Verdross’s proposal, for the reasons given by Mr. Verdross.

7. Mr. BARTOŠ said he approved of the text proposed by the Drafting Committee, on the understanding that the authorization could be revoked at any time by the State which had given it. He was not opposed to the practice of delegation of power, even on a long-term basis, but he considered that if it was not specified that the arrangement was revocable, the provision would jeopardize the principle of independence of States laid down in the Charter and condone situations that might be tantamount to a disguised protectorate.

8. Mr. JIMÉNEZ de ARÉCHAGA, referring to the proposal to delete the concluding proviso, said that there might appear to be some reason for the deletion, since the authorization in question did not require consent or recognition by the other States in order to be granted. However, the article embodied two ideas: first, that one State could authorize another to perform on its behalf any act necessary for the conclusion of a treaty; and second, that such an authorization could only be exercised with the consent of the other States concerned. The best manner of dealing with the problem was to make clear that the consent of the other parties was required not for the granting, but for the exercise of the authorization.

9. Mr. ROSENNE agreed with those remarks. The question raised was not one of recognition, but of knowing with whom one was contracting.

10. Mr. YASSEEN said that the validity of the authorization referred to in the article was not conditional on the agreement of the other parties, and he therefore supported Mr. Verdross’s proposal. Nevertheless, the other parties must know whom they were dealing with when a State negotiated or concluded a treaty on behalf

¹ 732nd and 733rd meetings.

of another State; hence the Commission should provide that the other parties must be notified of the authorization. In addition, as he had said during the previous discussion on article 60, the authorization should always be revocable.²

11. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Jiménez de Aréchaga and Mr. Rosenne had explained the position adequately. His own draft of article 59 (A/CN.4/167) had simply stipulated that the other parties must be aware of the authorization. If a State objected to the arrangement whereby one State represented another, it was always open to it to refuse to negotiate with the representing State. In substance, it was therefore true to say that the assent of the other States was necessary. However, he found Mr. Yasseen's suggestion acceptable, in that the provision thus amended would make it clear that the other States must be aware of the authorization; their right to object could be implied.

12. He maintained his view that the case of Liechtenstein and Switzerland was a very special one.

13. Mr. REUTER said he supported Mr. Verdross's proposal, because the representation of one State by another for the purpose of concluding a treaty might perhaps raise a problem of recognition, but could not be conditional on the consent *stricto sensu* of the other parties.

14. The article proposed had been drafted with the legitimate intention of giving an implicit warning against the protectorate system, but it left aside the structures which could be founded on the equality of States, such as unions of States, federations, or even international organizations. The article did not say whether a State could authorize the organs of a union of States to act on its behalf. Some members of the Commission might perhaps think that that question was connected with the question of relations between States and inter-governmental organizations. For his part, he would not be able to accept the article if it ruled out the possibility of States delegating to certain organs of a union of States the right to perform certain acts for the purpose of concluding international treaties.

15. The CHAIRMAN said he thought all the members of the Commission agreed that the proposed text in no way prejudged the question whether a State could delegate to an international organization the power to conclude a treaty on its behalf.

16. Speaking as a member of the Commission, he asked the Drafting Committee and the Special Rapporteur whether the first part of the article really meant that the representing State could conclude a treaty on behalf of the represented State, or whether it referred only to the intermediate acts, exclusive of the actual conclusion.

17. He recognized that the concluding proviso of the article was too strict: in the case of a multilateral treaty it would be impossible to make sure of obtaining the consent of all the other States. He therefore sug-

gested that the passage beginning "provided that" should be replaced by the words "if the other States do not object".

18. Sir Humphrey WALDOCK, Special Rapporteur, said that his original draft of article 60 (A/CN.4/167) had spoken of the conclusion of a treaty by one State on behalf of another State. However, the Drafting Committee's object in proposing the text under discussion had been to make allowance also for the case in which, for example, a State which was being represented by another State at a conference reserved to itself the right of ratification.

19. In reply to the Chairman's other point, he said that the other States had to be aware of the authorization, for it was clearly the right of States to know with whom they were contracting. The position varied with the type of treaty. In the case of a multilateral treaty, the conference convened to establish the text would sooner or later have to deal with the question of credentials and today it did not necessarily do so at the opening. Moreover, it was possible that a State which had not felt sufficiently affected to send delegates to a conference, might change its mind and ask another State to act on its behalf. The crucial moment for the negotiating States to know of any such authorization would be the time of settlement of the final clauses of the treaty, in other words, the adoption of the text of the treaty.

20. The CHAIRMAN, speaking as a member of the Commission, said that the first part of the article would be less ambiguous if it specified that a State could authorize another State to conclude a treaty on its behalf and to perform any act necessary for the conclusion of the treaty.

21. With regard to the last part of the article, he still thought that provision should be made for objection by the other parties in certain cases.

22. Mr. TUNKIN said that the Drafting Committee had proceeded on the assumption that, in normal cases, the authorization would relate to the performance of some particular act or acts, but not to the whole process of concluding a treaty. It would hardly be possible under existing conditions for one State to authorize another to ratify a treaty on its behalf. Such a situation would be most abnormal and would suggest a sort of protectorate. He was therefore opposed to the amendment suggested by the Chairman. The wording proposed by the Drafting Committee did not exclude the exceptional case in which a State authorized another to perform all the acts leading up to the conclusion of a treaty, but it was important not to give undue prominence to that exceptional case.

23. The CHAIRMAN, speaking as a member of the Commission, said he still thought that normally, where there was an agency relationship, it was for the purpose of concluding a treaty. That was particularly true of treaties which came into force on signature.

24. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had thought that the

² 732nd meeting, para. 47.

commentary would deal with the question of an authorization given by a State to a union of States or to an international organization to act on its behalf. The alternative would be to say in the article that a State might authorize "another State or subject of international law to perform on its behalf any act, etc." The Committee had not made any reference to those cases in the article, because it was to be placed in section II of Part I, which was entitled "Conclusion of treaties by States". Admittedly, when one State concluded a treaty with another through an international organization the treaty was still concluded between States, but the introduction of the organization complicated the matter and the Committee had preferred to confine the article to authorizations given to States.

25. With regard to the point mentioned by Mr. Tunkin, he pointed out the relevance of quasi-federal relationships and economic unions of the type linking Belgium and Luxembourg. Another illustration of representation of one State by another in the conclusion of treaties was provided by the Byelorussian SSR and the Ukrainian SSR, which were parties to treaties as separate subjects of international law, but for which the USSR acted on occasion in the conclusion of international treaties.

26. Mr. PAL said that the problem which had arisen would be largely solved if the proposed additional article was placed in section II of Part I near article 4, which dealt with the authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty. The additional article could be formulated as proposed by Mr. Verdross, and article 4 could be slightly amended so as to cover the case of one State representing another and the requirements for such representation.

27. The CHAIRMAN said that the Commission appeared to be in agreement on the position of the new article.

28. Mr. VERDROSS supported Mr. Yasseen's suggestion; the last part of the article could be amended to read: "provided that the other States have been notified of the authorization". The other States could not deny that the agency relation was a lawful one, but they were entitled to know of its existence. They could decline to negotiate a particular treaty with the representing State, but they could not deny its authority to conclude such a treaty.

29. The case of Switzerland and Liechtenstein was not unique; there was also the Belgium-Luxembourg Economic Union relationships such as those between Bhutan and India.

30. Sir Humphrey WALDOCK, Special Rapporteur, said he had not claimed that the case of Liechtenstein was unique; in fact, he had mentioned other cases in the commentary on his original article 60. He had pointed out, however, that the agreement between Liechtenstein and Switzerland was a very peculiar form of treaty arrangement which the Commission had agreed to leave aside.

31. Mr. BARTOŠ was in favour of retaining the concluding proviso as it appeared in the Drafting

Committee's text because, for one reason, there had been cases in which the possibility of certain agency relationships had been excluded by virtue of a special status. For example, representation of the Free Territory of Trieste by Italy or by Yugoslavia had been expressly prohibited. No doubt that kind of restriction was exceptional — and contrary to the principles of the equality and sovereignty of States — but it might be necessary for political reasons and for the maintenance of world peace.

32. Mr. de LUNA said that the wording suggested by the Chairman was clearer than that proposed by the Drafting Committee. However, it was not absolutely essential to specify that a State could authorize another to perform all the acts leading up to the conclusion of a treaty. He agreed that the authorization should be brought to the notice of the other States concerned, but he could not agree that notification should be made an actual condition for the validity of the authorization. The authorization was valid regardless of any notification to other States; the notification was necessary only to enable the representing State to act on behalf of the represented State *vis-à-vis* the other States. If the other States did not wish to negotiate under those conditions, it was always open to them not to enter into negotiations.

33. Nor was the consent of the other States a necessary condition for the validity of the authorization. As he had pointed out, the consent was necessary only to enable the representing State to act upon the authorization.

34. Mr. EL-ERIAN reserved his position regarding the additional article, which the Commission had not an opportunity to discuss when it had considered the effects of treaties on third parties. The Commission had regarded that question as being of an exceptional character, and he thought it unnecessary to go into details regarding the exceptional situation contemplated in the article.

35. He found the main provision of the article much too broad, in that it referred to "any act" necessary for the conclusion of a treaty. With regard to the proviso, he supported Mr. Yasseen's suggestion that the reference to agreement by the other States should be replaced by a reference to the requirement of notification.

36. The CHAIRMAN, speaking as a member of the Commission, said that the situation contemplated in the article was not exceptional and need not necessarily arise from quasi-constitutional arrangements such as the Belgium-Luxembourg Economic Union. There would be a serious gap in the Commission's draft if no such article was included.

37. Mr. TUNKIN said there appeared to be general agreement regarding the first part of the article.

38. With regard to the discussion on the concluding proviso, he reiterated his view that the whole article dealt with exceptional cases; that was why his first impression had been that the article was hardly necessary. Normally, in international relations every State

acted for itself alone; the representation of one State by another was quite exceptional in modern times, although there were still a few small British protectorates.

39. The very fact that one State was authorized to act for another could have political implications. Pressure had sometimes been exerted on a State to make it subscribe to an authorization of that type. Other States might not be prepared to accept such a situation, and their right to object should be recognized. He therefore considered that the Commission should at least amend the article to provide for notification of the authorization and for the right of the other States to object.

40. Mr. YASSEEN explained that when making his earlier remarks he had not lost sight of the fact that a State was free to enter or not to enter into treaty relations with other States. Notification would be the condition not of the validity of the authorization, but perhaps of its efficacy. The concluding proviso of the article could be replaced by a second sentence reading:

“The other States which are to conclude the treaty must be duly notified of the authorization.”

Thus amended, the article would not in any way imply that the other States were obliged to negotiate and conclude the treaty with the representing State.

41. Mr. de LUNA said that his objection had been to notification being made a condition of the authorization. He suggested that the proviso should be replaced by a separate sentence reading:

“The other States participating in the adoption of the text of the treaty must agree to the performance of the said act.”

42. Mr. AMADO proposed that the article should be drafted to read:

“If a State is authorized by another State to conclude a treaty on its behalf, the consent of the other party or parties is necessary.”

That wording would remove the obscurities without over-emphasizing the fact that the other States must be told what was happening.

43. Mr. ELIAS proposed, as a compromise solution, that the words “provided that” should be replaced by the word “if” and the words “agree thereto” by the words “are aware of such authorization and do not object to it”.

44. Mr. PAL said it did not seem to him very material whether the second part of the article was retained or deleted. The fact that one State authorized another to act on its behalf did not mean that other States would be bound to act under the authority even against their own inclination.

45. Mr. TUNKIN supported Mr. Elias’ suggestion subject to drafting changes.

46. Referring to the point made by Mr. PAL, he said it would not be sufficient merely to state that the authorization was possible; such a statement could be

held to imply that other States were obliged to accept the situation.

47. Mr. JIMÉNEZ de ARÉCHAGA suggested that the article should be referred back to the Drafting Committee.

48. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the article should be redrafted on the following lines:

“A State may authorize another State to perform on its behalf any act necessary for the conclusion of a treaty provided that the other States participating in the adoption of the text have notice of such authorization and do not object.”

49. He would prefer not to include the words “to it” proposed by Mr. Elias, in order to avoid the implication that the other States could object to the actual authorization. By virtue of the principle of the independence of States there would be no right to object to the authorization itself; other States could only object to negotiating with the representing State under those conditions.

50. Another difference between his text and that proposed by Mr. Elias was the use of the words “have notice of” instead of “are aware of”.

51. Mr. LIU said it would be better not to be content with a mere awareness by other States. It was extremely difficult to determine whether a State was aware of a situation or not. He would therefore prefer the article to stipulate that the other States should be duly notified and that there must be no objection on their part.

52. Sir Humphrey WALDOCK, Special Rapporteur, said that such a stipulation would be too strict. In the case of the union between Belgium and Luxembourg, there would be no formal notification of the right of Belgium to represent Luxembourg, but there would be notice of the situation. In some cases, a formal notification might be given, but not always, so the article should be drafted in more cautious terms.

53. Mr. ELIAS said that the omission of the concluding words “to it” would leave the text open to several interpretations. Brevity should not be achieved at the expense of clarity.

54. He did not think that the article should be referred back to the Drafting Committee without a clearer indication of what the Commission had agreed upon.

55. The CHAIRMAN observed that the members of the Commission were agreed on the substance: if a State negotiated on behalf of another State, the other parties must know of the agency relationship; they could not refuse to recognize an authorization given by one State to another, but they could refuse to negotiate under those conditions. It would be for the Drafting Committee to find the most appropriate wording.

56. Speaking as a member of the Commission, he maintained that the authorization related essentially

to the act of concluding the treaty. That point might be made clear in the commentary.

57. He added that, in his opinion, the words "*les autres Etats appelés à adopter le texte du traité*" in the French text did not exactly correspond to the English wording "the other States participating in the adoption of the text of the treaty".

58. Sir Humphrey WALDOCK, Special Rapporteur, said that in the opinion of the Drafting Committee, the stage at which the text of a treaty was adopted was the critical moment when the participating States had to know with which others they were going to enter into treaty relations.

59. The CHAIRMAN, speaking as a member of the Commission, expressed the opinion that the door should be left open to every possibility by using a more general expression such as "contracting States", so that the concluding passage would not refer solely to the moment at which the text of the treaty was adopted.

60. Mr. REUTER said he would have to oppose any text which called in question an institution so well established as the Customs union and which would allow a State, either during the negotiations or even when the text of the treaty was adopted, to object that it could not agree to deal with the authorized representative.

61. He would prefer the Commission to specify that a State could not delegate functions of sovereignty permanently, except under arrangements preserving the equality of States or to an international organization.

The additional article for Part I (former article 60) was referred back to the Drafting Committee for revision in the light of the discussion.

ARTICLE 61 (Treaties create neither obligations nor rights for States not parties)

62. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Committee proposed the following new text for article 61:

"Treaties create neither obligations nor rights for States not parties"

"A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon States not parties to it."

63. The Drafting Committee considered that that was a concise and exact rendering of the general rule. It would be noted that in the English text the reference to "third States", which had appeared in the Special Rapporteur's original draft (A/CN.4/167), had been dropped from the titles of article 61 and the three following articles proposed by the Committee, which read:

"Article 62"

"Treaties providing for obligations for States not parties"

"A State may become bound by an obligation contained in a provision of a treaty to which it is not a party if the parties intended the provision to be

the means of establishing that obligation and the State in question has expressly agreed to be so bound.

"Article 62 A"

"Treaties providing for rights for States not parties"

"1. A State may exercise a right provided for in a treaty to which it is not a party if (a) the parties to the treaty intended the provision to accord that right either to the State in question or to a group of States to which it belongs or to all States, and (b) the State expressly or impliedly assents thereto.

"2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions laid down in, or in conformity with, the treaty for the exercise of the right.

"Article 62 B"

"Termination or amendment of provisions regarding rights or obligations of States not parties"

"When in accordance with article 62 or 62 A a State is subject to an obligation or entitled to exercise a right under a provision of a treaty to which it is not party, the provision may only be terminated or amended with the consent of that State, unless it appears from the treaty or the circumstances of its conclusion that the obligation or right was intended to be revocable."

64. Mr. RUDA said that the titles and wording of articles 61, 62 and 62 A proposed by the Drafting Committee were inconsistent. Whereas the title of article 61 stated that "Treaties create neither obligations nor rights for States not parties", the titles of the immediately following articles 62 and 62 A referred to treaties providing for obligations and rights for States not parties. Again, the categorical rule laid down in article 61 was followed by the exceptions provided for in articles 62 and 62 A. Perhaps the apparent illogicality could be remedied by adding the words "in principle" at the beginning of article 61.

65. The CHAIRMAN, speaking as a member of the Commission, asked whether it was a rule of the Commission to give a separate title to each article, or whether it could group several articles together under a single title. If permissible, it would be convenient to group the three articles in question under the heading "Treaties and third States".

66. Sir Humphrey WALDOCK, Special Rapporteur, said it had been the Commission's practice to give each article a title. It would, of course, be possible to devise a more general title for article 61 such as "Treaties and their effects on third parties".

67. Some members of the Drafting Committee had not entirely approved of so absolute an affirmation as that made in article 61 and had considered that a qualifying phrase of the kind suggested by Mr. Ruda was necessary; but it had finally been decided that article 61 could remain as it stood provided that articles 62 and 62 A were properly formulated.

68. Mr. BRIGGS explained that the Drafting Committee had been at pains not to take a position on the

doctrinal controversy which had arisen in the Commission as to whether a treaty could actually create rights for third States or only provide an offer of a right which could be accepted or declined. The Committee had decided that it would not be inconsistent to use the phrase "neither imposes any obligations nor confers any rights" in article 61 and to speak of treaty provisions that could be the "means of establishing" a right or obligation in the following articles. Although some members had argued that article 61 should be made subject to the two succeeding articles, such a proviso had been rejected as out of place, because the succeeding articles did not really constitute exceptions to article 61.

69. Mr. CASTRÉN said that, although he found the wording of the articles generally satisfactory, and despite the explanations given by the Special Rapporteur and Mr. Briggs, he agreed with Mr. Ruda that the titles and contents of the articles were too broadly drafted in so far as they related to rights. The text proposed by Mr. Jiménez de Aréchaga for article 62 C³ mentioned treaties that conferred rights on third States, so that article 61 should at least contain a saving clause referring to articles 62 A and 62 C.

70. Mr. ROSENNE drew attention to the discrepancy between the titles of articles 61 to 62 B in the different languages. In the French and Spanish versions, the expressions "Etats tiers" and "terceros Estados" were used, although the term "third States" had been deliberately avoided in the English.

71. He suggested that the Commission should follow the order in which the Drafting Committee has proceeded and leave the discussion of article 61 until after articles 62, 62 A and 62 B had been considered.

72. Mr. VERDROSS said that he fully agreed with Mr. Ruda and Mr. Castrén. Article 61 should consist only of the first phrase, "A treaty applies only between the parties". The second part of the sentence was unnecessary and, indeed, inaccurate, since there could be treaties providing for obligations for States not parties — the case dealt with in article 62 — and treaties providing for rights for States not parties — the case dealt with in article 62 A. Moreover, it might be advisable to add a proviso concerning the rights and obligations of a successor State, which might read: "without prejudice to the rules of State succession".

73. The CHAIRMAN, speaking as a member of the Commission, said that apart from its title article 61 seemed to him to be well drafted. A treaty did not, as such, impose any obligations or confer any rights on a non-party State without that State's consent. That principle was confirmed in the other articles and the arrangement was therefore a logical one. One might be opposed to the arrangement, but assuming that it was adopted, the formulation proposed by the Drafting Committee was satisfactory.

74. Mr. de LUNA associated himself with the comments made by Mr. Ruda and Mr. Verdross. Although

it was true that a treaty could not create obligations for a non-party State without its consent, it could nevertheless create subjective rights, whether or not they were exercised by the States for which they had been created. Hence the text should satisfy those who did not admit that a treaty could really create rights and regarded it as making an offer that might be accepted or declined. That being so it was unnecessary to make any reference to States not parties. So far as obligations were concerned, the question of third States did not arise. So far as rights were concerned, it was still uncertain which members of the Commission believed that treaties could create rights without the need for another treaty to establish those rights with the consent of the States for which they had been created.

75. In any event, in laying down that rule, the Commission was merely giving expression to the general principle *res inter alios acta aliis nec prodest nec nocet*. Article 62 should be so worded as to take both views into account: the view of those who regarded the right as an offer that had been accepted, and the view which he, for one, maintained, that subjective rights could be conferred on a non-party State without any need for its acceptance.

76. The CHAIRMAN urged the members of the Commission not to resume the long discussion which had already taken place on the principle. They were in agreement on one point, which had been emphasized by Mr. Jiménez de Aréchaga, namely, that the consent of a non-party State was required before either an obligation or a right could exist. That meant, not that there must be external evidence of consent in each case, but that two States could not impose an obligation or a right on another State against its will.

77. Mr. LACHS said he could subscribe to the principles embodied in articles 61 to 62 B, but he feared that if article 61 were read in isolation instead of in the context of the four articles, it might give the impression of regulating the whole matter, whereas articles 62 and 62 A were complementary and provided for exceptions to the rule.

78. As in some other instances the word "applies" might not be altogether satisfactory and perhaps it should be replaced by the word "binds", in which case the word "between" would need to be deleted.

79. Sir Humphrey WALDOCK, Special Rapporteur, said that the use of the word "binds" would not be altogether satisfactory. The word "applies" was being used in an intransitive sense.

80. Although originally he had had some objections to the somewhat bald statement of principle in article 61, he had come round to the view that it could stand, because, as drafted, the two succeeding articles clearly showed that obligations and rights might arise for third parties subject to their consent.

81. The formula did not seem to him to compromise the position either of those members who regarded articles 62 and 62 A as exceptions or of those who did not.

³ 752nd meeting, para. 1.

82. The CHAIRMAN, speaking as a member of the Commission, said he would prefer to leave the text as it was; but in order to satisfy Mr. Lachs he would suggest that some such clause as "subject to the provisions of the following articles" be added to article 61.
83. Mr. REUTER suggested the words "without prejudice to the following articles".
84. Mr. ELIAS suggested that the title of article 61 be amended to read "The effect of a treaty upon States not parties to it" and that the titles of the succeeding three articles be dropped. The general principle stated in article 61 would then be read in conjunction with the remaining provisions, which could be left as they stood.
85. The CHAIRMAN observed that the same result could be achieved by making articles 62 to 62 B into paragraphs of article 61.
86. Mr. TABIBI said he was not in favour of altering the title of article 61; it explained the content of the principle laid down, the exceptions to which were stated in the two succeeding articles. He was, however, in favour of deleting the latter part of the article from the words "and neither imposes". The question of the succession of States in the matter of treaties might also be mentioned, as suggested by Mr. Verdross.
87. Mr. PESSOU said that if it was necessary to find a title for the whole of the text, his preference would be a formula such as that suggested by the Chairman: "Treaties and third States". The general rule could be set out clearly in article 61, and articles 62 and 62 A, which stated the exceptions, could begin with word "however".
88. Mr. YASSEEN said that article 61 was very well drafted and stated the existing rule of positive law, in other words the general principle of international law that treaties could not be invoked against third States. The same was true of articles 62, 62 A and 62 B. The essential point was that the situations provided for in articles 62, 62 A and 62 B were not exceptional; those articles based the rights and obligations that might result from a treaty on the general theory of international agreement. In reality neither the rights nor the obligations existed until they had been accepted by the non-party State. He was not in favour of introducing into article 61 a clause such as "subject to the provisions of the following articles", which might give the impression that there were exceptions. He was prepared to accept the articles as proposed by the Drafting Committee.
89. Mr. AMADO suggested that the difficulty might be overcome by retaining the existing title of article 61 and its opening phrase and beginning article 62 with the sentence:
- "A treaty imposes no obligations and confers no rights on States not parties to it, but a State may be bound by an obligation provided for in a provision of a treaty to which it is not a party."
90. The CHAIRMAN pointed out that that would mean recasting the whole text, as Mr. Amado's proposal referred only to obligations and not to rights.
91. Mr. ROSENNE said that article 61 was a precise statement of the law as it stood, both in its positive and its negative aspects, and should be left unchanged. The principle involved was the application to the law of treaties of the more general and fundamental rule *res inter alios acta tertiis nec nocent nec prosunt* and the Commission should be careful not to upset that rule.
92. Rather than combine the four articles, it would be preferable to place them in a separate section together with article 64, which was also closely linked with them.
93. There was no need to mention in the text of article 61 the question of State succession, concerning which a general reservation had been made in the introduction to Part III of the Special Rapporteur's third report (A/CN.4/167) and in the commentary on certain articles. The same procedure would suffice in the present instance.
94. The CHAIRMAN thought that generally speaking it would be advisable to introduce as few reservations as possible concerning State succession or State responsibility, since the Commission might subsequently overlook the need for them in other articles.
95. Sir Humphrey WALDOCK, Special Rapporteur, agreed with Mr. Rosenne that the matter of State succession should be dealt with in the commentary only, because in whatever language the reservation was inserted in the text of the articles themselves, it would hardly be possible not to prejudge the existence or non-existence of a possible rule of State succession.
96. Mr. JIMÉNEZ de ARÉCHAGA said that there was a contradiction between article 61 and articles 62 and 62 A. Mr. Briggs's explanation that article 61 referred only to the creation of rights was contradicted by the use of the word "confers" rather than "creates". Mr. Yasseen's contention that articles 62 and 62 A did not constitute exceptions would only be tenable if the words "without their assent" appeared at the end of article 61. The only way of removing the contradiction would be to include in article 61 some neutral formula such as "subject to the provisions of the following articles" which would make it plain that the succeeding provisions were not exceptions.
97. Mr. RUDA said that as he had not been present at the earlier discussion on the principle, he was only concerned to prevent any apparent contradiction in the presentation of the three articles. There were two prerequisites for the granting of rights and the imposition of obligations: the intention of the parties to a treaty to impose the obligations and to confer the rights, and the consent of the third State to accept them. Those elements should be common to the articles under consideration: but the idea of consent was lacking in article 61, so that it might perhaps be advisable to add some such phrase as "except with their consent".

98. The CHAIRMAN, speaking as a member of the Commission, pointed out that in that case the word "imposes" in article 61 would become meaningless and there would be no need for the next two articles. He would prefer a saving clause on the lines suggested by Mr. Reuter.

99. Mr. RUDA confirmed that his suggestion would involve the deletion of the subsequent articles. He would be prepared to accept a saving clause, however.

100. Mr. AMADO said that the Special Rapporteur's objection that a saving clause would affect the actual substance of the articles had yet to be answered, but the Commission appeared to have abandoned every other solution, including even the wording he had suggested himself, against which the Chairman's objection was hardly valid.

101. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Amado so far as the idea was concerned, and therefore favoured a saving clause, for he did not see how an article could begin with the word "however".

102. Mr. ROSENNE said that he would regret the insertion of any qualifications in article 61, for in his opinion that article accurately and forcefully stated the general principle. In the form in which they were drafted, he did not consider that articles 62 and 62 A constituted exceptions.

103. Mr. PAREDES said he was in favour of a single title for the four articles. Every treaty was essentially concerned with some matter of particular interest to the parties, and any rights or obligations that might be created for non-party States should be regarded as exceptions. Articles 62 and 62 A stated exceptions to the rule contained in article 61, with which he agreed.

104. The CHAIRMAN suggested that at its next meeting the Commission should first consider articles 62, 62 A and 62 B, so as to reach full agreement on their contents, and then revert to article 61.

It was so agreed.

The meeting rose at 1 p.m.

751st MEETING

Wednesday, 24 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(continued)

[Item 3 of the agenda]

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the group of four articles relating to the effects of treaties on States not parties to them in the order

agreed at the previous meeting, taking articles 62, 62 A and 62 B first and then reverting to article 61.

ARTICLE 62 (Treaties providing for obligations for States not parties)

2. Mr. BRIGGS, Chairman of the Drafting Committee said that the Committee proposed the following title and text for article 62:

"Treaties providing for obligations for States not parties"

"A State may become bound by an obligation contained in a provision of a treaty to which it is not a party if the parties intended the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound."

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the French text of article 62 did not exactly correspond to the English.

4. Mr. REUTER said he agreed that the verb "être" did not convey the idea of movement in the English verb "to become", but a literal translation would not be correct French.

5. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the opening words of article 62 should be amended to read "An obligation may arise for a State from a provision of a treaty...".

6. Mr. LIU said that probably the phrase "A State may become bound" had been used in order to establish the link between articles 62 and 61, but if they were ultimately to be combined it would suffice to say "A State may be bound".

7. Article 61¹ spoke of "imposing" obligations and "conferring" rights, whereas the succeeding articles spoke of "establishing" obligations and "according" rights. The language should be made uniform.

8. The CHAIRMAN said that the terms "impose" and "establish" had been used advisedly in order to stress that the assent of the third State was necessary for the obligations to come into being.

Article 62 was approved with the amendment suggested by the Special Rapporteur.

ARTICLE 62 A (Treaties providing for rights for States not parties)

9. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 62 A:

"Treaties providing for rights of States not parties"

"1. A State may exercise a right provided for in a treaty to which it is not a party if (a) the parties to the treaty intended the provision to accord that right either to the State in question or to a group

¹ See previous meeting, para. 62.

of States to which it belongs or to all States, and (b) the State expressly or impliedly assents thereto.

"2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions laid down in, or in conformity with, the treaty for the exercise of the right."

10. Mr. VERDROSS said he approved of the drafting of paragraph 1 as far as the end of clause (a). The words "A State may exercise" were also acceptable to those who held that actual rights could be created for third States, for it had never been part of their theory that rights could be imposed on third States. On the other hand it seemed that the supporters of the opposite theory might be able to drop clause (b), which recognized that the assent could be implied, since they held that the exercise of the right constituted implied assent.

11. The CHAIRMAN pointed out that if clause (b) were deleted all idea of assent would be removed. By merely saying that a State might exercise a right, the Commission would give the impression that, in its opinion, the right existed independently of assent.

12. Mr. JIMÉNEZ de ARÉCHAGA said that although on theoretical grounds he had some sympathy with Mr. Verdross's view, he must point out that clause (b) was intended as a compromise to reconcile the difference of opinion between those who believed that the right derived directly from the treaty and those who considered that the express or implied assent of the third State was necessary before the right could come into existence.

13. Mr. ROSENNE agreed with the previous speaker.

14. Mr. YASSEEN said that although he supported the theory of the supplementary agreement, he doubted whether clause (b) should be retained, since to exercise a right was to accept it. However, he could only agree to the deletion of that clause if the text of the paragraph was amended, for instance, by replacing the words "exercise a right" by the words "expressly or impliedly accept a right".

15. Mr. JIMÉNEZ de ARÉCHAGA said that the compromise solution should be retained.

16. The CHAIRMAN, speaking as a member of the Commission, said he thought Mr. Yasseen's suggestion had merit, for the present wording of clause (b) was rather illogical. To say that a State could exercise a right if it had given its assent suggested that the assent must precede the exercise of the right, whereas in fact the very moment a State decided to exercise the right, it gave its implied assent thereby.

17. Mr. JIMÉNEZ de ARÉCHAGA observed that what needed to be emphasized was that the State concerned could exercise the right provided for it.

18. Sir Humphrey WALDOCK, Special Rapporteur, agreed with Mr. Jiménez de Aréchaga. Possibly the difficulty mentioned by Mr. Verdross might be removed

if the opening words of the article were amended to read "A right may arise for a State from a provision in a treaty ...".

19. Mr. de LUNA said he thought the Commission had agreed that a neutral formula should be adopted. But the Special Rapporteur's text favoured one particular theory — that which regarded a right provided for in a treaty for a third State as an offer requiring acceptance.

20. Mr. ROSENNE said that the wording suggested by the Special Rapporteur would be acceptable. He was not sure whether perfect symmetry in the language used in the various articles was either necessary or desirable. Any changes would in any case need to be reviewed by the Drafting Committee.

21. Mr. JIMÉNEZ de ARÉCHAGA said that the Special Rapporteur's suggestion would offer a way out.

22. Mr. BRIGGS said that the wording suggested by Mr. Yasseen was both clearer and neater and would not prejudge the question whether the treaty created the right or provided a means for the parties to offer a right to non-party States.

23. The CHAIRMAN, speaking as a member of the Commission, said that the beginning of paragraph 1 might be amended to read "A State may expressly or tacitly assent to a right ..."

24. Mr. TUNKIN said that if it were amended as suggested by Mr. Yasseen, the provision would be virtually meaningless and would say nothing on the main question, which was whether a right could arise from a treaty for a non-party State.

25. The CHAIRMAN said that, on further reflection, he considered the Special Rapporteur's wording preferable to his own.

26. Mr. RUDA observed that a right was never accepted or assented to: it was exercised.

27. Mr. LIU said that the titles of articles 62 and 62 A should both be dropped, as it was undesirable to give the impression that they provided a classification of certain types of treaty.

28. The CHAIRMAN pointed out that the titles referred to treaties "providing for", not "creating", rights or obligations.

29. Mr. BRIGGS said that the titles of all the articles would have to be reconsidered by the Drafting Committee.

30. Mr. REUTER said it would be better to use the present tense instead of the past in the French text, the word "*entendaient*" being replaced by "*entendent*" and the words "*a donné*" by "*donne*".

31. Mr. VERDROSS supported that change.

32. He thought it should be explained in the commentary that if, in the circumstances contemplated in

article 62 A, a State exercised a right arising for it from a treaty to which it was not a party, according to the theory which denied the creation of rights in favour of third States without their consent, that State could be deemed to have consented implicitly to accept the right.

33. Sir Humphrey WALDOCK, Special Rapporteur, agreed with Mr. Reuter that it would be preferable to use the present tense.

The wording suggested by the Special Rapporteur for paragraph 1 was approved, and it was agreed that the present tense should be used.

34. Mr. RUDA said that the Spanish text of paragraph 2 did not correspond to the English and should be altered.

35. Mr. JIMÉNEZ de ARÉCHAGA agreed.

36. The CHAIRMAN thought the French text also needed alteration; he was not sure what was meant by the words "*ou conformément au traité*".

37. Mr. LACHS asked whether the phrase "or in conformity with", in paragraph 2, was intended to refer to conditions laid down outside the treaty itself.

38. Sir Humphrey WALDOCK, Special Rapporteur, replied that it was. An example of such conditions would be those laid down by a State concerning rights of passage by waterway through its territory. Such a State would be entitled to promulgate regulations in conformity with the treaty; but not necessarily by virtue of the treaty; the regulations would naturally have to be observed by all States exercising rights under the treaty.

39. Mr. LACHS asked what would be the relationship between such an instrument and the original treaty.

40. Mr. ROSENNE said he could not see why the phrase "or in conformity with" should cause any difficulty.

41. Mr. LACHS pointed out that a treaty might be signed and enter into force after consultation with non-parties interested in exercising rights under the treaty, and the parties themselves might subsequently agree on additional conditions limiting the enjoyment of the rights in question.

42. Sir Humphrey WALDOCK, Special Rapporteur, asked whether Mr. Lachs wished an express reference to related instruments to be added.

43. Mr. TUNKIN said that the meaning of the words "or in conformity with" was perfectly clear and was consistent with practice. For example, certain navigation rules quite separate from, but in conformity with, the 1948 Convention regarding the Regime of Navigation on the Danube² and with general rules of international law were accepted by the parties to that Con-

vention. He was unable to see why the words in question should cause any problem.

44. Mr. BRIGGS said that presumably the phrase was meant to refer to conditions not actually laid down, but provided for in the treaty; for example, the treaty might contain a clause enabling the territorial State to enact certain regulations.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Briggs's example was not exactly a case in point; in such circumstances, the conditions existed by virtue of the treaty.

46. The CHAIRMAN suggested, in the light of Mr. Lachs's remarks, that paragraph 2 might be amended to read "A State exercising a right in accordance with paragraph 1 shall comply with the conditions for the exercise of that right laid down by the parties in the treaty or in conformity with the treaty in other instruments".

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the conditions might not necessarily be laid down by one of the parties in an instrument of the kind referred to. They were more often laid down by a territorial State in the exercise of its sovereignty.

48. Mr. ROSENNE suggested that the difficulty could be overcome by substituting the word "by" for the word "in" after the words "conditions laid down" and striking out the two commas.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that that solution would be acceptable.

50. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Tunkin on the substantive issue, but considered it unnecessary for the Commission to enter into the question who was competent to establish conditions outside the treaty. The present drafting of paragraph 2 was perhaps rather awkward and might be amended to read: "... the conditions laid down in the treaty or established in conformity with it ..."

51. Mr. LACHS said that if additional conditions were stipulated by the parties it would be necessary to determine the relationship between those conditions and the original treaty. He therefore suggested that the sentence should read "A State exercising a right in accordance with paragraph 1 shall comply with the conditions laid down in the treaty or in related instruments in conformity with it".

52. The CHAIRMAN said that the exercise of the right should be linked with the conditions, for otherwise the provision would be meaningless.

53. Mr. de LUNA agreed with Mr. Lachs. The problem was very important, especially if it was accepted that there were two agreements: the main treaty and a related instrument. The essential point was that the Commission should not draft the provision in terms that would allow obligations to be imposed on a third State without its consent. A State accepting a right

² United Nations Treaty Series, Vol. 33, p. 197.

must know what it was doing and what commitments it was entering into.

54. Mr. REUTER pointed out that that problem had given rise to serious international disputes such as those concerning rights of transit through Indian territory, passage through the Corfu Channel, and navigation in the North Atlantic. He would therefore prefer a formula which did not raise the problem, such as "the conditions laid down by a treaty for the exercise of the right referred to in paragraph 1 shall be binding on a State which intends to exercise that right"; that would leave the doctrinal question open.

55. Mr. YASSEEN observed that in such cases the non-party State could not have more than the treaty had been intended to offer. Hence it was logical that those who wished to take advantage of the right should have to comply with the conditions laid down in, or in conformity with, the treaty. The wording of the paragraph met every requirement and was entirely satisfactory.

56. Mr. TUNKIN said he thought the discussion had shown that it would be wiser for the Commission to draft paragraph 2 in such a way as to refer only to the provisions of the treaty itself.

57. Sir Humphrey WALDOCK, Special Rapporteur, said that the phrase "or in conformity with" was of some value because conditions existing outside the treaty might have to be observed.

58. The CHAIRMAN, speaking as a member of the Commission, said that a party might well be able to lay down certain rules because it was empowered to do so under the treaty. If those rules were in conformity with the treaty, the non-party State would have to comply with them; if they were not, the non-party State would not be bound.

59. Mr. BARTOŠ said that he found the wording of paragraph 2 satisfactory, but it should be clearly understood that the conditions laid down in the treaty, to which that paragraph referred, must be in conformity with the general rules of international law.

60. Mr. JIMÉNEZ de ARÉCHAGA said that the text would be incomplete if it referred solely to the conditions laid down in the treaty, since it would not include additional regulations such as those establishing the limits of draught for vessels on an international waterway. As the text stood at present, the rights of the territorial State would be taken into consideration. On the other side, the requirement that the additional conditions should be in conformity with the treaty constituted an important guarantee for users.

61. Mr. LACHS expressed a strong preference for the Chairman's text; he was firmly convinced of the need to drop the reference to conditions outside the treaty.

62. Mr. ROSENNE said that the omission of the phrase "or in conformity with" would open the way for misunderstanding. After all, certain conditions might

be laid down outside the treaty, as in the purely hypothetical case of a treaty concerning freedom of navigation through the Corinth Canal, which made no mention of detailed regulations governing, for example, the carriage of explosives; the territorial State would be entitled to draw up such regulations provided that there was no violation of the treaty.

63. Mr. RUDA said he agreed with Mr. Rosenne. The conditions in question were laid down in two kinds of instrument: the treaty itself, and national legislation on the subject, which must be in conformity with the treaty. If the words "or in conformity with" were left out, there would be no reference to part of the conditions laid down.

64. Mr. de LUNA said that, since an obligation could not be imposed on a State without its consent, it seemed to him that the obligation could only be one imposed by a rule of international law or by a treaty and, consequently, one which the third State had accepted either under international law or by accepting the treaty.

65. The CHAIRMAN pointed out that the provision was not concerned with establishing obligations, but only with the conditions governing the exercise of a right. That right could not only be accepted by the third State as it was offered, and it was offered subject to certain conditions governing its exercise, which were either expressly laid down in the treaty or would be determined by the party concerned in accordance with the terms of the treaty.

66. He understood that the majority of the Commission would prefer to mention the additional limitations. Accordingly, he thought that paragraph 2 should be referred back to the Drafting Committee with the request that it should give particular consideration to the formula "the conditions governing the exercise of that right provided for by the treaty or established in conformity with it" and should make any other changes in the paragraph that were consequential on the redrafting of paragraph 1.

It was so agreed.

ARTICLE 62 B (Termination or amendment of provisions regarding rights or obligations of States not parties)

67. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Committee proposed the following text for article 62 B:

"Termination or amendment of provisions regarding rights or obligations of States not parties

"When in accordance with articles 62 or 62 A a State is subject to an obligation or entitled to exercise a right under a provision of a treaty to which it is not party, the provision may only be terminated or amended with the consent of that State, unless it appears from the treaty or the circumstances of its conclusion that the obligation or right was intended to be revocable."

68. Sir Humphrey WALDOCK, Special Rapporteur, said it would be desirable to reserve the words "or the circumstances of its conclusion" in view of the discussion to which those words had given rise.

69. Mr. VERDROSS said that in principle he approved of the wording of the article, which he took to mean, *a contrario*, that so long as the non-party State had not exercised the right in question, that right could be terminated or amended by the parties.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that the provision, as he had originally drafted it in his report (A/CN.4/167, article 62, para. 3) had embodied two limitations, one of which was that mentioned by Mr. Verdross. The limitation in question, however, was covered by implication in the Drafting Committee's text; by a process of *a contrario* reasoning, it could be deduced from that text that, until a State became subject to an obligation or became entitled to exercise a right under a provision of the treaty, it was possible to terminate the obligation or right in question.

71. Mr. ROSENNE said he had accepted the text of article 62 B in the Drafting Committee, but he now had misgivings on two points. The first was the use of the verb "terminate", which he had himself previously suggested should be used in place of "revoke".³ On careful consideration, he would prefer to revert to a term such as "revoke", because an examination of the articles in Part II (invalidity and termination of treaties) showed that there were many methods of termination. Article 62 B was intended to refer to the case in which the parties agreed to amend or put an end to a treaty provision, not to that in which a party had a right to call for the termination of the treaty in accordance with some of the provisions of Part II.

72. The second point which caused him concern was the need to cover the case of suspension of the operation of a treaty by agreement among the parties. He thought that article 62 B should be adjusted so as to refer to an agreement to revoke or amend the provision in question, and so as to apply both to the suspension and to the termination of the treaty.

73. Mr. YASSEEN said he could accept the wording of the article as a whole, but it might perhaps be preferable to use a positive formula such as "... the provision may be terminated or amended with the consent of that State ...", so as not to prejudice the possibility of terminating the provision under other rules already adopted by the Commission.

74. In addition, the final passage would be improved if it read: "unless it appears from the treaty that the provision was revocable"; that would eliminate the controversial phrase "or the circumstances of its conclusion" and bring the end of the sentence into line with the beginning, which referred to a "provision", not to an obligation or a right.

75. Mr. BARTOŠ said that on the whole he was satisfied with the text proposed. When a State had

declined the proposal made to it in the treaty, its consent was not necessary for the amendment or termination of that proposal. That interpretation was fully in conformity with clause (b) of article 62 A, paragraph 1. But there was a period of option and it was open to question whether the provisions of the treaty could be amended before that period had elapsed. The Drafting Committee had omitted to take account of the period of option, which was very common in practice. The third State might have expected that it would be in a position to exercise the right or assume the obligation and have made arrangements to do so; in that event it would not be fair for the parties to the treaty to be able to withdraw their proposal unilaterally. The Commission should make provision for that case, which could arise very frequently in practice.

76. Mr. JIMÉNEZ de ARÉCHAGA said he was prepared to accept article 62 B as drafted. He pointed out, however, that the wording of the article reversed the presumption established by the Permanent Court of International Justice in the *Free Zones* case.⁴ In that case, the Court had proceeded on the assumption that any provision in favour of a third State could be revoked by the parties to the treaty unless the treaty itself or the circumstances of the case showed an intention to provide for irrevocability. Article 62 B, on the other hand, was based on the assumption that the right of the third State was irrevocable unless a contrary intention appeared from the treaty or the circumstances of its conclusion. He had no objection to reversing the Court's ruling, but thought it would be going too far to drop the reference to the circumstances of the treaty's conclusion. Without that reference, article 62 B would, in effect, state that the right was irrevocable unless the parties to the treaty took care to insert in it an explicit provision to the contrary. He did not believe that such a formulation would constitute progressive development, or that it would encourage the use of the method contemplated in the article under discussion.

77. Mr. TUNKIN favoured the Drafting Committee's text. Although he had had some doubts on the point, he would prefer to keep the reference to the circumstances of the treaty's conclusion.

78. In view of the close links between article 62 B and articles 62 and 62 A, he suggested that the Drafting Committee should consider bringing the wording of article 62 B into line with that of the other two articles.

79. The CHAIRMAN, speaking as a member of the Commission, said that on the whole he found the text acceptable. However, he feared that the expression "under a provision of a treaty" might give the impression that the right or obligation had been directly created by the treaty, which would be inconsistent with the previous articles. It might perhaps be better to use some such expression as "arising from a treaty" ("*découlant d'un traité*").

80. He did not think it would be enough to refer to the terms of the treaty in the final clause; and the

³ 737th meeting, para. 20.

⁴ P.C.I.J., 1929, Series A, No. 22, and 1932, Series A/B, No. 46.

expression "or the circumstances of its conclusion" was itself too restrictive, since revocability might be the consequence of an event subsequent to the conclusion of the treaty, for instance, diplomatic conversations with the non-party State concerned. It would perhaps be better to use the phrase "or the circumstances", which was both more concise and broader in meaning.

81. The adjective "revocable" was no doubt appropriate for a right, but less so for an obligation.

82. Sir Humphrey WALDOCK, Special Rapporteur, said that the difficulty could be overcome by redrafting the "unless" clause on the lines suggested by Mr. Yasseen, to read "unless the provision was intended to be revocable".

83. Mr. de LUNA said that notwithstanding the commendable efforts made, the attempt to steer a middle course between two different doctrinal positions had produced an eclectic text that was neither elegant nor clear.

84. It was obvious that without the consent of the non-party State, no obligation could arise for that State. As far as rights were concerned, it would be natural for those members who accepted the doctrine of offer and acceptance to regard the offer as a unilateral legal instrument. For those who, like himself, considered that the right existed by virtue of the treaty even before it was exercised, irrevocability would be the rule, by virtue of the autonomy of the will of the parties.

85. The CHAIRMAN, speaking as a member of the Commission, observed that since article 62 B referred back to articles 62 and 62 A, it was clear that the right came into existence only when the non-party State had given its consent, either expressly, or impliedly, by exercising the right. Until it did so, the right was revocable.

86. Sir Humphrey WALDOCK, Special Rapporteur, said that the Chairman's comment went a little too far. Members such as Mr. Verdross, Mr. Jiménez de Aréchaga, Mr. de Luna and himself did not admit that nothing in the nature of a right existed until the consent of the third State was given. The purpose of the formula used in article 62 B was to leave the doctrinal question open. All the members of the Commission agreed that, except where there was a contrary intention of the parties, a perfect and irrevocable right existed in principle only when the consent of the non-party State had been given. The use of the present tense in article 62 B made it possible to keep the doctrinal question open.

87. Regardless of doctrinal differences, all the members of the Commission agreed that, in practice, the right of the non-party State should be revocable until that State had accepted or exercised it.

88. The CHAIRMAN said that that idea could be expressed by stating that, as soon as a right or an obligation came into being, it ceased to be revocable.

89. Mr. CASTRÉN said that he could accept the article as a whole, with the drafting changes proposed.

90. During the earlier discussion on article 62 he had proposed a text which made the terms of the treaty the only criterion for determining the question of revocability.⁵ The non-party State would be put in a difficult position if it was obliged to examine not only the text of the treaty, but also other factors, which might even have arisen after the conclusion of a treaty. It might have taken steps to exercise its right which involved economic sacrifices; it should not be possible to deprive it of that right without its consent unless the terms of the treaty showed that the right was revocable. He therefore proposed that the words "or the circumstances of its conclusion" should be deleted. He did not think that the Permanent Court of International Justice had decided the question, and that opinion was supported by the Special Rapporteur's commentary on the original draft article 62 (A/CN.4/167).

91. Sir Humphrey WALDOCK, Special Rapporteur, said that the Permanent Court had not in fact ruled on the question. The ruling to which Mr. Jiménez de Aréchaga had referred was contained in the dissenting opinion of Judges Hurst and Altamira.⁶ As far as the Court was concerned, it had rather assumed that the provision in favour of the third party was irrevocable in the particular case because of the circumstances.

92. The difficulty in article 62 B arose to a large extent from the attempt to deal concurrently with obligations and rights, in respect of which the positions were slightly different. With regard to obligations, it was the possibility of amendment of the relevant treaty provision that was important to the non-party State; the termination of an obligation, and in most cases its suspension, would not be a matter of concern to that State. With regard to rights, the non-party State was the beneficiary and it would be appropriate to lay down a stricter rule.

93. The CHAIRMAN said it might happen that the treaty itself contained no provision on the subject, but the parties, in a communication to the non-party State, stipulated the revocability of the right and that State accepted the revocability.

94. Mr. YASSEEN said that the parties could amend the treaty after its conclusion, but before acceptance by the non-party State. However, that subsequent agreement between the parties should be brought to the notice of the non-party State concerned in the same way as the original treaty.

95. The CHAIRMAN suggested that article 62 B should be referred back to the Drafting Committee.

It was so agreed.

ARTICLE 61 (Treaties create neither obligations nor rights for States not parties) (*resumed from the previous meeting*)

96. The CHAIRMAN invited the Commission to resume consideration of article 61, which read:

⁵ 738th meeting, para. 7.

⁶ P.C.I.J., 1932, Series A/B, No. 46, pp. 174 *et seq.*

*"Treaties create neither obligations nor rights
for States not parties"*

"A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon States not parties to it."

97. He reminded the Commission that Mr. Rosenne had agreed to the use of the Latin maxim *pacta tertiis nec nocent nec prosunt* in the title. That would make it possible to avoid the obvious contradiction between the present title and the titles of the following articles, which specifically referred to treaties providing for obligations or rights for States not parties.

98. Mr. BRIGGS said that the main idea of the Drafting Committee in its formulation of articles 61, 62, 62 A and 62 B, had been to differentiate between rights and obligations. In keeping with that idea, he suggested that articles 61 and 62 should be combined, all reference to rights being omitted from article 61. The combined article would read:

"1. A treaty applied only between the parties and imposes no obligations upon States not parties to it.

"2. A State may become bound by an obligation . . ." (as in the article 62⁷ proposed by the Drafting Committee).

99. It would thus be possible to overcome the difficulty arising from the fact that, according to one school of thought, the treaty itself conferred rights on the non-party State, whereas according to the other school, the treaty made an offer which needed acceptance for its completion. Obligations would be dealt with in one article, and rights in subsequent articles.

100. Mr. ROSENNE said he had grave misgivings regarding Mr. Briggs's proposal. The principle embodied in article 61 was a very fundamental one which was broader than the law of treaties itself — the principle expressed in the maxim *res inter alios acta aliis nec prodest nec nocet*. The wording proposed by Mr. Briggs might therefore have much more far-reaching effects than would appear at first sight.

101. Mr. BRIGGS pointed out that the essential statement that a treaty applied only between the parties would remain.

102. The CHAIRMAN thought that the formula proposed was nevertheless extremely dangerous. The article would refer only to obligations and say nothing about rights.

103. Mr. CASTRÉN said he supported Mr. Briggs's proposal, which would avoid many difficulties. The Commission had always tried to keep rights and obligations separate, but article 61 dealt with both together.

104. Mr. ELIAS said it was undesirable to alter the contents of article 61 in the manner suggested by Mr. Briggs; that article expressed an autonomous and fundamental principle which should be given due prominence.

105. He had suggested at the previous meeting that the four articles 61, 62, 62 A and 62 B should be grouped together so as to emphasize their interrelation.⁸ If that were done, the titles could be dropped and replaced by a new comprehensive title such as:

"Effects of a treaty on States not parties to it".

106. The CHAIRMAN said he thought Mr. Elias's proposal should be considered after the Commission had decided whether to retain the text proposed by the Drafting Committee or to amend the article as proposed by Mr. Briggs.

107. Mr. YASSEEN was in favour of retaining the article in the form proposed by the Drafting Committee. To say that a treaty applied only between the parties was to state a principle from which followed two consequences of the same kind and equal force, namely, that a treaty did not impose any obligation and did not confer any right on non-party States. Those two consequences should be stated immediately after the general principle.

108. Mr. VERDROSS said that for practical reasons, in particular to facilitate voting, it would be better to deal with rights and obligations in two separate provisions. Besides, there was no need to state at once, in article 61, what would be said in the following articles. He was in favour of retaining only the first phrase of the article.

109. Mr. AMADO said that the starting point of the discussion was the fact that there was a glaring contradiction, beginning with the titles themselves, between article 61 and the next two articles. That fact must be tackled and a solution found, but Mr. Briggs's proposal was no solution. The Commission should seek the logical continuity between a principle and its consequences.

110. Mr. EL-ERIAN said he was in favour of retaining article 61, which was a useful general statement of a general principle.

111. Mr. JIMÉNEZ de ARÉCHAGA agreed with Mr. El-Erian. Personally, he would have liked the provisions on rights to be separated from those on obligations, but he thought the principle stated in article 61 should be retained as it stood. Nevertheless, he was also in favour of adding a proviso such as that suggested by the Chairman at the previous meeting,⁹ which would make the principle in article 61 subject to the provisions of article 62.

112. Mr. TUNKIN said he was in favour of retaining article 61, for the reasons already stated.

113. To add a proviso such as "subject to the following articles" would be going too far, for it would imply that the following articles stated exceptions, which they did not.

114. He proposed that, as Mr. Ruda had suggested at the previous meeting,¹⁰ the words "except with their

⁸ 750th meeting, para. 84.

⁹ Para. 82.

¹⁰ Para. 97.

⁷ See para. 2 above.

consent" be added at the end of the Drafting Committee's text of article 61. There would thus be a logical sequence between article 61 and the articles that followed.

115. Mr. RUDA agreed with Mr. Tunkin. He realized that the proposal he had made at the previous meeting to add that proviso to article 61 and delete the following articles had been rather too drastic. On reflection, he thought that the following articles could be retained if article 61 was amended as Mr. Tunkin has just proposed. Article 61 would then state the principle and the following articles would show how it was to be applied. If the Commission did not wish to adopt that solution, it would still be necessary to remove the contradiction between article 61 and the following articles.

116. Mr. CASTRÉN observed that Mr. Briggs's proposal would not eliminate the statement of principle; it was merely a way of dividing it into two parts, one in one article and the other in the next.

117. The CHAIRMAN, speaking as a member of the Commission, said he was becoming increasingly inclined to accept the solution proposed by Mr. Ruda and Mr. Briggs.

118. Mr. PAL said he was in favour of retaining article 61 as proposed by the Drafting Committee. He did not believe that the phrase suggested by Mr. Ruda would remove all the difficulties: consent was not the only requirement specified in articles 62, 62 A and 62 B. He suggested that the problem could perhaps be solved by amending article 61 to state that a treaty applied only between the parties and "by itself" neither imposed any obligations nor conferred any rights upon States not parties to it.

119. The CHAIRMAN pointed out that that kind of wording had already been considered without success.

120. Mr. TABIBI supported article 61 as the expression of the fundamental rule concerning the effects of treaties on non-party States. But he was not altogether satisfied with the title of the article.

121. Mr. de LUNA stressed that all the difficulties arose from the fact that the Commission was not taking a stand in favour of either of the two legal theories on the subject. Article 61 as drafted presented difficulties for those members who favoured the theory of offer and acceptance. Other members considered that a treaty could not impose obligations on non-party States, but that it could confer rights on them.

122. He would be prepared to accept the traditional rule laid down in article 61 in the context of the series of articles now under consideration.

123. Mr. AMADO said that none of the proposed solutions satisfied him. He therefore suggested that the Commission should adopt the articles as they stood without troubling itself any more about the contradiction between article 61 and the following articles. The

future would show how those articles were to be interpreted.

124. Mr. RUDA said that his doctrinal position was the same as that of Mr. de Luna, Mr. Jiménez de Aréchaga and Mr. Verdross. Without entering into the question of substance, however, he wished to stress that from the point of view of form there was an obvious contradiction between article 61 and the following articles.

125. He did not think the provisions submitted were completely neutral with regard to the two doctrines supported during the discussion; article 62 A, in particular, inclined towards the doctrine he favoured himself.

126. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept either of the two solutions which had been put forward. Article 61 expressed the general rule, but should, of course, be read in conjunction with the other articles of the draft. There was nothing very strange in the fact that articles 62 A and 62 B qualified the general rule laid down in article 61; there was perhaps some element of inelegance, because of the absence from article 61 of any anticipatory reference to the subsequent articles. From the legal point of view, however, no difficulty arose so long as the qualifications were stated in the articles. It was probably desirable to amend the title so as to show that article 61 stated only the general rule regarding the effect of treaties on non-party States.

127. Nevertheless, he would have no objection to the addition of the words suggested by Mr. Ruda, particularly since the term "consent" was used; that term was wider than "agreement" and committed the Commission no further than it had already committed itself in articles 62 and 62 A.

128. The CHAIRMAN, speaking as a member of the Commission, said he had definitely come round to Mr. Ruda's suggestion, although he had at first opposed it at the previous meeting. Thus amended, article 61 was less categorical and heralded what followed.

129. The first phrase might perhaps be improved if it were amended to read: "A treaty produces legal effects only for the parties".

130. Mr. REUTER objected that that wording would give even greater weight to the need, mentioned by Mr. Jiménez de Aréchaga, for a reference to the most-favoured-nation clause in that part of the draft.

131. The CHAIRMAN suggested that article 61 be referred back to the Drafting Committee.

It was so agreed.

The meeting rose at 1.10 p.m.

752nd MEETING

Thursday, 25 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(continued)

[Item 3 of the agenda]

ARTICLE 62 C (Most-favoured-nation clauses) (proposed by Mr. Jiménez de Aréchaga)

1. The CHAIRMAN invited Mr. Jiménez de Aréchaga to introduce his proposal for an additional article dealing with most-favoured-nation clauses, which read:

“ Article 62 C

“ Most-favoured-nation clauses

“ 1. Nothing provided in articles 61, 62 A or 62 B affects or diminishes in any way the rights or privileges which a State may be entitled to invoke, deriving from the provisions of treaties entered into by other States, by virtue of the operation of most-favoured-nation clauses.

“ 2. When treaty provisions granting rights or privileges have been abrogated or renounced by the parties, such provisions can no longer be relied upon by a third State by virtue of a most-favoured-nation clause.”

2. Mr. JIMÉNEZ de ARÉCHAGA said that when he had first raised the question of the most-favoured-nation clause, he had realized that the Commission as a whole was not at that time prepared to insert a substantive provision on the subject in its draft. Hence he had not intended to press the point until, perhaps, the second reading of Part II. However, certain important changes had been introduced into the structure of the draft, and in view of the wording adopted by the Drafting Committee for articles 61, 62, 62 A and 62 B,¹ it had become not only advisable, but indispensable to insert a provision exempting most-favoured-nation clauses from the operation of those articles.

3. The Special Rapporteur had said that he had not covered the matter because there was a clear difference between stipulations in favour of third States and the most-favoured-nation clause, the difference being that in the latter case there was a second treaty containing the clause, and that second treaty applied normally. He could not disagree with that analysis of the difference between the two situations. However, the school of thought which considered that in such circumstances a collateral agreement existed had succeeded to a large extent in introducing its views into the draft concerning stipulations in favour of third States. The broad and general terms in which articles 61, 62 A and 62 B had

now been drafted tended to blur the distinction between provisions in favour of third States and the operation of the most-favoured-nation clause.

4. It might perhaps be claimed that the most-favoured-nation clause referred to future treaties, whereas a collateral agreement referred to an existing treaty. He did not believe that any valid criterion could be based on that distinction: it was perfectly possible to enter into a collateral agreement accepting rights to be provided for in a future treaty and it was also possible for the most-favoured-nation clause to refer to the past and to enable a State to obtain benefits provided for in an existing treaty.

5. The impossibility of establishing a clear distinction between the two cases meant that articles 62 A and 62 B could be read as being applicable to most-favoured-nation clauses, unless some saving provision were introduced. Without such a provision, the articles in question would have the unintended effect of seriously affecting and even abolishing a useful practice which was the cornerstone of most modern trade and customs agreements.

6. For instance, article 61, as drafted, stated categorically that “ A treaty applies only between the parties ” — a statement which was not literally true since, by virtue of the operation of the most-favoured-nation clause, a treaty concluded between two States could also govern relations between one of them and a third State.

7. Article 62 A stated in paragraph 1 that “ A State may exercise a right provided for in a treaty to which it is not a party ” only if the parties “ intended the provision to accord that right ”. But through the most-favoured-nation clause, a State not a party to a treaty could exercise a right provided for in the treaty, even if the parties had not had that intention.

8. The most serious difficulties, however, arose from the provisions of article 62 A, paragraph 2, and article 62 B. Article 62 A, paragraph 2, if not expressly made inapplicable to most-favoured-nation clauses, could be interpreted as ruling out the unconditional form of such clauses. The Commission could be considered as taking the position that before a State could exercise, by virtue of the most-favoured-nation clause, the rights or privileges accorded under another treaty to another State, it must first comply with any conditions, or duty to compensate, imposed on that State. The Commission would thus find itself at variance with the prevailing trend, which was that, in the event of silence on the point, the most-favoured-nation clause operated unconditionally, automatically and without any compensation.

9. Article 62 B would also seriously upset the operation of the most-favoured-nation clause. Its application would be an inducement to discontinue that useful practice, because rights or privileges extended to a State under the operation of the clause might be freely revoked or amended between the parties to the treaty governing them, not only without the consent of the State benefiting from the clause, but even without consultation of that State.

¹ See 750th meeting, paras. 62-63.

10. In order to avoid those undesirable results, paragraph 1 of his proposal made it clear that the provisions of articles 61, 62, 62 A and 62 B did not in any way affect or diminish rights invoked by virtue of the operation of the most-favoured-nation clause. That paragraph took the form of a saving clause, very similar to the Special Rapporteur's draft or article 64, relating to principles of a treaty extended to third States by formation of international custom (A/CN.4/167). The provisions of the paragraph were not very ambitious and made no attempt to cover the substantive problems raised by the most-favoured-nation clause; they merely reserved the question. He did not believe that an explanation in the commentary would be sufficient to achieve that result: it was not good policy for the Commission to draft unduly wide and equivocal provisions and to try to protect itself against unintended interpretations by explanations in a commentary. The articles should speak for themselves without ambiguity.

11. Paragraph 2 of his proposal contained the only substantive rule in the article. It stated the generally accepted rule that the provisions from which a third State might benefit by virtue of the operation of the most-favoured-nation clause could be freely abrogated or renounced by the parties without the beneficiary's consent or even knowledge. The point was an important one and had been the subject of a clear ruling by the International Court of Justice in the case concerning *Rights of nationals of the United States of America in Morocco*.² The purpose of paragraph 2 of article 62 C was to state that ruling, which of course reversed the rule laid down in article 62 B. The words were taken almost literally from the judgment of the International Court of Justice. Some writers had observed that in certain cases it might be possible for a State to claim that the rights enjoyed under the most-favoured-nation clause survived the termination of the treaty granting them. Such a possibility did exist, since under the rule *pacta sunt servanda* States could agree on the consolidation of rights which had originated in that clause. But in the light of the Court's decision, the subsistence of rights in such a case would not be the effect of the most-favoured-nation clause, but the result of an additional agreement superimposed on the clause. The Court had made it clear that since the essential purpose of most-favoured-nation clauses was to maintain a régime or non-discrimination, any rights or privileges enjoyed by a State by virtue of the operation of the clause would lapse upon the termination of the treaty which established those rights and privileges.

12. Mr. CASTRÉN said that although the idea expressed in the proposed article 62 C was certainly correct, he wondered whether it was really appropriate to devote a special article to the most-favoured-nation clause and whether it might not be enough to mention that clause in the commentaries on articles 62 A and 62 B. In commenting on his proposal, Mr. Jiménez de Aréchaga had said that, through the most-favoured-nation clause, a State not a party to a treaty could

exercise a right provided for in that treaty even if the parties had not had that intention. But since the right of the third State in that particular case derived from the clause and from the treaty containing the clause, it could hardly be claimed that the parties to the treaty had had a contrary or more restricted intention. Besides, it could be said that when two States concluded a treaty containing such a clause, they recognized that the provisions of the treaty could be abrogated without the consent of the State benefiting from the clause. Those conclusions followed from the very nature of the most-favoured-nation clause and were supported by the general practice of States. Consequently, neither paragraph 1 nor paragraph 2 of the proposed article was necessary.

13. Mr. ROSENNE said that Mr. Jiménez de Aréchaga had made a convincing case for including a provision reserving the question of the most-favoured-nation clause. The expression "most-favoured-nation clauses" used in the title, although awkward, could be retained, since it was taken from the authoritative English text of the judgment of the International Court of Justice in the case concerning *Rights of Nationals of the United States of America in Morocco*.

14. He was in favour of including a saving provision on the subject of most-favoured-nation clauses, if only because that was the best way of testing the reactions of governments on the matter.

15. The title of the article should be amended, for it was too ambitious as it stood; and the article itself should be shortened to a single paragraph simply reserving the question of the most-favoured-nation clause. He suggested that it be redrafted to read.

"Non-application

of articles to most-favoured-nation clauses

"Nothing in articles 61 to 62 B affects the operation of provisions in treaties granting most-favoured-nation rights to States which are not parties to those treaties and in particular the power of the parties to revoke or amend such treaties at any time without the consent of the States claiming the benefit of those provisions."

16. He added that most-favoured-nation clauses were not confined to treaties dealing with commercial and economic matters; they also appeared in other treaties.

17. Mr. de LUNA thanked Mr. Jiménez de Aréchaga for having drawn the Commission's attention to the problem of the most-favoured-nation clause. The very arguments he had put forward, however, had clearly shown that there was nothing in common between stipulations in favour of third parties and the operation of the most-favoured-nation clause. There was no analogy between the two situations; any attempt to draw such an analogy would be like seeing a similarity between a brush and an elephant because neither of them could climb trees.

18. The effect of the most-favoured-nation was not that the provisions of a treaty became applicable to a third State: the State invoking the clause did not

² *I.C.J. reports*, 1952, pp. 187, 191, 192, 204.

become a party to the treaty which provided for the rights and privileges it invoked.

19. Whatever language was adopted for articles 61, 62 A and 62 B, it should be made perfectly clear that they did not apply to the operation of the most-favoured-nation clause.

20. Sir Humphrey WALDOCK, Special Rapporteur, said he was not convinced that, from the strictly legal point of view, there was any real need, to include the proposed article 62 C. The situation arising from the operation of the most-favoured-nation clause was radically different from that envisaged in articles 62 A and 62 B. He conceded that the change in drafting adopted at the previous meeting for those two articles, which now made reference to rights and obligations "arising" from a treaty for a non-party State, provided some grounds for the misgivings expressed by Mr. Jiménez de Aréchaga. But even article 61, the most categorical of the group of four articles considered at the last two meetings, clearly did not apply to the situation created by the most-favoured-nation clause: rights and obligations arising from the operation of that clause derived from the clause itself and not from the other treaty.

21. Accordingly, if any saving provision were to be introduced at all, it would have to state that nothing in the draft articles related to the operation of the most-favoured-nation clause. If the Commission wished to introduce a saving provision of the kind suggested by Mr. Rosenne, it should be further shortened so as to state simply that nothing in articles 61 to 62 B affected the operation of the most-favoured-nation clause.

22. Mr. YASSEEN said that he appreciated the force of the arguments advanced by Mr. Jiménez de Aréchaga, but was not convinced. It was not sound practice to reserve something which did not need to be reserved. Under the system of the most-favoured-nation clause, everything was governed by the treaty containing the clause; the other treaty was only the condition for the operation of the arrangements made by the parties to the first treaty. But that condition could be fulfilled otherwise than by a treaty: it might be fulfilled by *de facto* most-favoured-nation treatment. Consequently, if the Commission tried to deal with the whole problem, its draft might become too cumbersome. The ideas expressed in the two paragraphs of the proposed article were correct, but the same conclusions would be reached if the article was not included.

23. Mr. TABIBI thanked Mr. Jiménez de Aréchaga for having drawn attention to a very important question, which was particularly complex in the context of treaties other than trade agreements.

24. When the Commission had taken its final decision on articles 61, 62 A and 62 B, he would favour the addition of a small paragraph to the effect that nothing in those articles affected the operation of the most-favoured-nation clause. Such a paragraph would be useful and would certainly do no harm.

25. Mr. BRIGGS said he did not favour the inclusion of article 62 C. There was really nothing in the draft articles which could affect the operation of the most-favoured-nation clause. However, if the majority of the Commission agreed to include a saving clause, it should be as brief as possible, as suggested by the Special Rapporteur.

26. Mr. TUNKIN said that Mr. Jiménez de Aréchaga had raised a very important point. Although the obligations and rights arising from the most-favoured-nation clause was different from those arising from stipulations in favour of third parties, he thought that Mr. Jiménez de Aréchaga had shown the possible usefulness of including a short saving provision, in order to prevent articles 61 to 62 B from being interpreted as in any way affecting the operation of most-favoured-nation clauses.

27. He considered that a short saving clause might be included on a tentative basis; when the Commission came to the second reading of the draft articles, it would see whether the provision was necessary.

28. The CHAIRMAN, speaking as a member of the Commission, said he was uncertain whether it would be desirable to introduce a provision on the most-favoured-nation clause into the draft. Mr. Jiménez de Aréchaga had certainly raised an important problem, and if the Commission wished to deal with it fully, provisions other than those proposed might perhaps be needed. For example, a treaty containing a most-favoured-nation clause might also provide that once a certain treatment had been obtained, it could not thereafter become less favourable, even after termination of the treaty with the third State which had introduced the improvement.

29. A very short and very general reference would probably do no harm, but it should not be allowed to destroy the logical coherence of the draft. The most-favoured-nation clause was a clause with a variable content which changed with the conclusion of other treaties. The legal effect of the clause derived from the treaty containing it, not from the other treaties, so it was perhaps an unnecessary precaution to state that the articles relating to the effects of treaties on non-party States did not affect the operation of the most-favoured-nation clause.

30. Mr. BARTOŠ said that the most-favoured-nation clause was a very important and very commonly used institution, which might operate to the advantage of a State or to that of its nationals, or even sometimes to that of certain persons, as under the Convention relating to the Status of Refugees.³ As Mr. Yasseen had pointed out, the clause was not always linked to a contract, and its effect sometimes depended on a *de facto* situation. Whereas the basis of the legal effect of a treaty on a third State was its accession or consent—sometimes even certain conduct on its part—the legal basis of the most-favoured-nation clause was twofold: on the one hand a treaty and on the other a situation (not

³ United Nations Treaty Series, Vol. 189, p. 150.

necessarily another treaty). Consequently, the subject was difficult to fit into the system proposed by the Special Rapporteur and accepted by the Commission.

31. Mr. Jiménez de Aréchaga had been right to raise the problem, however. The institution of the most-favoured-nation clause deserved examination. But if the Commission decided to deal with it in the draft articles, it would have to include much more elaborate provisions, calculated to facilitate the application of the clause.

32. Mr. PAL supported the inclusion of a brief saving provision to make it clear that articles 61 to 62 B did not in any way affect the operation of the most-favoured-nation clause. Although it might not be necessary to include elaborate provisions on the clause in the draft articles, some reservation of that type was clearly needed.

33. Mr. AMADO complimented Mr. Jiménez de Aréchaga on his proposal. Few international lawyers had not pondered on the very peculiar nature of the most-favoured-nation clause. Its peculiarity lay in the indeterminate relationship established and the fact that the clause produced certain effects without any precise expression of the will of the parties concerned. True to the attitude he had always adopted in the Commission, he could not accept the proposed article or even the formula suggested by the Special Rapporteur. The clause existed, and it had certain links with the law of treaties; but it was not a matter directly pertaining to the Commission's draft.

34. Mr. ELIAS agreed with Mr. de Luna and the Special Rapporteur that the problem dealt with in article 62 C was completely different from that of the effects of treaties on non-party States.

35. With regard to the inclusion of a brief saving clause, he thought it would not do justice to so important a subject, unless a very long commentary were attached.

36. His own view was that there was no need for a provision concerning the most-favoured-nation clause in the draft articles and that the matter could be adequately dealt with in the commentary. If the majority favoured the inclusion of an article, he thought it should be tentative and be accompanied by an elaborate commentary explaining the whole subject.

37. Mr. JIMÉNEZ de ARÉCHAGA said that the question at issue was not whether stipulations in favour of third States were different from most-favoured-nation clauses, but whether the Commission was regulating the former in such broad terms that the latter would be affected. Mr. de Luna had said that the one type of clause was as different from the other as a brush from an elephant; but if a provision in the draft articles were so framed as to apply to all objects with hair, it could be construed as applying both to a brush and to an elephant, regardless of the fact that the two were so obviously different from one another. As drafted, articles 61 to 62 B could be construed as covering the case of most-favoured-nation clauses. The Chairman's

argument that the articles on third States were obviously not applicable to most-favoured-nation clauses, since such clauses did not involve any third State, might prove too much. On the view taken by the Chairman and some other members of the Commission, a collateral agreement was always necessary under articles 61 to 62 B, so that the third State was a party to a second agreement, just as in the case of most-favoured-nation clauses. That was why Anzilotti had dealt with one of those questions immediately after the other.⁴

38. The discussion which had taken place had been very useful, however, because it had shown that the Commission did not intend to cover the most-favoured-nation clause in those articles of its draft. It had dispelled any possible doubts, and his proposal for an additional article 62 C had therefore ceased to be indispensable; in the circumstances, it was now easy for him to withdraw it.

39. The CHAIRMAN, speaking as a member of the Commission, said that if States A and B concluded a treaty containing a most-favoured-nation clause and if State A then concluded another treaty with State C whose effect was to bring into operation the most-favoured-nation clause in the first treaty, it could not be said that there was a legal connexion between the two treaties. It could only be said that the content of the first treaty was established according to the content of the second. Mr. Jiménez de Aréchaga had done the Commission a great service by drawing its attention to the problem. He should not withdraw his proposal too hastily, for the Commission might wish to deal with the matter, not in the articles concerning the effects of treaties on non-party States, but in some other part of its draft.

40. Sir Humphrey WALDOCK, Special Rapporteur, said he fully agreed with the Chairman. If the Commission were to deal with the most-favoured-nation clause, it should do so separately. The subject was an important one and might even be examined as a topic separate from the general law of treaties. Any consideration of the question of the most-favoured-nation clause would require a careful study of Customs unions and of the GATT system, and would be a major undertaking which could clearly not be envisaged during the present session.

41. He wished to make it clear that he had not suggested the introduction of a saving provision concerning the most-favoured-nation clause. He did not consider that a provision of that kind had any place in the part of the draft under discussion. The subject could appropriately be dealt with in the commentary on article 61 or article 62 or in the introduction to the Commission's report; the latter course would be in conformity with the Commission's practice in regard to policy decisions.

42. Mr. RUDA said that his position from the outset had been that the subject of the most-favoured-nation clause was not related to that of the effect of treaties on third States. From the strictly legal point of view, those were two completely separate questions. The discussion

⁴ Anzilotti, D., *Cours de droit international* (Trans. Gidel), Paris, 1929, Tome I, pp. 413-439.

had nevertheless shown that the question of the most-favoured-nation clause called for thorough study by the Commission. However, there seemed to be no place for provisions on that question either in Part I of the draft, dealing with the conclusion, entry into force and registration of treaties, or in Part II, dealing with the invalidity and termination of treaties. It was even possible that the subject could best be dealt with apart from the law of treaties.

43. Mr. BARTOS said that in deciding whether it should insert an article on the most-favoured-nation clause in the part of the draft under consideration, the Commission should bear in mind that the clause might also relate to a treaty which had not yet been concluded or to a situation which had not yet arisen. Thus the question did not depend on the application of the rule *pacta tertiis nec nocent nec prosunt* as envisaged by the Commission.

44. Another difficulty was that there were two entirely different types of most-favoured-nation clause: the conditional and the unconditional. If it adopted any provision on the clause at all, even in the simplest and most general terms, the Commission would be in danger of prejudging a matter to which it had not given the necessary study.

45. The CHAIRMAN noted that the members of the Commission seemed inclined not to insert any article on the most-favoured-nation clause in the section under consideration. An article constituting a proviso to the preceding articles would appear to be providing for exceptions, whereas the members of the Commission seemed to be convinced that there were no exceptions to be provided for.

46. Nevertheless, as the Commission was preparing a detailed draft on the birth, life and death of treaties, it was necessary to consider whether the application of the most-favoured-nation clause was not a case of the automatic modification of treaties by the operation of an external circumstance and, consequently, whether the Commission should not deal, in another section of its draft, with the effects of that clause in regard to the treaty containing it.

47. Mr. JIMÉNEZ de ARÉCHAGA said that perhaps that question should be considered by the Special Rapporteur when he came to review the whole draft.

48. Sir Humphrey WALDOCK, Special Rapporteur, said he was not an expert on the subject, but he suspected that closer study would show that it should be dealt with separately. In any event the Commission would not be able to take it up at the present session. Rousseau certainly dealt with the matter in his treaties,⁵ but had recognized that the legal basis of most-favoured-nation clauses was entirely different from that of stipulations in favour of third States.

49. Mr. BRIGGS said he did not believe that the Commission should undertake the detailed study of

special types of clause in a general draft on the law of treaties.

50. Mr. VERDROSS agreed with Mr. Briggs. The most-favoured-nation clause was a special type of clause appearing in certain treaties: if the Commission proposed to make a study of that clause, it would also have to study all the other types of special clause.

51. Mr. YASSEEN said that the issue was not the content of treaties. A treaty was a technical instrument in which States could include whatever they chose. But the most-favoured-nation clause was not an ordinary clause: it was a self-contained system, a general condition much used in practice, which affected the actual operation of the treaty. Hence it might perhaps be advisable to deal with it in the draft convention.

52. Mr. ROSENNE said that apart from arguments put forward by Mr. Jiménez de Aréchaga, the points made in the discussion had alone been sufficient to convince him of the need to include in the draft a short article reserving the question of most-favoured-nation clauses. The matter would be subject to review at the second reading. At some later stage the General Assembly could, if necessary, state whether it wished the Commission to codify rules on most-favoured-nation clauses.

53. Mr. TUNKIN said there was general agreement in the Commission that the operation of most-favoured-nation clauses would not be affected by the provisions laid down in the draft and there would be no harm in saying so in a short article. Indeed, such a course would have the advantage of drawing the attention of governments to the matter and possibly eliciting some observations and even recommendations from them. Certainly the Commission was in no position at present to tackle the substantive issues, which involved numerous economic considerations.

54. Mr. AMADO said he favoured the Special Rapporteur's suggestion that the subject should be referred to in the introduction to the Commission's report on the law of treaties. In that way, the Commission would show its interest in the problem, which was unquestionably an important one, while at the same time emphasizing that it did not come within the scope of the codification of the law of treaties. In a treaty, one party dealt with another, whereas under the most-favoured-nation clause the ultimate beneficiary was an ill-defined and mysterious entity.

55. Sir Humphrey WALDOCK, Special Rapporteur, suggested a statement concerning most-favoured-nation clauses be inserted in the introduction to his third report.

It was so agreed.

*Section II: Modification of treaties
redrafted by the Special Rapporteur*

56. Sir Humphrey WALDOCK, Special Rapporteur, said that in accordance with the Commission's wishes he had redrafted articles 67 to 69, which had formed

⁵ Rousseau, C., *Principes généraux du droit international public*, Paris, 1944, Tome I, pp. 64 et seq.

section II of his original draft (A/CN.4/167/Add.1). The redraft read :

“ Section II — Modification of treaties ”

“ Article 67 ”

“ Procedure for amending treaties ”

“ 1. The amendment of a treaty is effected by the conclusion and entry into force of another instrument modifying its provisions.

“ 2. The rules laid down in Part I apply to such instrument except in so far as the treaty or the established rules of an international organization may otherwise provide.

“ Article 68 ”

“ Amendment of multilateral treaties ”

“ 1. Every party to a multilateral treaty has the right, subject to the provisions of the treaty,

“ (a) to be notified of any proposal to amend it and to a voice in the decision of the parties as to the action, if any, to be taken in regard to the proposal ;

“ (b) to take part in the conclusion of any instrument drawn up for the purpose of amending the treaty.

“ 2. An instrument amending a treaty does not bind any party to a treaty which does not become a party to that instrument, unless it is otherwise provided by the treaty or by the established rules of an international organization.

“ 3. The effect of an amending instrument on the obligations and rights of the parties to the treaty is governed by articles 41 and 65.

“ 4. The application of an amending instrument as between the parties thereto may not be considered as a breach of the treaty by any party to the treaty not bound by such instrument if it signed, or otherwise consented to, the adoption of the text of the instrument.

“ 5. If the bringing into force or application of an amending instrument between some only of the parties to the treaty constitutes a material breach of the treaty vis-à-vis the other parties, the latter may terminate or suspend the operation of the treaty under the conditions laid down in article 42.

“ Article 69 ”

“ Agreements to modify multilateral treaties between certain of the parties only ”

“ 1. Two or more of the parties to a multilateral treaty may enter into an agreement to modify the application of the treaty as between themselves alone if

“ (a) such agreements are expressly contemplated by the treaty ; or

“ (b) the modification in question

“ (i) does not affect the enjoyment by the other parties of their rights under the treaty ;

“ (ii) does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole ; and

“ (iii) is not expressly or impliedly prohibited by the treaty.

“ 2. Any proposal to conclude such an instrument must be notified to all the parties to the treaty.”

57. The CHAIRMAN invited the Commission to consider article 67 as redrafted by the Special Rapporteur.

ARTICLE 67 (Procedure for amending treaties)

58. Sir Humphrey WALDOCK, Special Rapporteur, said members would notice that he had omitted subparagraph (b) of his original article 67, leaving it to be implied that the other parties must consider in good faith what action should be taken on a proposal for the amendment of a treaty. The rule laid down in the article applied both to bilateral and to multilateral treaties.

59. Mr. VERDROSS suggested that the words “ conclusion and ” should be deleted from paragraph 1. It was obvious that there could be no entry into force without conclusion of the instrument.

60. Mr. RUDA noted that the Special Rapporteur had changed the titles of section II and of article 67 in such a way as to remove any idea of revision. That was commendable, but the English text now contained the words “ modification ” in the title of section II, “ amending ” in the title of article 67 and “ amendment ” in paragraph 1 of that article, whereas in the French and Spanish texts the same word (*modification, modificación*) was used throughout. He asked the Special Rapporteur to explain what he considered to be the difference between the English terms “ modification ” and “ amendment ”.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that the terms “ modification ” and “ amendment ” were used rather loosely, and sometimes, but not always, as synonyms. It might be said that “ modification ” had a somewhat broader meaning and was appropriate for *inter se* agreements when the alterations introduced a change in the operation of the treaty between the States concerned without amending the treaty in the ordinary sense of that term.

62. The CHAIRMAN, speaking as a member of the Commission, said he thought that “ modification ” was a more neutral term and probably also implied more important changes than “ amendment ”, which seemed to have a narrower meaning.

63. Mr. RUDA observed that in Spanish the word *modificación* was not a legal term, although it was used — wrongly — in the United Nations Charter. The correct word was *enmienda* (amendment), and in the light of the Special Rapporteur's explanations that word should be used in the Spanish text and its equivalent in the French.

64. Mr. LIANG, Secretary to the Commission, suggested that the language used in both paragraphs of article 67 was too sweeping, because it seemed to imply that the modification of some of the provisions of a treaty necessarily resulted in a new instrument, which he did not think was the case. For example, if the proposed amendments to the United Nations Charter concerning an increase in the membership of the Security Council and the Economic and Social Council were adopted, the process of amendment would be confined to a few specific provisions and would in no sense mean that a new Charter would come into being.

65. Sir Humphrey WALDOCK, Special Rapporteur, said he did not think that the text of article 67 was open to the objection raised by the Secretary. Its wording meant that the amendment of a treaty would lead to another act by the parties, but one which would not cancel the original treaty.

66. The criticism which might with justice be made of paragraph 1 was that it did not cover all the possibilities. One way in which amendment could take place was by the development of a subsequent practice by agreement between the parties.

67. Mr. CASTRÉN said that the Special Rapporteur's redraft of article 67 to 69 was a great improvement on the original text and he found it acceptable, apart from some matters of form. With regard to the substance, there was only one point that worried him, but after considerable hesitation he had come to the conclusion that the Special Rapporteur's solution was perhaps the best: he was referring to the modification *inter se* of multilateral treaties, now dealt with in article 69. It could well be argued, as some speakers had done during the first reading, that a proposal to modify a treaty of general effect would often, or nearly always, result in a modification that applied only among some of the parties. Consequently, the two kinds of modification could be dealt with in the same article and the same rules laid down for both.

68. On the other hand, the draft articles could hardly prohibit special arrangements among some of the parties which wished to exclude the other parties from those arrangements *ab initio*, provided that there was no violation of the treaty and no impairment of the enjoyment of the rights which the parties not included in the arrangement derived from the original treaty, which would of course remain in force as between the two groups of States. He therefore approved of the way in which the Special Rapporteur had settled those problems in articles 68 and 69. He also approved of the deletion of the original article 67, which had been of little or no practical value and which most of the members of the Commission had apparently thought it best to omit. He had no comments on the new article 67.

69. The CHAIRMAN, speaking as a member of the Commission, said he could not approve of the content of article 67, which gave the impression that the only means of amending a treaty was to conclude and bring into force another instrument in writing. It was true that the Commission had decided only to codify the law of treaties in written form, but there were other forms of international agreement which could be used to amend a written treaty. It was not only by an instrument in writing that such a treaty could be amended. An amendment might very well be oral, and there could be a perfectly genuine oral agreement. Hence some very general expression, such as "another agreement" should be used.

70. Mr. EL-ERIAN said he could not commit himself on the substitution of the word "modification" for the word "revision". Nor could he understand why the

word "amendment" should be used in articles 67 and 68, but the word "modification" in article 69.

71. He rather regretted the disappearance of subparagraph (b) of the original article 67, but welcomed the deletion of the proviso "Subject to the provisions of the treaty" which had given rise to some objection.

72. Mr. BRIGGS said that the redraft of articles 67 to 69 was a great improvement on the original. He hoped that the word "amendment" would be used in the English version and its equivalents in the French and Spanish texts.

73. Referring to the suggestion that the words "conclusion and" should be deleted, he said he would prefer to delete the words "and entry into force", because that stage would be covered by the word "conclusion".

74. With regard to the Chairman's remark, he said that if the words "may be effected" were substituted for the words "is effected", it would be clear that another instrument was not always necessary. It might possibly be found desirable to modify article 67 in such a way as to show that there were different ways of amending treaties, but that the present articles dealt only with amendment by a subsequent instrument.

75. Mr. TUNKIN said that the redraft was superior to the original, but paragraph 1 in the new article 67 was excessively stringent and did not correspond to accepted practice. There was no reason why a treaty should not be amended by a less formal procedure or through custom accepted by all the parties as meaning a modification of the treaty. In his opinion, the rule should be stated in a more flexible form indicating that a treaty could be modified by any procedure by common agreement between the parties.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission would have to consider whether a reservation should be included in the article concerning amendment by means of a change in subsequent practice, which was a form of tacit agreement and raised issues of interpretation. To deal with the matter in the article itself might be a departure from the structure of the draft articles since the Commission had decided that its draft articles would not deal with oral agreements.

77. He had used the word "instrument" in paragraph 1, in the sense of another treaty, inasmuch as an amendment became a new international agreement which, by virtue of the definition laid down in article 1,⁶ was a treaty.

78. Mr. BARTOŠ said that, in the main he approved of the text of article 67, but he had a few comments to make on the form. With regard to paragraph 1, he agreed with Mr. Verdross that the words "conclusion and" should be deleted, but for both practical and theoretical reasons he would oppose the deletion of the words "modifying its provisions"; it was necessary to distinguish between the amendment of a treaty and its replacement by another amended or revised treaty.

⁶ *Yearbook of the International Law Commission, 1962, Vol. II, p. 161.*

79. As to the idea of "another instrument", he was inclined to agree with the Special Rapporteur rather than the Chairman. The Commission, when discussing Part I of the draft articles, and prompted by the regulations on the registration of treaties, had decided to disregard oral treaties entirely⁷ and not to take sides in the argument on whether, since the entry into force of the United Nations Charter, oral treaties were still recognized in international law. The word "instrument" should therefore be retained, but with the proviso that it was the treaty itself that entered into force; the "instrument" might sometimes be merely evidence of the treaty's existence.

80. Paragraph 2 also raised a question of doctrine, namely, whether a treaty containing provisions that differed from the rule laid down in paragraph 1 could debar the parties from resorting to another method of amending an earlier treaty by a later one: should the new instrument be based on the rules concerning amendment laid down in the previous treaty? It might also be asked whether "the established rules of an international organization" were of such overriding force that States could not make any other arrangement. In the case of a treaty concluded within such an organization, naturally discipline required that the members should observe its rules. But if only two States members of an international organization were concerned, and the organization proposed, recommended or laid down a procedure governing relations among its members, the point was open to doubt.

81. Lastly, article 67, which was linked with articles 68 and 69, raised the question of the meaning of the term "multilateral treaties". The Commission had defined a "general multilateral treaty", but it had not given a general definition of a "multilateral treaty". Did articles 68 and 69 constitute exceptions to article 67 with regard to all multilateral treaties, including not only those that were not really of "general interest", but also all the others that were only tripartite or had very limited effects between certain States?

The meeting rose at 1 p.m.

753rd MEETING

Friday, 26 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Later: Mr. Herbert W. BRIGGS

Yearbooks and Summary Records of the Commission

1. Mr. PAREDES said that the essential part of the considerable amount of work done by the Commission was not so much the formulation of definitive rules of law, which governments might or might not accept, as

the high-level exchange of views on legal questions and the trend to be followed in dealing with them. He therefore wished to thank the Secretariat, which had begun to distribute the *Yearbooks* containing the records of the debates, and hoped that the Spanish text of the summary records for 1963 would be issued shortly. If governments were expected to state their views, they must be given all the necessary material on which to base them.

2. The Commission's provisional summary records, however, were drafted in such a way that the speaker did not recognize his own statements; either the text made him say the opposite of what he had really said, or it stressed subsidiary points at the expense of essentials. That might be because the summary records were drafted in English and French and then translated into Spanish, or because the *précis* writers did not have the thorough knowledge of law required. In any event, it was essential that the Chairman should assert the speaker's right to correct the summary record, so as to ensure that it reproduced the thoughts he had expressed.

3. The CHAIRMAN said that the *précis* writer's work was not easy. Summarizing was a most difficult task, and the subjects dealt with by the Commission were highly technical. Besides, the members of the Commission represented different legal systems and different schools of thought, and not everyone could be expected to be familiar with all of them. Furthermore, although the speakers themselves knew what they considered important or secondary in their statements, their listeners might well gain quite a different impression. Members of the Commission usually spoke extempore, which was as it should be, but as a result, their mode of expression might not be so clear as their thinking, so that it was necessary to restrict the right to correct the summary records to some extent. If members entirely rewrote the summary of their own statements, some of the subsequent statements by other speakers might lose their point.

4. He himself had noted a very considerable improvement in the summary records. But members of the Commission should nevertheless have the broadest possible right of correction, and the Secretariat had never had any idea of contesting it.

5. Mr. ROSENNE pointed out that volume I of the English text of the Commission's *Yearbooks* for 1962 and 1963 had been distributed only the previous day; he hoped that the delay in publication would be further reduced in the future. It was essential for governments to have the *Yearbooks* as early as possible.

6. Associating himself with the Chairman's remarks about the summary records, he said that as far as the English text was concerned they reported, in a generally accurate manner, difficult debates on what were sometimes esoteric subjects.

7. Mr. BRIGGS said he was glad that volume I of the *Yearbooks* for 1962 and 1963 had appeared. It was important that those publications should be issued as early as possible so that they could be consulted by governments in preparing their comments on the Commission's drafts.

⁷ *Ibid.*, p. 163, para. (10).

8. He agreed with the Chairman that there had been an improvement in the summary records at the present session.

9. Mr. LACHS also expressed his satisfaction at the publication of the *Yearbooks*.

Law of Treaties

(continued)

[Item 3 of the agenda]

ARTICLE 67 (Procedure for amending treaties) (continued)

10. The CHAIRMAN invited the Commission to continue consideration of the redraft submitted by the Special Rapporteur for article 67.¹

11. Mr. PAREDES thought that paragraph 1 gave the impression that any amendment of a treaty involved the conclusion of a new treaty replacing the earlier one. That was certainly not the meaning the text should bear or the meaning the Special Rapporteur had intended to convey. Amendments differed in scope and might affect essential or subsidiary points, so that it might not be necessary to conclude a new treaty. The parties might simply agree to extend their rights and obligations. Amendment was merely a new application of the same rule of law, not the replacement of one rule of law by another.

12. The term "modification", which it had sometimes been suggested should be replaced by "amendment", had given rise to some interesting discussion. In his own view, neither term was appropriate. The idea of amending included, up to a point, that of correcting an error, while the term "modification" was also restricted in scope—by no means so broad as "revision", which meant a fresh study of the essential elements of the text. Revision did not mean a complete change: it might affect only part of a treaty, but it would still relate to its bases or fundamentals. On the other hand, there was no denying that governments used the term "revision" very frequently, and it was Commission's duty to give a precise meaning to terms that were in current use in international life; in that particular case it must ensure that "revision" was not understood in the sense in which certain governments used it, i.e. to mean any change whatever in the system provided for by a treaty, regardless of whether the treaty was void or voided or whether some derogation from, or termination of, the treaty had been proposed. For those reasons he still advocated the use of the term "revision".

13. Sir Humphrey WALDOCK, Special Rapporteur, said that in the light of the criticism made by some members at the previous meeting that his redraft of article 67 was too stringent and did not allow for more informal methods of amending a treaty, he proposed that it should be further revised to read:

"A treaty may be amended by agreement between the parties. Except in so far as the treaty or the established rules of an international organization may otherwise provide, such agreement may be embodied

"(a) in an instrument drawn up in accordance with Part I in such form as the parties shall decide; or

"(b) in communications made by the parties to the depositary or to each other."

If it was acceptable to the majority, that text would satisfy him. Although it would by implication cover the case of amendment by subsequent practice, that particular point might need to be dealt with more explicitly in some other part of the draft.

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

14. Mr. VERDROSS supported the Special Rapporteur's new proposal, which was a great improvement because it spoke of agreement "between the parties", whereas the earlier text had not made it clear by whom the instrument was concluded.

15. Mr. ROSENNE said that the new text proposed by the Special Rapporteur was acceptable. He had no strong views about the term to be used in the title of section II as he did not believe that from the strictly legal standpoint there was any substantial difference between amendment, revision and modification. There might be some advantage, however, in following the language of Chapter XVIII of the Charter and explaining the matter in the commentary, even if a slight discordance between the texts in the different languages would result.

16. He regretted that the Special Rapporteur had not made the whole of his new article 67 subject to the terms of the treaty or to the established rules of an international organization, but if the majority thought the proposed formulation satisfactory he would not press the point.

17. The Commission need not concern itself with the amendment of bilateral treaties. Obviously they could not be amended unilaterally, and the situation was to some extent analogous to that of reservations to bilateral treaties, which the Commission had described in 1962 as presenting no problem.²

18. The word "instrument" was the correct term to describe the document incorporating an amendment formally adopted. As in the case of an agreement to terminate a treaty, it was implicit that the theory of the so-called "equal act" would not apply to such an instrument, and that point should be mentioned in the commentary in order to preserve the degree of flexibility desired by some members of the Commission.

19. Some care would have to be taken to make it plain that the expression "established rules of an international organization" meant the rules applicable to the treaty and not those applicable to the parties in their capacity as members of the organization. Unless that drafting point were dealt with, the text might be open to some unforeseen interpretation.

¹ See previous meeting, para. 56.

² *Yearbook of the International Law Commission, 1962, Vol. II, p. 176, para. (1).*

20. Mr. AMADO said he found the Special Rapporteur's new text satisfactory.

21. Mr. ELIAS said he approved of the new text, which was similar to one he had intended to propose himself. It might perhaps be shortened in the course of review by the Drafting Committee.

22. Mr. YASSEEN said that the procedure contemplated in the article was logical: what had been done by *mutuus consensus* could be changed by *mutuus dissensus*. Nevertheless, he foresaw some difficulties in the application of the article.

23. In the first place, must the amendment take exactly the same form as the treaty, in accordance with the theory of the "contrary act"? Some writers had maintained that it must, but there was nevertheless some practice in the matter showing more flexible methods: the parties were sometimes satisfied with an exchange of notes or concordant declarations. The text should accordingly be based on that practice. The amendment need not necessarily take the same form as the treaty; the essential point was that the parties should really consent to it. Thus the new wording proposed by the Special Rapporteur was satisfactory, as it did not depart from the accepted general principles.

24. Consequently, it might perhaps be better not to refer in the article to other forms of implicit amendment, such as amendment consequent upon mere conduct in the application of a treaty. The greatest caution should be observed in that respect, for conduct in itself might not be evidence of the will to amend the provisions of a treaty. In practice, an attitude implying amendment might be regarded as a continuous violation of the treaty by one party. The other party might refrain from protesting vigorously out of resignation or courtesy, or because there was little at stake, but that did not prove that it had consented to the amendment.

25. Mr. JIMÉNEZ de ARÉCHAGA, commenting on the new draft submitted by the Special Rapporteur, said that it attempted to be symmetrical with article 40 on termination.³ However, some questions were raised which might create unnecessary difficulties, such as the question whether unanimous consent was needed to amend a treaty. There was not an exact parallel in that respect, because while termination required unanimous agreement, the "*inter se*" technique of amendment allowed that requirement to be dispensed with in certain cases. It would therefore be wiser not to go into that question, especially as the two following articles correctly solved the substantive problems. Article 69 covered the special case of *inter se* agreements, an example of which was the practice of the five permanent members of the Security Council not to regard abstentions from voting as an exercise of the veto. That practice was an instance of "*inter se*" *de facto* amendment not touching upon the rights of other States Members of the United Nations and therefore not requiring their consent.

³ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 15.*

26. It would also be preferable not to mention the methods by which amendment could be effected. The methods mentioned in the new text did not by any means constitute an exhaustive list: among others, they did not include record of agreement by parallel statements before an international organ, as in the case of the Security Council practice regarding abstention, or subsequent practice, to which Mr. Tunkin had called attention. It would not be appropriate to deal with amendment by subsequent practice as a matter of interpretation.

27. He therefore considered that article 67 should be restricted to the subject-matter of the original article 68, paragraph 3 (A/CN.4/167/Add.1) and should only provide that, except in so far as the treaty or the established rules of an international organization stipulated otherwise, the rules laid down in Part I applied to the conclusion and entry into force of any instrument designed to amend a treaty.

28. Mr. TABIBI said he could have accepted the first redraft of article 67 with the deletion of the words "modifying its provisions" in paragraph 1. The new text proposed would cover not only amendment in the strict sense of the term, but also any amplification of the original treaty.

29. One point would need to be determined: what would be the position of a party not a member of an international organization, which was opposed to amendment of a treaty that was to be amended in conformity with the rules of that organization?

30. Mr. TUNKIN said that in practice nearly all modern treaties contained provisions concerning their amendment and revision, so that difficulties about the procedure to be followed for their amendment rarely arose. The problem not covered in either of the redrafts of article 67 was whether a treaty could be modified by the development of custom accepted as law by the parties. He appreciated the danger, mentioned by Mr. Yasseen, of recognizing such a possibility.

31. The first part of the new text proposed by the Special Rapporteur was acceptable, but the latter part of sub-paragraph (b) was too vague where it spoke of an agreement being embodied in communications between the parties.

32. He was inclined to doubt whether there was much need for such an article, particularly as it would be virtually impossible to devise rules which could adequately meet the requirements of States and which would not in some way be a hindrance in a sphere in which practice was extremely flexible.

Mr. Ago resumed the Chair.

33. Mr. LACHS said that the new text proposed by the Special Rapporteur was an improvement on the previous one, but he would suggest that, by analogy with article 40, the amendment of a treaty required the agreement of all the parties. The document in which the amendment was embodied could take various forms, and as it stood the provision was not exhaustive; that point would require further consideration.

34. A clear distinction should be drawn between interpretation, which gave life to a text, and a formal amendment, which changed an existing instrument. For example, by a process of interpretation chapters XI to XIII of the Charter had acquired a new meaning without having been formally amended.
35. If the rules of an international organization were to be mentioned, the reference should be to those laid down in its constituent instrument.
36. Mr. LIU said he hoped the principle of peaceful change which had been enunciated in the Covenant of the League of Nations would receive adequate mention in the commentary. There seemed to have been some shift of opinion in the Commission, for whereas initially it had been inclined to be cautious, it was now discussing various ways of effecting revision. In view of some uncertainties in the new text prepared by the Special Rapporteur, he would prefer a formula on the lines suggested by Mr. Jiménez de Aréchaga.
37. Mr. EL-ERIAN said it might prove extremely difficult to draft a satisfactory provision because a number of the issues involved were controversial. The Commission had moved a long way from Lord McNair's assertion that treaty revision was a matter for politics and diplomacy;⁴ it seemed to be contemplating a fairly strict provision.
38. The opening proviso in the Special Rapporteur's original text of article 67 (A/CN.4/167/Add.1) had been reintroduced in the latest redraft in the words "except in so far as the treaty or the established rules of an international organization may otherwise provide". Such a clause would only be acceptable if it referred to the procedure for amendment, for in his opinion the principle of the amendment of a treaty could not be barred altogether by the actual terms of the treaty.
39. Sir Humphrey WALDOCK, Special Rapporteur, explained that an important point of substance was involved in the fact that article 67 did not refer to the agreement of "all the parties" as did article 40, which dealt with termination.
40. There had been general recognition of the need, in dealing with the amendment of multilateral treaties, to strike a balance between stagnation and flexibility. In his first draft of the articles on the amendment of treaties (A/CN.4/167/Add.1) he had attempted to strike that balance by means of the provisions of article 68, paragraph 3, which specified that the rules laid down in Part I applied to the amending instrument. For the adoption of the text of that instrument, the rules embodied in article 6⁵ would therefore apply. Provision was thus made for the adoption of the text by a two-thirds majority at an international conference and, where appropriate, for the application of the voting rule of an international organization, while the requirement of unanimity remained the residuary rule.
41. Where multilateral treaties were concerned, there was a strong case for drawing a distinction between amendment and termination. When a treaty was terminated, the rights of the parties ceased to exist; when it was amended, the parties which did not wish to accept the amendment remained bound by the original treaty, except on those rare cases in which the treaty itself, or the applicable rules of an international organization such as WHO, laid down that an amendment adopted by a specified majority was binding upon all the parties, including the minority which had opposed the amendment.
42. It was with those thoughts in mind that he had prepared the new draft of article 67.
43. The CHAIRMAN, speaking as a member of the Commission, said he was surprised that the Special Rapporteur's text should give rise to so many difficulties, some of which were surely rather imaginary. It would be paradoxical and regrettable if, owing to disagreement, the Commission had to drop the article, which formed the counterpart to article 40 on the termination of treaties. In that connexion he would like to know whether the Special Rapporteur meant to make a distinction between the two articles by saying "agreement of all the parties" in article 40 and "agreement between the parties" in article 67.
44. Reference had been made to the amendment of treaties by State practice. In his view, interpretation could ultimately lead to a kind of modification of a treaty, even though the parties, unlike jurists, believed that only interpretation was involved. In some cases, however, he thought that the emergence of a particular practice actually resulted in amendment in the true sense of the term. For instance, as a result of technical developments, certain clauses of the treaties relating to the laws of war had become obsolete, which in fact amounted to an amendment. But he did not think that point should be taken up at present. The same problem arose in connexion with article 40, and the Commission had not taken it up when considering that article. The question should probably be considered as a whole, perhaps when the Commission came to deal with interpretation. For the time being he was satisfied with the text proposed by the Special Rapporteur.
45. Mr. TUNKIN said he had taken "agreement between the parties" to mean "agreement of all the parties".
46. Sir Humphrey WALDOCK, Special Rapporteur, said he had deliberately not used the word "all", in order to introduce a distinction between the termination and the amendment of a treaty.
47. The CHAIRMAN, speaking as a member of the Commission, asked the Special Rapporteur whether the clause beginning with the words "Except in so far as" did not constitute a sufficient safeguard. It was hard to think of other cases in which a treaty could be amended without the consent of all the parties.
48. Sir Humphrey WALDOCK, Special Rapporteur, said that the great majority of modern amendments to

⁴ *The Law of Treaties, 1961*, p. 534.

⁵ *Yearbook of the International Law Commission, 1962*, Vol. II, p. 166.

multilateral treaties had been made without the consent of all the parties to the original instrument and in the absence of any provision in the original treaty explicitly providing for such a procedure.

49. Mr. YASSEEN observed that the Special Rapporteur's new draft also covered the case of amendment of a treaty by *inter se* agreement among some of the parties.

50. He asked Mr. Tunkin whether, when speaking of international custom, he had been referring to custom in the sense of usage, or to customary rules of international law.

51. Mr. TUNKIN replied that the terms "usage" and "custom" had given rise to considerable confusion. Strictly speaking, "custom" meant a customary rule of international law. The term "usage" applied to a practice which was not accepted as law. In view of the tendency in some quarters to use the term "custom" rather loosely in the sense of "usage", he preferred to avoid that term and to employ the expression "customary norm or rule of international law" — an expression that could give rise to no misunderstanding, because it made clear that the reference was to a rule of law and not to a mere practice. In that connexion, he drew attention to Article 38, paragraph 1 (b) of the Statute of International Court of Justice which referred to "international custom as evidence of a general practice accepted as law." That provision of the Statute made it clear that, contrary to the assertion of Kelsen,⁶ practice by itself did not constitute international law.

52. He suggested that article 67 should be formulated in such a way as to confine its provisions within the framework of the law of treaties, but not to exclude some other ways of modifying treaties, such as the operation of a rule of customary international law.

53. The Drafting Committee should be invited to amend the article so as to cover that point, though the task would not be an easy one.

54. Mr. YASSEEN said that, in referring to international custom considered as a set of rules of law, Mr. Tunkin had raised a very important matter, to which he (Mr. Yasseen) had referred during the discussion of article 64.⁷ Mr. Tunkin had given the Commission yet another reason why it should study the whole question of the relationship between conventional and customary rules. There was no denying that the provisions of a treaty could become obsolete — a phenomenon that had been analysed as the effect of a supervening customary rule which put an end to the treaty or modified some of its provisions. In such a case, the amendment of the treaty was not brought about by the mutual agreement of the parties, which only came into play if, and in so far as, it could be considered as a factor contributing to the formation of the custom. The Commission should consider the

possibility of studying, in the context of its draft, the problem of conflict between conventional rules and rules of law derived from other sources.

55. Mr. de LUNA congratulated the Special Rapporteur on his new draft of article 67. The basic idea of the article had been to facilitate the development of international law and to prevent clashes between law and politics from leading to dangerous international conflicts.

56. The new article 67 appropriately emphasized the need for agreement between the parties. But that agreement need not necessarily be of a formal kind; international law was very flexible in that respect, since it permitted the conclusion of an international agreement even by means of signals; for example, the use of the white flag for concluding a truce.

57. The interpretation of a treaty could serve to clarify its provisions or to fill any gaps in them. It could not serve to replace an old rule by a new one or settle the case in which a rule became obsolete because it had ceased to be effective.

58. The parallel between articles 40 and 67 was not complete. In the case of termination under article 40, the treaty was extinguished for all the parties. In the case of amendment of a multilateral treaty, if the *inter se* process was accepted, the amendment could be made without the agreement of all original parties.

59. He was prepared to accept the new formulation of article 67, but he urged that the Commission should consider how to deal with the points raised by Mr. Tunkin and Mr. Lachs. In doing so it should take care not to prejudice any member's doctrinal position with regard to customary international law. For his part, he could not agree that the rules of customary international law had their source in the tacit agreement of States.

60. Mr. ROSENNE stressed that article 67 did not stand alone; it should be read in conjunction with articles 68 and 69.⁸ Article 68 specified the rights of all the parties to a multilateral treaty in regard to proposals for amendment. If article 67 were considered together with article 68, it was likely that the problem which had arisen would become largely one of drafting. It would therefore be advisable to refer both articles together to the Drafting Committee.

61. He agreed with Mr. Tunkin that section II, on the modification of treaties, dealt with the law of treaties and not with other branches of international law.

62. Mr. BARTOŠ said that, for the reasons given by Mr. El-Erian and Mr. Yasseen, he had the same objections to the new draft or article 67 proposed by the Special Rapporteur as he had put forward at the previous meeting with regard to the former version.⁹

63. Mr. BRIGGS said that there was obviously more than one way of amending a treaty, but articles 67 to 69

⁶ Kelsen, H., *Principles of International Law*, New York, 1932, pp. 307 *et seq.*

⁷ 740th meeting, paras. 44-45.

⁸ See previous meeting, para. 56.

⁹ *Ibid.*, paras. 78-81.

dealt with a particular type of amending instrument. For that reason, he favoured the former redraft of article 67, stating that "The amendment of a treaty is effected by the conclusion and entry into force of another instrument modifying its provisions", with the addition of a proviso such as "or by agreement between the parties". The actual wording could be left to the Drafting Committee, but he thought it important that the Commission's draft should contain a provision on the lines of article 67.

64. He agreed with Mr. Lachs that a distinction should be made between the amendment of a treaty and the process whereby a new meaning was given to its provisions by interpretation.

65. Mr. RUDA said he thought article 67 should be retained in the draft. He was also in favour of retaining the main idea expressed in the first sentence of the Special Rapporteur's new draft, namely, that a treaty could only be amended by agreement between the parties or with their consent. With regard to the subsidiary idea — the manner in which a treaty could be amended — on the whole he approved of the formula suggested in the new draft, but he thought the Commission should take into consideration the comments made by Mr. Tunkin and Mr. Lachs.

66. In order to leave greater latitude to the will of the parties, it should be added that they could amend a treaty by any procedure they considered appropriate.

67. Mr. CASTRÉN said he agreed with Mr. Jiménez de Aréchaga. Perhaps the best solution might be to reintroduce the original text of article 68, paragraph 1 (A/CN.4/167/Add.1), which had only referred to amendment of a treaty by an instrument, without mentioning any other possibility.

68. Sir Humphrey WALDOCK, Special Rapporteur, said he thought article 67 could now be referred to the Drafting Committee, which should be able to produce a generally acceptable text.

69. He was not in favour of introducing a reference to customary international law. To do so would result in an imbalance, since no reference to customary international law had been made in other articles of the draft. Moreover, it would introduce an element of confusion into the provisions of article 67, the purpose of which was to clarify the rules applicable to the more formal kind of revision of treaties.

70. As to the problem of the effect on treaties of changes in the rules of general international law, and of the emergence of new rules of customary international law, he would have to consider that matter when reformulating article 56 on the inter-temporal law.

71. Mr. AMADO said he thought that interpretation should not be mentioned in connexion with the amendment of a treaty. In fact, interpretation very often had the opposite effect and restored the original meaning of a treaty after it had been distorted.

72. He was opposed to tendency to go into unnecessary details when speaking of custom: to speak of "custom"

in international law was to speak of international law itself, from which custom could not be expected.

73. The Drafting Committee should base its text of the article on the Special Rapporteur's latest draft, amended as suggested by Mr. Ruda.

74. As to the choice between the words "the parties" and "all the parties", he did not see how the second expression could be regarded as saying any more than the first. A reference to "the parties" in connexion with a treaty certainly meant all the parties.

75. The CHAIRMAN, speaking as a member of the Commission, said that in his view the word "all" before "the parties" in article 40 was redundant.

76. He would like to make two recommendations to the Drafting Committee. First, as Mr. Amado had just pointed out, interpretation should not be confused with amendment: it would be dangerous to include under the term "interpretation" matters that were entirely different. Secondly, reference had been made to the amendment of treaties by the formation of customary rules. In practice, such cases were very rare. It happened much more frequently that a treaty was amended by tacit agreement or by the conclusion of another treaty, which, by implication, involved the amendment of the first treaty.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that whatever views might be held on the matter, it had to be admitted that a very real difficulty arose in practice. Even where the intention in a multilateral treaty was that any amendment required the consent of all the parties, an amending instrument had been known to enter into force without being ratified or accepted by all the parties to the original treaty.

Article 67 was referred to the Drafting Committee for consideration in the light of the discussion.

ARTICLE 68 (Amendment of multilateral treaties) (redrafted by the Special Rapporteur)

78. Sir Humphrey WALDOCK, Special Rapporteur, said that, as Mr. Rosenne had pointed out, article 68 constituted an essential complement to article 67, particularly on the question of the unanimity of the parties. His redraft of article 68 read:

"Amendment of multilateral treaties"

"1. Every party to a multilateral treaty has the right, subject to the provisions of the treaty,

"(a) to be notified of any proposal to amend it and to a voice in the decision of the parties as to the action, if any, to be taken in regard to the proposal;

"(b) to take part in the conclusion of any instrument drawn up for the purpose of amending the treaty.

"2. An instrument amending a treaty does not bind any party to a treaty which does not become a party to that instrument, unless it is otherwise provided by the treaty or by the established rules of an international organization.

"3. The effect of an amending instrument on the obligation and rights of the parties to the treaty is governed by articles 41 and 65.

" 4. The application of an amending instrument as between the parties thereto may not be considered as a breach of the treaty by any party to the treaty not bound by such instrument if it signed, or otherwise consented to, the adoption of the text of the instrument.

" 5. If the bringing into force or application of an amending instrument between some only of the parties to the treaty constitutes a material breach of the treaty vis-à-vis the other parties, the latter may terminate or suspend the operation of the treaty under the conditions laid down in article 42."

79. The provisions of the redraft were based on the original text of articles 68 and 69 (A/CN.4/167/Add.1) and on the discussion in the Commission. Paragraph 1 set forth the right of every party to a multilateral treaty to be notified of any proposal for its amendment and to participate in the negotiations. At that point he had introduced a reference to the right to a voice in the decision of the parties as to any action that might be taken; the purpose of that change was to take into account the view expressed by some members that the article should specify the right of every party not only to be consulted and to participate in the negotiations, but also to have a voice in the decision taken. That right, however, was subject to the proviso in the opening passage of paragraph 1. Many treaties concluded under the auspices of the United Nations laid down that any proposal for amendment must be referred to the General Assembly or another United Nations organ; in those cases, it could not be said that every party had a voice in deciding the procedure to be followed.

80. Some of the provisions of the new article 68 were taken from the text of his original draft of article 69. For example, paragraph 4 concerned a case of estoppel previously dealt with in article 69, paragraph 2. The case contemplated was that of a multilateral treaty amended by an international conference; a State which had attended the conference and had consented to the adoption of the text of the amending instrument, but which did not ultimately accept to be bound by it, would not be entitled to accuse the other parties of committing a breach of the original treaty merely because those parties had decided to apply the amending instrument as between themselves. The former text had referred to participation in the adoption of the amending instrument; that language had been replaced by a reference to the circumstance that the party concerned had "signed, or otherwise consented to the adoption of the text" of the amending instrument. The purpose of the words "or otherwise consented to" was to cover the case in which the party concerned had voted in favour of the text at the conference.

81. Paragraph 5 of the redraft reproduced the substance of the original article 69, paragraph 3 (b), but the words "a violation of the treaty" had been replaced by "a material breach of the treaty" to bring the language into line with that of article 42. In that case common agreement was necessary; where a number of the original parties had not consented to the amendment and regarded its entry into force between some of the other parties to the treaty as a material departure from the original treaty, they would have the right to withdraw subject to their being unanimous among themselves.

82. The provisions of the redraft of article 68 were in substance similar to those embodied in the previous texts, but he had endeavoured to take into account the objections to the drafting put forward during the discussion.

83. Mr. RUDA said he had the impression that the new text of article 68 dealt with two completely different subjects. Some of its provisions stated rules on the amendment of multilateral treaties generally, whereas paragraphs 2, 4 and 5 dealt with the amendment of multilateral treaties between some of the parties only and therefore seemed to belong to the subject-matter of article 69.

84. Sir Humphrey WALDOCK, Special Rapporteur, explained that articles 68 and 69 as redrafted dealt with two totally different situations. The agreements covered by article 69 were those in which two or more of the parties to a multilateral treaty decided to modify its application as between themselves alone; they deliberately set out to make an *inter se* agreement and did not contemplate that the other parties to the original treaty would agree to the amendment. Paragraphs 2, 4 and 5 of article 68 dealt with a different situation, which arose quite frequently: the parties set out to modify the treaty for all of them, but some of them did not ratify or accept the new treaty or amending instrument.

The meeting rose at 1 p.m.

754th MEETING

Monday, 29 June 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(continued)

[Item 3 of the agenda]

ARTICLE 68 (Amendment of multilateral treaties) (continued) and

ARTICLE 69 (Agreements to modify multilateral treaties between certain of the parties only)

1. The CHAIRMAN invited the Commission to continue consideration of article 68, taking up article 69 in conjunction with it. The two articles as redrafted by the Special Rapporteur read:

" Article 68

" Amendment of multilateral treaties

" 1. Every party to a multilateral treaty has the right, subject to the provisions of the treaty,

"(a) to be notified of any proposal to amend it and to a voice in the decision of the parties as to the action, if any, to be taken in regard to the proposal;

"(b) to take part in the conclusion of any instrument drawn up for the purpose of amending the treaty.

"2. An instrument amending a treaty does not bind any party to a treaty which does not become a party to that instrument, unless it is otherwise provided by the treaty or by the established rules of an international organization.

"3. The effect of an amending instrument on the obligations and rights of the parties to the treaty is governed by articles 41 and 65.

"4. The application of an amending instrument as between the parties thereto may not be considered as a breach of the treaty by any party to the treaty not bound by such instrument if it signed, or otherwise consented to, the adoption of the text of the instrument.

"5. If the bringing into force or application of an amending instrument between some only of the parties to the treaty constitutes a material breach of the treaty vis-à-vis the other parties, the latter may terminate or suspend the operation of the treaty under the conditions laid down in article 42.

"Article 69

"Agreements to modify multilateral treaties between certain of the parties only

"1. Two or more of the parties to a multilateral treaty may enter into an agreement to modify the application of the treaty as between themselves alone if

"(a) such agreements are expressly contemplated by the treaty; or

"(b) the modification in question

"(i) does not affect the enjoyment by the other parties of their rights under the treaty;

"(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole; and

"(iii) is not expressly or impliedly prohibited by the treaty.

"2. Any proposal to conclude such an instrument must be notified to all the parties to the treaty."

2. Mr. VERDROSS thanked the Special Rapporteur for his redraft of paragraphs 1 and 4 of article 68, which stated some important rules that had not been very clear before. He thought, however, that paragraph 1 could be simplified by deleting sub-paragraph (a), which was implicit in sub-paragraph (b), since a party could not take part in the conclusion of the instrument in question unless it had been notified in advance. It would also be better to speak of the obligation of the State requesting the amendment, rather than the right of the other States. Paragraph 1 would then read: "A State which requests the amendment of a multilateral treaty is obliged to invite all the other parties to take part in the conclusion of any instrument drawn up for the purpose of amending the treaty."

3. Paragraph 4 was logical. If a State authorized its representative to sign a treaty containing a provision under which the treaty would come into force after it had been ratified even by a small number of States, that State could not be heard to complain afterwards.

4. Mr. BRIGGS said that there seemed to be general agreement on the pattern to be followed in article 68:

it should deal with the procedure for the amendment of multilateral treaties and with the legal consequences of the amending instrument. So far as drafting was concerned, however, he believed that paragraph 1 could be simplified to read: "Every party to a multilateral treaty has the right, subject to the provisions of the treaty, to be notified of any proposal to amend it and to participate in any action which may be taken with a view to the amendment of the treaty". Such a provision would have the effect of opening any amendment—even one originally proposed as an *inter se* agreement—to participation by any party to the multilateral treaty.

5. Paragraph 2 laid down a fundamental and acceptable principle, namely, that an amending instrument did not bind any non-party to it.

6. Paragraph 3 dealt with the legal consequences of conflicting instruments and referred to article 41 (termination implied from entering into a subsequent treaty),¹ and to the new article 65 (application of incompatible treaty provisions)² paragraph 4 (b) and (c) of which covered *inter se* amendments. The relationship between articles 68 and 69 had not yet been worked out satisfactorily. They were really two kinds of *inter se* agreement: those resulting automatically from the fact that not all the parties to a treaty became bound by the amending instrument and those intended at the outset to apply *inter se*. In article 69, paragraph 1, the latter type of instrument was hedged about with additional safeguards beyond the rights of notification and participation stipulated in article 68, paragraph 1. But the limitations set out in article 69, paragraph 1, did not appear to be applicable to amendments not originally designed to be *inter se*, and it was doubtful whether the Commission would consider it desirable to apply them to all proposals to amend a multilateral treaty. However, since under the new article 68, paragraph 1, even proposed *inter se* amendments were open to participation by all parties to the treaty, it became difficult to devise a distinguishing criterion between an *inter se* amendment and any other amendment. Perhaps a way out would be to insert certain elements taken from article 69 in article 68, paragraph 4, which might then provide that the application of an *inter se* amendment could not be considered a breach of the treaty by any party to the treaty if it was not bound by the amending instrument and if that instrument did not violate certain of the conditions set out in article 69.

7. The reference to article 42 in article 68, paragraph 5, was inappropriate to the amending process. On the other hand, reference should be made to article 51 if the possibility of termination on grounds of a material breach was to be mentioned.

8. Sir Humphrey WALDOCK, Special Rapporteur, said that although he agreed that articles 68 and 69 did not make a sufficiently clear distinction between the two kinds of *inter se* agreement, Mr. Briggs's idea of introducing into the former the conditions laid down

¹ Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 16.

² See next following meeting, para. 1.

in the latter would entirely destroy the purpose of article 68, paragraph 4, which was to impose a complete estoppel in the case of *inter se* agreements that were not intended as such, but came into being as a result of some parties staying out of the amending process.

9. He had inserted the provision contained in article 69, paragraph 2, because it appeared to be the general view that all the parties should be notified of an *inter se* agreement deliberately intended as such from the beginning, in case there might be grounds for questioning it, but of course other parties would not be able to insist on participating in the *inter se* instrument.

10. The CHAIRMAN, speaking as a member of the Commission, drew attention to the difference between articles 68 and 69. In the case covered by article 68, the initial intention was to amend the whole treaty, whereas in the case covered by article 69 the intention was only to conclude a collateral agreement. It would be advisable to make that difference still clearer by deleting paragraph 2 of article 69.

11. Mr. CASTRÉN thought that, in order to stress the difference between the case of a general amendment dealt within article 68 and that of an *inter se* agreement to modify a treaty dealt within article 69, it would be appropriate to add, after the words "proposal to amend it" in article 68, paragraph 1 (a), some such phrase as "as between all the parties" or "having a general effect". Paragraph 3 of article 68, which might be interpreted literally, also needed clarification: as it stood, it gave the impression that the effect of the instrument amending the treaty would be governed by articles 41 and 65 for all the parties to the original treaty. To avoid such an interpretation, the words "to that instrument and" should be inserted after the words "the parties". It would then be clear that the effect of the instrument was confined to the parties which had accepted the amendment and that the legal situation of the other parties was not affected by the amendment, as was very correctly stated in the preceding paragraph.

12. The French text of paragraphs 4 and 5 of article 68 did not exactly correspond to the English original, since it contained the words "*manquement*" and "*manquement réel*" instead of the words "*violation*" and "*violation substantielle*" used in article 42, to which those paragraphs related and which was referred to in paragraph 5.

13. Mr. ROSENNE said that in general he could accept the underlying purpose of articles 67 to 69 particularly in the light of the Special Rapporteur's explanation of the relationship between articles 68 and 69.

14. However, he would like to hear from the Special Rapporteur why special recognition, for a limited period, should not be given to States which had taken part in drawing up the treaty, on the lines of the recognition given to such States in articles 9³ and 40.

15. He was not certain that the relationship between paragraphs 2 and 3 of article 68 had been properly brought out, and suggested that the two provisions might be combined.

16. Paragraph 4 should be made subject to the terms of the treaty, because in a number of treaties—for example, the United Nations Charter—consent to amendment was given as it were *a priori*.

17. Mr. RUDA asked what was the use of the notification referred to in article 69, paragraph 2, if the parties concerned could not make their views known and take part in the conclusion of the instrument amending the original treaty. He thought it would be more logical to delete that paragraph.

18. Mr. YASSEEN pointed out that he had already drawn attention to the difference between *inter se* agreements of general effect and *inter se* agreements of special effect or collateral agreements. The difference was a material one, but to what extent should it cause a difference in the rights of the other parties? In his opinion, even an *inter se* agreement of limited effect should be notified to the original parties, for it might directly or indirectly affect the original treaty, the parties to which should be given an opportunity of expressing their views. The implied prohibition referred to in paragraph 1 (b) (iii) of article 69 might be disputed. It was understandable that the States which had to be notified should have no voice in the decision of the parties between which it was proposed to modify the treaty, but such notification was necessary nevertheless.

19. Mr. TUNKIN said that the right of all parties to be notified of a proposal to amend the treaty should be stipulated in article 69 as well as in article 68.

20. The provisions contained in article 68, paragraph 1 (a) and (b), should be retained, possibly with some drafting changes, so as to make the procedure clear. Paragraph 4 was too categorical, however: a State might conceivably vote in favour of an amendment and later conclude that the amendment violated its rights or those of other parties. Its first action should not be regarded as finally binding.

21. Mr. LACHS subscribed to the general views expressed by Mr. Verdross and Mr. Briggs concerning the structure of article 68. He agreed with Mr. Verdross that the article should refer to the obligations of parties proposing amendments.

22. Mr. Briggs' criticism had been very much to the point; it was important to distinguish clearly between the two kinds of *inter se* agreement. The distinction was blurred in articles 68 and 69.

23. He agreed with Mr. Tunkin's comment on article 68, paragraph 4: signature or consent to the adoption of the text could not create any obligation for the State concerned or any rights for the other parties. The position was, of course, entirely different once the amending instrument had been ratified.

24. There was no need to deal separately with the question of *a priori* consent, which was already covered

³ Yearbook of the International Law Commission, 1962, Vol. II, p. 168.

in paragraph 2, and the particular example of the Charter could be left aside: a vote in the General Assembly constituted an inchoate title which could only create rights and obligations in special circumstances.

25. The duty to notify any proposal to amend should be extended even to agreements intended from the beginning to be restricted to a group of the parties.

26. Mr. de LUNA said that one difference between articles 68 and 69 lay in the subject-matter amended by the instrument; the difference between the two articles should accordingly be brought out more clearly. The only condition for amendment laid down in article 68 was notification, whereas article 69 reproduced the conditions laid down in article 46.

27. More attention should also be given to the effects of the amending instrument. He did not approve of the text of article 68, paragraph 5, as it stood. If the States concerned wished to make an *inter se* agreement, but did not comply with the conditions laid down in paragraph 1 (a) and (b), that would be a case of the incompatibility of a later treaty with an earlier one contemplated in article 65, the terms of which were cautious enough and would normally be sufficient.

28. In article 69, it would be meaningless to stipulate the conditions in paragraph 1 (a) and (b) if the other parties had no means of knowing what had happened. Hence notification was necessary, as followed from paragraph 1 and as was stated in paragraph 2.

29. Mr. AMADO said he was opposed to the idea of introducing into an article passages which required interpretation; that applied to the words "or otherwise" in article 68, paragraph 4. He was convinced that the Drafting Committee would smooth out the differences, which did not go very deep, and that the words "*violation substantielle*" should be used in the French text instead of "*manquement réel*".

30. The CHAIRMAN, speaking as a member of the Commission, suggested that the wording of article 68, paragraph 1, should be slightly amended so as to mention the specific case in which the parties wished to amend the treaty as between all of them. It would be for the Drafting Committee to decide whether to use the passive form and speak of the right of the other parties to be notified or to use the active form and refer to the obligation of the amending parties to notify them.

31. It would be better to use the word "*violation*" than the word "*manquement*" in paragraph 4 of the French text.

32. He doubted whether the fact of having taken part in the adoption of the instrument debarred a State from claiming that the conclusion of the new treaty was in itself a breach of the original treaty. Either the new treaty really constituted a breach of the earlier one, in which case a party could not lose its right to invoke that fact, even if it had not noticed it beforehand; or else there was no breach and no right, so that no right was lost. Consequently, the grounds for estoppel were rather dubious, and it would be better not to include them.

33. In paragraph 5, he thought that some such words as "without prejudice to the international responsibility which may arise as a consequence" should be added, so that the reader should not infer that where the conclusion of a new treaty was really a breach of the original treaty, the only possible consequence would be that the injured State could terminate the treaty, whereas other possibilities were open to it.

34. Paragraph 2 of article 69 should be deleted.

35. Mr. TUNKIN suggested that paragraph 5 of article 68 might be dropped, as it was essentially covered by article 42, paragraph 1.

36. Mr. JIMÉNEZ de ARÉCHAGA said he would be prepared to agree to the deletion of paragraph 5 of article 68, but certainly not to that of paragraph 4, for in view of the terms of article 47,⁴ to drop that provision would be entirely illogical.

37. Article 69, paragraph 2, should also be retained, as it embodied an important provision concerning the procedure for satisfying the conditions laid down in paragraph 1.

38. The CHAIRMAN, speaking as a member of the Commission, observed that the case contemplated in article 47 was very different from that dealt with in article 68, paragraph 4; that paragraph related to a breach, and if there was a breach, a party could not lose the right to invoke it.

39. Sir Humphrey WALDOCK, Special Rapporteur, said that there was an even more cogent reason for retaining paragraph 4 than that given by Mr. Jiménez de Aréchaga. The paragraph provided for the situation in which a State had been notified of a proposal to amend a treaty, had participated in drafting the amending instrument and had adopted the text, thus giving validity to the final clauses and setting in motion the whole machinery for entry into force. It would be entirely unreasonable to allow such a State afterwards to claim that the instrument violated its rights.

40. Mr. YASSEEN said that the matter dealt with in paragraph 4 was not of very great importance, since the provision was only intended to prevent a State from claiming that the new treaty infringed its rights. But a State which had agreed to negotiate, had taken part in a conference, and had even signed the instrument or consented to its adoption, had already committed itself too far to be able to claim that the treaty definitely impaired its right; to recognize its claim would be to cast doubt on the seriousness with which a State was presumed to behave when concluding a treaty. The only controversial point was the phrase "or otherwise". Probably it would be enough to say "if it signed the instrument or consented to the adoption...".

41. The CHAIRMAN, speaking as a member of the Commission, asked what was the exact meaning of the words "or otherwise consented to".

⁴ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 24.*

42. Sir Humphrey WALDOCK, Special Rapporteur, said it had not been easy to find appropriate wording for paragraph 4, because some treaties were simply adopted by a resolution of a conference and were not signed at all; the phrase "or otherwise consented to" was meant to denote an affirmative vote in favour of a text. He had carefully worded paragraph 4 so as not to admit of any possible implication that a State not a party to an amending instrument could suffer any loss of rights enjoyed under an earlier treaty.

43. Mr. AMADO said he was still not convinced of the need for the words "or otherwise". The idea of consent should at least come before the reference to signature.

44. Mr. LACHS associated himself with Mr. Amado's remark. The Commission should be careful not to minimize the importance of the institution of ratification; an affirmative vote at a conference might not be ratified by parliament, even though the agent had negotiated in good faith.

45. He asked what would be the position, where a treaty contained a clause prohibiting *inter se* agreements, if the parliament of one of the parties refused to ratify an amending instrument.

46. Mr. BARTOŠ said that although he approved in theory of the principle that any manifestation of a State's will was a source of obligation, even after hearing the Special Rapporteur's explanations he doubted that the words used made it quite certain that there was a will to be taken into consideration. He reminded the Commission how votes were generally taken at meetings of international organizations; roll-call votes were exceptional and, as a general rule, it was not known who had voted for or against a text unless it was expressly mentioned in the record.

47. Mr. TUNKIN said he would have preferred paragraph 4 of article 68 to be omitted altogether, because it dealt with a matter of very little importance. It was most unlikely that any State, having signed an amending instrument, would afterwards allege that the instrument violated its rights. If the paragraph were retained, however, at least the words "or otherwise consented to the adoption of" should be deleted.

48. Sir Humphrey WALDOCK, Special Rapporteur, emphasized that paragraph 4 reflected existing practice. Although it was unlikely that a State which had signed an amending instrument and set in motion the whole process of entry into force would then complain that the instrument violated its rights, it would nevertheless be unsafe for the other States concerned to ratify the amending instrument if there was no such rule as that laid down in paragraph 4.

49. He agreed that a State which had not participated in the negotiation of an amending instrument might object to it; but it seemed hardly likely that a State which had done so would object to the instrument.

50. Mr. REUTER said that, although he was prepared to support the majority view on article 68, paragraph 4,

he shared the Special Rapporteur's opinion on that paragraph—the drafting of which might perhaps be improved—and was convinced that there was a misunderstanding between him and his opponents. The Special Rapporteur held that if a State clearly made known through its diplomatic representatives, who were fully competent for that purpose, that it had no legal objection to the conclusion of a treaty, it was bound by that statement. It might be argued that the attitude of the State could be interpreted in two senses: the positive sense of committing itself, which had not been adopted by the Special Rapporteur, and the negative sense of making no legal objection to the treaty. But no parliament had ever been competent to say whether or not one treaty was compatible with another; that was a task for the diplomatic organs. The misunderstanding might be due to the fact that the Special Rapporteur had referred to positive forms of acceptance, such as signature and consent, as expressing a negative opinion.

51. With regard to article 69, paragraph 2, on the other hand, he was inclined to agree with the Chairman. That paragraph should be deleted or at least redrafted. Article 69, paragraph 1, provided for two different situations. The first was that in which an *inter se* agreement was expressly contemplated by the treaty; it would be logical that in that case, at least, there should be no obligation to notify. In the other situation provided for, to require notification would amount to establishing preventive supervision, which would be going too far. Besides, such supervision could not be carried out in practice, because the text would not be settled until after the notification had been made. In any event, the other parties to the original treaty would be informed through the publication of the *inter se* agreement.

52. Mr. YASSEEN, referring to article 68, paragraph 4, said that in his view it was sufficient for a State to say in a diplomatic note that it had no objection to the conclusion of the new treaty. He understood Mr. Bartoš' concern: the voting system was such that it was not known who had voted for or against a text, so that it was impossible to say that a particular State had consented. Paragraph 4 should make it possible to know whether there had been positive acceptance—whether a state had really consented to the adoption of the text of the instrument.

53. Mr. JIMÉNEZ de ARÉCHAGA considered that the Special Rapporteur was entirely justified in pressing for the retention of paragraph 4, which would in no way detract from the importance of the process of ratification. The paragraph meant that a State which had signed an amending instrument and had failed to ratify it, was estopped from alleging that the amendment violated the earlier treaty. Such a State would therefore continue to be bound by the original treaty in the unamended form in which it had ratified it.

54. Mr. AMADO observed that some members of the Commission had given very subtle interpretations of the Special Rapporteur's text; he urged that the

Commission should express itself definitely, clearly and concisely.

55. The CHAIRMAN, speaking as a member of the Commission, stressed that the idea expressed in article 68, paragraph 4, was not of great importance; the provision concerned the exceptional case in which the conclusion of the amending instrument constituted a breach of the treaty. If the Commission wished to retain the idea, it would have to be expressed in a rather different form, perhaps something like the rule stated in article 47. A State might, indeed, have made its position very clear by some means other than signing or adopting the instrument.

56. Sir Humphrey WALDOCK, Special Rapporteur, said he was surprised to learn that there was no way of discovering which States had voted for the adoption of the text of an instrument. He had originally thought of drafting a provision imposing estoppel on a State which signified that it had no interest in an amendment, but some members had been unwilling to go so far and he had accordingly redrafted the provision in its present form.

57. Mr. BARTOŠ said he did not agree that paragraph 4, related to an exceptional case. On the contrary, he thought the problem might often arise and was of general interest.

58. From the practical point of view he agreed with Mr. Amado's comment: the text should be clear and not liable to be misunderstood.

59. From the theoretical point of view, he agreed with Mr. Reuter. It was necessary to establish the will of the State concerned; when that will had been expressed in the normal way the State was bound. Leaving aside the question of evidence of acceptance, the Special Rapporteur's text was satisfactory. But in practice the provision would be impossible to apply if the Commission did not clearly specify the acts by which a State committed itself.

60. M. TUNKIN said that it would make no substantial difference if paragraph 4 were dropped altogether, but if it was retained at least its meaning should be made clearer.

61. Sir Humphrey WALDOCK, Special Rapporteur, said he acknowledged that the drafting of paragraph 4 might be improved, but he still thought its content was important and should be retained.

62. Mr. TSURUOKA said that from the practical point of view it did not matter much whether paragraph 4 was retained or deleted. If it was retained, governments would tend to abstain from voting on the instrument amending a treaty or to vote against it; the general consequence would be that the revision of treaties would become more difficult, which was not the object of the article. In order to promote the stability and security of inter-governmental transactions, it might perhaps be better only to say "if it signed the instrument" and delete the remaining words. Thus amended, the provision would approximate to current practice.

63. Mr. ELIAS said that while there was much force in the Special Rapporteur's arguments in favour of retaining the substance of paragraph 4, he did not believe that the omission of that provision would be any great loss; it would then be for the International Court of Justice, or some other adjudicating body, to apply the rule of estoppel.

64. In his view, there were two possibilities open to the Commission. The first was to replace paragraph 4 by a brief cross-reference to article 47, thus adopting the same approach as in paragraph 3. The second, which he would prefer, was to drop paragraph 4 altogether and leave it to the competent court to apply the rule embodied in article 47 or some amended version of it.

65. Mr. CASTRÉN said he was in favour of retaining paragraph 4, but if possible in a clearer, and certainly in a positive, form. There would be no advantage in referring to article 47, since the rule laid down in that article was too vague for the situation referred to in article 68, paragraph 4.

66. Mr. ROSENNE said he had the impression that the many difficulties which had arisen, in a matter admittedly of some delicacy, were largely questions of drafting.

67. It had been suggested that a reference to article 47 should be added; but in fact it was necessary to coordinate article 68 not only with article 47, but also with the articles in Part I dealing with the process of adoption of the text of a treaty and its legal effects.

68. He did not believe that a reference to signature in article 68, paragraph 4, would be sufficient, because many revising instruments were not signed, but adopted in another manner.

69. With regard to his objection that paragraph 4 ought to be made subject to the terms of the treaty, and Mr. Lachs' reply that the difficulty was overcome by the provisions of paragraph 2, he maintained that it was possible to give a different interpretation to those provisions: hence it was necessary to clarify their drafting.

70. Mr. de LUNA said that all the members of the Commission were agreed that the rule of estoppel applied to the amendment of treaties. The problem was therefore only one of drafting, and it was essential that the language adopted should reflect progress.

71. He agreed with Mr. Bartoš that article 68, paragraph 4 was very important. Not only in legal writings, but also in State practice, there had been cases of silence being construed as tacit consent to the amendment of a treaty. There were other cases in which silence had been given conflicting interpretations by legal writers. For example, the Treaty of Versailles contained provisions embodying the consent of the parties to the declaration by Belgium on the termination of its status of neutrality;⁵ Russia and the Netherlands, which had been parties to the treaty of London establishing the neutrality of Belgium,⁶ had not been parties

⁵ Article 31.

⁶ *British and Foreign State Papers*, Vol. XXVII, p. 990.

to the Treaty of Versailles and had remained silent. It was becoming increasingly common for treaties to include a clause to the effect that silence was to be interpreted as consent.

72. He did not think it would be sufficient for paragraph 4 to contain no more than a cross-reference to article 47. Such a solution would not make for greater clarity and would not simplify the application of article 68 in practice.

73. Mr. BRIGGS noted with satisfaction that it was intended to delete article 68, paragraph 5. As to paragraph 4, the main objection to its wording had not yet been stated: unfortunately it seemed to imply that if a State did not sign an amending instrument and did not otherwise consent to the adoption of its text, it would be fully entitled to regard any amendment as a breach of the original treaty.

74. Referring to article 69, he said that the deletion of paragraph 2 of that article would not have the intended effect, because article 68, paragraph 1, as it stood covered both *inter se* agreements and other agreements. He therefore agreed with Mr. Yasseen that it would be advisable to retain paragraph 2 of article 69.

75. Sir Humphrey WALDOCK, Special Rapporteur, said he fully agreed that article 68, paragraph 4 needed redrafting. The provision should not be omitted, however, because it stated a principle of some importance. In that connexion, he drew attention to article 17, paragraph 1⁷ which obliged a State that took part in the negotiation, drawing up or adoption of a treaty or had signed a treaty "to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force". In the light of that provision the text of article 68, as now proposed, did not even go far enough — unless, of course, a proviso were included in the draft articles to the effect that article 17 did not apply to amending instruments.

76. He suggested that article 68 should be referred to the Drafting Committee without any commitment on the part of members as to their future positions. He believed it would be possible for the Drafting Committee to prepare a generally acceptable text.

77. With regard to article 69, which, he suggested, should also be referred to the Drafting Committee for reconsideration in the light of the discussion, he thought that many of the objections to paragraph 2 would probably disappear after article 68 and paragraph 1 of article 69 had been redrafted.

78. The CHAIRMAN said that so far as article 68 was concerned the Drafting Committee should take account of the following points, on which the members of the Commission were in general agreement. Paragraph 1 should make it clearer that the article related to amendments which, at least when they were proposed, were intended to be adopted by all the parties to a treaty. It seemed to be the general opinion that paragraph 4 should be deleted; if it was retained,

however, the condition should be redrafted so as to place on the same level as the signature of the instrument, the other equally important manifestations of will. The Commission seemed to be in general agreement that paragraph 5 should be deleted.

79. Mr. CASTRÉN said he had some comments to make on the drafting of article 69, the substance of which he found satisfactory.

80. In paragraph 1, sub-paragraph (a), which had not appeared in the text originally submitted (A/CN/4/167/Add.1), could be deleted, as it merely confirmed an obvious idea which was implicit in sub-paragraph (b) (iii).

81. Sub-paragraph (b) (ii) was not necessary either. A modification which did not fulfil the conditions laid down in that sub-paragraph would not fulfil the conditions in sub-paragraph (b) (i) either; it would certainly be prohibited by the treaty, at least implicitly, and would therefore also be excluded under sub-paragraph (iii).

82. Paragraph 2 was important in that it safeguarded the interests of the other parties to the treaty. That provision went far enough and there was no need to settle the problems which might arise if the other parties objected.

83. Mr. BARTOŠ, referring to article 69, observed that in addition to the conditions stated in paragraph 1 (b), there was also the condition of the general interest of the States parties to the treaty: it might be to their advantage to maintain the *status quo*.

84. With regard to paragraph 2 he agreed with Mr. Reuter. There was no need to require that all the parties should be notified of the proposal in advance if *inter se* agreements were expressly provided for in the treaty. In that case the other parties need only be informed of the existence of the instrument after it had been concluded. In the contrary case, where the treaty did not expressly provide for *inter se* agreements, but — like the Vienna Conventions on Diplomatic Relations and Consular Relations — provided only for the conclusion of more detailed bilateral conventions not conflicting with the general rules of the treaty, the provision in paragraph 2 should be retained. For in that case all the parties must be informed of the proposal to modify the treaty; otherwise, they could complain that they were the victims of discriminatory measures.

85. The CHAIRMAN, speaking as a member of the Commission, suggested, as an example, that the members of the Organization of American States might wish to conclude among themselves a special convention derogating from a treaty which did not provide for *inter se* agreements. Would they have to notify their intention to all the other parties to the treaty? He did not think so. Such notification would be pointless: it would be neither a request for authorization — since the proposed modification would be in no way unlawful — nor an invitation — since the American States had decided to conclude the new instrument among

⁷ Yearbook of the International Law Commission, 1962, Vol. II, p. 175.

themselves. He agreed that when it has been concluded the instrument would have to be published, but he doubted whether all the parties need be notified of the proposal.

86. Mr. BARTOS said that the answer to the Chairman's question would depend on the terms of the treaty itself. There were treaties, such as the copyright conventions and the conventions for the protection of industrial property, which attempted to standardize a rule of international law and thus to exclude special rules. By virtue of the most-favoured-nation clause, the amendment of one provision might entail modification of a whole system. In that case, the States concerned must be able to judge whether their rights were jeopardized by the proposed modification: they must be notified of all proposed modifications, even *inter se* modifications, because the whole system of legal relations established by the treaty might be effected. He therefore supported the Special Rapporteur's proposal.

87. The CHAIRMAN, speaking as a member of the Commission, suggested that article 69, paragraph 1 (a), should be amended to read: "the possibility of concluding such an agreement is expressly contemplated by the treaty".

88. Speaking as Chairman, he suggested that articles 68 and 69 be referred to the Drafting Committee.

It was so agreed.

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

ARTICLE 64 (Rules in a treaty becoming binding through international custom)

89. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following title and text and for article 64:

"Rules in a treaty becoming binding through international custom"

"Nothing in articles 61 to 62 A precludes rules set forth in a treaty from becoming binding upon States not parties to that treaty in consequence of the formation of customary rules of international law."

90. It would be remembered that during the Commission's previous discussion of his original draft of article 64 (A/CN.4/167),⁸ some members had expressed the opinion that the article should embody more comprehensive provisions on the whole relationship between treaty and custom. The general feeling in the Drafting Committee, however, had been that the contents of article 64 should be confined to the case in which rules set forth in a treaty developed into customary rules of international law.

91. The wish had also been expressed that article 64 should be formulated in positive rather than in negative terms, but the Drafting Committee had preferred to retain the negative formulation because the provisions

of article 64 constituted a reservation to those of articles 61 to 62 A, concerning the effect of treaties on States not parties to them.

92. The CHAIRMAN noted that the Drafting Committee's text referred only to the case in which the rules set forth in a treaty were not yet customary rules, but became customary rules later. It did not refer to the case in which a treaty stated in writing a rule which already existed as a customary rule.

93. Sir Humphrey WALDOCK, Special Rapporteur, said that that point had been discussed in the Drafting Committee, but it had been agreed that it should be dealt with elsewhere in the draft articles and that article 64 should be confined to the case envisaged in the text submitted.

94. The CHAIRMAN, speaking as a member of the Commission, suggested that the word "subsequent" be inserted before the word "formation".

95. Sir Humphrey WALDOCK, Special Rapporteur, said that that idea was conveyed in the English text by the use of the word "becoming".

96. Mr. VERDROSS proposed that the words "in consequence of the formation of customary rules" should be replaced by the words "if they have become customary rules".

97. The CHAIRMAN, speaking as a member of the Commission, stressed that it was not the treaty itself which became binding; what really created the obligation was the formation of a customary rule with the same content as the treaty. In order to avoid the repetition of the word "become", if the last phrase was amended as proposed by Mr. Verdross, the words "being binding" should be substituted for "becoming binding".

98. Sir Humphrey WALDOCK, Special Rapporteur, said that the English text he had introduced contained the idea embodied in the proposal made by Mr. Verdross and amended by the Chairman. Amended in accordance with the language of that proposal it would read:

"Nothing in articles 61 to 62 A precludes rules set forth in a treaty from being binding upon States not parties to that treaty if they have become customary rules of international law."

99. Mr. ROSENNE said that that text would cover both a treaty which was declaratory of an existing rule of customary international law and a treaty which itself generated the development of rules of customary international law.

Article 64, thus amended, was adopted unanimously.

The meeting rose at 6 p.m.

⁸ 740th and 741st meetings.

755th MEETING

Tuesday, 30 June 1964, at 10 a.m.

Chairman : Mr. Herbert W. BRIGGS

Law of Treaties
(continued)

[Item 3 of the agenda]

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

ARTICLE 65 (Application of incompatible treaty provisions)

1. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, the text proposed by the Drafting Committee for article 65 which read :

"Application of incompatible treaty provisions"

"1. Subject to Article 103 of the Charter of the United Nations, the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs.

"2. When a treaty provides that it is subject to, or is not inconsistent with, an earlier or a later treaty, the provisions of that other treaty shall prevail.

"3. When all the parties to a treaty enter into a later treaty relating to the same subject-matter, but the earlier treaty is not terminated under article 41 of these articles, the earlier treaty applies only to the extent that its provisions are not incompatible with those of the later treaty.

"4. When the provisions of two treaties are incompatible and the parties to the later treaty do not include all the parties to the earlier one

"(a) as between States parties to both treaties, the same rule applies as in paragraph 3 ;

"(b) as between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty applies ;

"(c) as between a State party to both treaties and a State party only to the later treaty, the later treaty applies.

"5. Paragraph 4 its without prejudice to any responsibility which a State may incur by concluding or applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

2. Mr. PAL suggested that, as the first paragraph governed the following three paragraphs, it might be left unnumbered, the paragraphs governed by it being numbered 1 to 3. He thought there was some inconsistency in the structure of the article, in that the governing paragraph spoke only of treaties the provisions of which were incompatible, while paragraph 3 dealt with case in which the provisions were *not* incompatible. Again, paragraph 5, though one of the following paragraphs mentioned in paragraph 1, was not designed to be governed by paragraph 1.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that a similar pattern had been followed in other

articles and he did not believe it was open to objection on grounds of logic.

4. Mr. LACHS said there was some force in Mr. Pal's criticism : the paragraphs dealing with provisions which were incompatible should be grouped together.

5. Mr. ELIAS said that the Drafting Committee had given a great deal of thought to the structure of the article ; he would be sorry if the Commission changed it and re-opened the discussion on substance. As it stood, the article seemed simple and straightforward.

6. Sir Humphrey WALDOCK, Special Rapporteur, said that the passage "the provisions of which are incompatible" in paragraph 1 was intended to govern paragraphs 2 to 4.

7. Mr. de LUNA said he did not think the presentation of paragraph 1 was illogical, since all the paragraphs concerned cases of incompatibility.

8. Mr. TSURUOKA thought that the words "the provisions of which are incompatible" were superfluous. The purpose of paragraph 1 was to make it clear that Article 103 of the Charter was entirely independent of the provisions of article 65 of the draft. Since paragraphs 2, 3 and 4 all referred to cases of incompatibility, it would be enough to State in paragraph 1 that Article 103 of the Charter prevailed.

9. Mr. LACHS suggested that the difficulty might be removed by amending the words in question to read : "the provisions of which may be incompatible".

10. Sir Humphrey WALDOCK, Special Rapporteur, said that if that change met with general support he would not oppose it.

11. The CHAIRMAN,* speaking as a member of the Commission, said he considered that paragraph 1 was acceptable as it stood. Its object was to state that, if the provisions of two treaties were incompatible, the rules laid down in the succeeding paragraphs became applicable.

12. Mr. ROSENNE said that a few drafting changes might meet the objections raised. He suggested that a colon should be substituted for the full-stop at the end of paragraph 1, and that paragraphs 3 and 4 should become sub-paragraphs (a) and (b). Paragraph 2 would remain as it stood and paragraph 5 might follow, or be embodied in a separate article.

13. Mr. REUTER suggested that in the French text of paragraph 1 the words "*sont incompatibles*" should be replaced by the words "*sont en concurrence*".

14. Sir Humphrey WALDOCK, Special Rapporteur, referring to Mr. Rosenne's suggestion, said that paragraphs 3 and 4 should remain where they were, for otherwise the rules stated in them would lose their force.

* Mr. Briggs.

15. Mr. ELIAS said that if Mr. Rosenne's suggestion were followed paragraph 2 would also have to become a sub-paragraph of paragraph 1, since paragraph 1 governed all the provisions that followed.

16. Mr. PESSOU said he realized that the members of the Commission represented different systems of law and upheld differing doctrines; but when it came to drafting a text which should reflect uniformity in that diversity, the final results were difficult to understand and indeed disheartening; that was true of the French text of paragraphs 1 and 2.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the difficulty which had arisen over paragraph 1 was perhaps partly due to the change made in the wording. The relevant passage in paragraph 2 of his original draft (A/CN.4/167) had read: "that its provisions should be subject to". Possibly paragraph 2 should be amended to read: "When a treaty provides that it is to be subject to or is not to be inconsistent with". Certain treaties contained clauses of that kind, for example, treaties establishing certain international organizations provided that their provisions should not be inconsistent with the Charter of the United Nations. The question whether or not there was incompatibility was an objective one to be determined by reference to the content of the treaty. The object of paragraph 2 was to provide that that treaty prevailed to which the other, by an express clause, had to give way, but of course it was not an easy principle to formulate.

Paragraph 1 was approved.

18. The CHAIRMAN,* speaking as a member of the Commission, said he had been rather troubled by the words "that other treaty" in paragraph 2, which seemed to be open to misconstruction.

Paragraph 2 was approved.

Paragraph 3 was approved.

Paragraph 4 was approved.

Paragraph 5 was approved.

19. Mr. TUNKIN said he doubted whether article 65 as a whole was entirely satisfactory. During the second reading the Commission would have to decide whether the point made in paragraph (17) of the Special Rapporteur's commentary on his original draft of article 65, that "any treaty laying down... obligations not open to contracting out must be regarded as containing an implied undertaking not to enter into subsequent agreements which conflict with those obligations", should be expressly covered in the article itself.

20. Mr. ROSENNE said that although he would vote in favour of the article as a whole, he maintained his earlier reservation concerning its relationship with article 41.¹

21. The CHAIRMAN put to the vote article 65 as proposed by the Drafting Committee.

Article 65 was adopted by 16 votes to none, with 3 abstentions.

Relations between States and Inter-governmental Organizations

(A/CN.4/L.104)

[Item 5 of the agenda]

22. The CHAIRMAN invited the Commission to consider the list of questions submitted by the Special Rapporteur as a basis of discussion for defining the scope and mode of treatment of the subject of relations between States and inter-governmental organizations (A/CN.4/L.104).

23. Mr. EL-ERIAN, Special Rapporteur, said that his suggested list of questions was not intended to supersede the working paper he had submitted at the previous session (A/CN.4/L.103) elaborating the conclusions set out in his preliminary report (A/CN.4/161). The list was intended to focus the Commission's attention on a number of specific questions and he was glad that time had been found to complete the preliminary discussion started in 1963, which was to have been continued at the winter session that had not taken place. Once he had received the necessary guidance he would be able to proceed with his work.

24. The discussion at the previous session had revealed a cleavage of opinion concerning the scope of the subject; some members had approved of the broad scope he had outlined and others had favoured a more restrictive approach. The part of his report devoted to the problem of the juridical personality of inter-governmental organizations had proved to be particularly controversial, both in the Commission and in the Sixth Committee of the General Assembly at its eighteenth session. For example, one representative in the Sixth Committee had said that "In the matter of relations between States and inter-governmental organizations, his delegation considered that sovereign and equal States were not only subjects of international law, in their capacity as holders of sovereignty, but also creators of international law." International organizations, despite their importance in the study and solution of the great problems facing mankind, were subjects of international law only to the extent that they needed that status in order to carry out their work; since they did not possess the same characteristics as a sovereign State, there could be no question of their holding the same status in international law.² On the other hand, a proponent of the broader approach had said that: "His delegation attached great importance to the study of relations between States and inter-governmental organizations. Through their activities in the field of economic and social co-operation and in peacemaking, the United Nations and related specialized agencies had acquired an original legal personality".³

² *Official Records of General Assembly, Eighteenth Session, Sixth Committee, 783rd meeting, para. 29.*

³ *Op. cit.*, 786th meeting, para. 22.

* Mr. Briggs.

¹ 742nd meeting, para. 56.

25. One reason why it was difficult to define the scope of the subject was the wording of its title in General Assembly resolution 1289 (XIII). The titles of other topics dealt with by the Commission were indicative of their general scope, but that was not true of the topic under discussion; the appearance of inter-governmental organizations as subjects of international law and the attribution to them of certain functions analogous to those of sovereign States was a comparatively new phenomenon and the legal problems it created were more or less uncharted. Moreover, the discussion in the Sixth Committee on the French delegation's proposal,⁴ which had resulted in the General Assembly's request that the Commission should study the topic, had provided little guidance as to its scope; it could not be inferred from that discussion that the study should be confined to diplomatic law in its application to relations between States and inter-governmental organizations.

26. He himself favoured a fairly broad approach. In the absence of any clear delimitation by the General Assembly he had been influenced, first, by the content of the eighth paragraph of the preamble to General Assembly resolution 1505 (XV), which read: "Considering that it is desirable to survey the present state of international law, with a view to ascertaining whether new topics susceptible of codification or conducive to progressive development have arisen, whether priority should be given to any of the topics already included in the Commission's list or whether a broader approach may be called for in the consideration of any of these topics"; and secondly, by the Commission's own decisions in response to that resolution, when it had defined the scope of the topics of State responsibility and the succession of States and Governments. As the study of particular aspects of the relations between States and inter-governmental organizations had on various occasions been deferred pending the outcome of other work by the Commission, it would be helpful if the Commission could now give an equally clear indication of what it intended to undertake in that particular field.

27. In that connexion he drew attention to the views of two Governments. The Austrian Government had expressed the opinion that "International organizations, within the express or implied powers conferred upon them by their statute, participate in international intercourse. Some aspects of the existence of international organizations as international legal phenomena are covered by international conventions which have been concluded for or by individual organizations. To other aspects of the external relations of international organizations, for which no such conventions exist, the traditional norms of international law can be applied only to a limited degree, because they were created by the practice of States and therefore fit the organizational structure of States. Although a new practice is slowly being developed by and in respect of international organizations, it is still embryonic and, above all, multiform. To ameliorate the situation, traditional norms need to be adjusted, new norms to be created. Regulations are, for instance, required for the conclusion of treaties by international organizations, the legal status

of permanent missions of Member States to international organizations and the legal status of international organizations in the territory of Member States, the responsibility of international organizations, etc. The International Law Commission has already been entrusted with the consideration of some of those questions, but has not yet taken them up".⁵ The Netherlands Government considered that one of the new topics the Commission could profitably study was the status of international organizations and the relations between States and international organizations.⁶

28. In summing up the discussion in the Sixth Committee on the Commission's decision to take up the topic and to appoint a Special Rapporteur, the Committee's Rapporteur, Mr. Ruda, had said: "A number of representatives stressed the importance that the question had acquired in international relations; some thought that a very valuable study could be made, within the topic, of such questions as the international personality of international organizations, their capacity to enter into treaties, their international responsibility and the privileges and immunities of the staffs of international organizations."⁷

29. In conclusion, he suggested that the Commission should deal with the questions on his list one by one. The first two were general and the third and fourth were questions concerning priority, the answers to which would of course depend on the decisions taken on the general question. The fifth question related to the particular problem of regional organizations and might be left aside until later.

30. Mr. TABIBI said that the Special Rapporteurs on special missions and on relations between States and inter-governmental organizations had initiated a helpful practice by submitting a list of questions to the Commission in order to obtain clear terms of reference.

31. He sympathized with Mr. El-Erian, who had been entrusted with the study of a complex subject that was in a state of evolution and had assumed great importance. International organizations had different procedures and the codification of rules in that sphere would contribute to the progressive development of law.

32. In his opinion the Commission should concentrate on the practical aspect of the subject and was free to delimit its scope. There was no contradiction between General Assembly resolutions 1289 (XIII) and 1505 (XV).

33. The Commission had already answered question II when it had appointed a Special Rapporteur to deal with relations between States and inter-governmental organizations as an independent subject. If it had taken a different view, it would have asked the Special Rapporteurs on State responsibility and State succession to deal with such aspects of the subject as fell within their sphere of study.

⁵ *Official Records of the General Assembly, Sixteenth Session, Annexes, agenda item 70, p. 16, para. 2.*

⁶ *Ibid.*, p. 17, para. 4.

⁷ *Op. cit. Seventeenth Session, Annexes, agenda item 76, p. 17, para. 51.*

⁴ See document A/CN.4/161, paras. 4-8.

34. His answer to question III would be that the Special Rapporteur should concentrate, first and foremost, on the question of the privileges and immunities of international organizations, their officials and delegations to them. That matter called for urgent consideration because practice varied considerably; one example was the anomaly of OPEX officials not having the status of international civil servants. Other important matters could be left for future consideration. He did not think it necessary at that stage to consider regional organizations, for they were sometimes of a temporary character and were in any case greatly influenced by the rules and procedures of organizations within the United Nations system.

35. Mr. CASTRÉN, after thanking the Special Rapporteur, said that in his view General Assembly resolution 1289 (XIII) could not be interpreted as being restrictive. The General Assembly had given the Commission great latitude as to the scope of its study and how it was to be carried out: that was what seemed to follow from General Assembly resolution 1505 (XV), from the Sixth Committee's discussions on the Commission's programme and methods of works and from the replies of governments. It was possible that the General Assembly and governments wished the Commission to give priority to the problems of diplomatic law in its application to relations between States and inter-governmental organizations.

36. It seemed to him that the Commission had already answered question II at its previous session. The subject was a special one, on which the Commission had been asked to formulate draft rules. But it was related to other branches of international law, particularly diplomatic law, the law of treaties, State responsibility and State succession. Consequently, the Commission should endeavour to avoid any overlapping between the rules governing relations between States and international organizations and the rules which already existed, or which it would propose, concerning those other branches of international law. That was why the Commission had provided for close co-operation between the Special Rapporteurs concerned, which seemed to be working satisfactorily.

37. Mr. PESSOU thanked the Special Rapporteur for his account of the way in which the subject could be approached. In his opinion, question I was of no importance, since the Commission could not deal with such a subject without taking into account its possible repercussions in other spheres, such as *ad hoc* diplomacy. The various topics should be considered as a whole, so as to avoid overlapping.

38. As to question II, he thought it would be preferable to treat the subject as an independent one. The Special Rapporteur himself had suggested the best approach: the two Special Rapporteurs concerned should consult one another to ensure that they did not deal with the same aspects of the matter.

39. Mr. REUTER said that, so far as instructions from the Sixth Committee were concerned, the Commission was free: it must take its own decisions.

40. He thought there was a preliminary question to be settled: were there — or could there be — any general rules applying to international organizations? If the Commission reached the conclusion that no such rules existed or could exist, it need consider the subject no further. He himself believed that the answer would not be entirely negative, but it would remain to determine whether there were many such rules or not. It would be for the Special Rapporteur to investigate that question. If the Commission reached the conclusion that there were many general rules on a given matter, it should embody them in a special convention. If it found that there were only a few rules, it should incorporate them in the draft conventions which also related to States. Of course, that approach to the problem by-passed questions I and II and went straight on to question V, for it was neither possible or desirable to work out rules that would be applicable only to the United Nations and the specialized agencies: there were organizations with a world-wide field of action which did not belong to the United Nations system, and it would make an unfortunate impression if the Commission appeared to be excluding them.

41. He would support whatever conclusions the Special Rapporteur proposed. He had already formed the opinion, however, that the Special Rapporteur would find fairly substantial general rules on diplomatic questions, but few, if any, general rules for international organizations concerning agreements, State responsibility and State succession. In the present state of international relations, there was no rule of equality of international organizations: unlike States, they were fundamentally unequal, so that only minimum rules could be laid down.

42. Consequently, when the Special Rapporteur had submitted his conclusions concerning the existence of general rules, the Commission would probably have to prepare a special draft convention on diplomatic questions linked with that on *ad hoc* diplomacy, and to include one or two articles on the problem of international organizations in the separate drafts on State responsibility, State succession and other topics.

43. Mr. de LUNA said he agreed with those speakers who had expressed the view that the Commission had a completely free hand with regard to the scope of the subject, provided that the matters dealt with came under the heading of relations between States and inter-governmental organizations.

44. From the practical point of view, it was certainly true to say that the only guidance was provided by the recognition by States of the privileges and immunities of inter-governmental organizations, of their treaty-making power and of their international personality generally. Without going into any theoretical issues, the Commission would have to define, for the purposes of its works, what constituted an inter-governmental organization. He did not believe that the study should be confined to international organizations of a universal character; regional organizations should not be ignored.

45. A further problem was whether an inter-governmental organization constituted a subject of interna-

tional law by reason of its treaty-making capacity or whether, on the contrary, it had that capacity by reason of its status as a subject of international law. In fact, the situation was that States were willing to establish formal relations of the treaty type with organizations.

46. He agreed with Mr. Reuter on the need to ascertain whether any general rules existed; but he did not think it would be advisable to make a comparative study of the constitutional arrangements and internal rules of the various international organizations. He was somewhat less pessimistic than Mr. Reuter, however, and could say from his own experience that in spite of the diversity of international organizations, there was some uniformity of practice as to privileges and immunities and also as to treaty-making capacity. Apart from the constitutional provisions of the organizations, and sometimes in the absence of any constitutional provisions on those two subjects, there were indications that certain customary rules were emerging in response to practical needs. That process was particularly evident in the case of privileges and immunities; and the concept of treaty-making capacity implicit in the constitution of an organization, which had gained some measure of acceptance, could only be explained by the formation of a customary rule.

47. With regard to question I on the Special Rapporteur's list, he urged him to adopt as broad an approach as possible. Experience had shown that it was preferable for the Commission to begin with a draft covering a fairly wide field, since its scope was inevitably narrowed down during discussion.

48. With regard to question II, it seemed clear that the subject was an independent one. It was equally clear that the Special Rapporteur should take into account the work done by the Commission on other subjects and keep in touch with the other Special Rapporteurs so as to avoid duplication.

49. With regard to the mode of treatment and order of priorities, he agreed with Mr. Tabibi that there would be some practical advantage in dealing first with the question of privileges and immunities.

50. With regard to question V, he urged that the Commission should deal with all international organizations, universal or regional, provided that they constituted inter-governmental organizations within the meaning of whatever definition the Commission might adopt for practical purposes.

51. He commended the Special Rapporteur for the manner in which he had undertaken an extremely difficult task and expressed the hope that the Commission would be able to formulate a number of rules on the subject and thus make a valuable contribution to the progress of international law.

52. Mr. JIMÉNEZ de ARÉCHAGA thanked the Special Rapporteur for submitting his questions to the Commission so clearly. He recalled that the Special Rapporteurs on the succession of States and on State responsibility had received certain directives from the Commission. The Special Rapporteur on *ad hoc* diplomacy had received guidance from the States assembled

at the Vienna Conference of 1961. The Special Rapporteur on relations between States and inter-governmental organizations was the only one who, so far, had received no directives and had been working as Special Rapporteurs had worked in the early years of the Commission. That system had in some cases led to unsatisfactory results, because there had occasionally been a disinclination on the part of the Commission to take up a particular report which had not met with general approval after having been prepared without any guidance from it.

53. The questions put to the Commission by the Special Rapporteur were concrete and objectively expressed. With regard to question I, it seemed to him premature to try to define the scope of the subject. The subject of relations between States and inter-governmental organizations was a very broad one and the Commission would be well advised to select, from among the many matters which it embraced, a few that clearly pertained to that subject alone. It was not a question of fixing boundaries between the main subjects for codification, but of assigning priorities to questions clearly within the scope of the present subject. It was clear from the manner in which the Special Rapporteur had formulated question III that he would be perfectly satisfied with an indication from the Commission regarding the aspect of the subject which deserved priority.

54. With regard to question II, it was too early for the Commission to decide how it would extend its work on treaties, State succession and State responsibility to cover international organizations. It would be appropriate to defer to a more advanced stage in the codification of those subjects the decision on whether the Commission should start from the specific subject-matter of treaties, succession and responsibility or from the subject of rights and obligations, i.e. the international organizations as such.

55. With regard to question II, he thought that priority should be given to diplomatic law in its application to relations between States and international organizations. The Commission would have to proceed with great caution, lest any of its work might in any way affect the status of the existing international conventions governing the United Nations and its specialized agencies, as the Secretary of the Commission had pointed out the previous year.⁸

56. The two topics mentioned in question IV reflected two aspects of one and the same problem. He did not believe that priority should be given to either of them at that stage: the Special Rapporteur should deal with them simultaneously, and decide later whether he would give priority to one of them.

57. With regard to question V, he did not think the Commission should deal with regional organizations, particularly at the present stage. Some regional organizations had their own codification organs, and it was undesirable that the Commission should invade the

⁸ *Yearbook of the International Law Commission, 1963, Vol. I, p. 303, paras. 39 et seq.*

field assigned to them. Accordingly, the Commission should confine its attention to universal organizations and, at least in the initial stages, concentrate on organizations belonging to the United Nations family.

58. Mr. AMADO said he was convinced that the Commission would have the greatest difficulty in codifying international law on a subject on which State practice was very recent and rules had not yet emerged. How could it develop law which was not yet codifiable? Although he was reluctant to adopt a negative attitude, he could not see what answers the Commission could give to the Special Rapporteur's questions. As Mr. Tabibi had said, it was probably in the sphere of diplomatic privileges and immunities that most custom and usages were to be found, but the Commission could not exclude the other aspects of the question, because it did not yet know what the results of the study would be. The Special Rapporteur himself was best qualified to answer the question he had asked. The Commission should leave it to him to clear the ground and to suggest, on completion of his study, what general rules could be codified and put into the form of articles.

59. Mr. ROSENNE said he wished to acknowledge the service rendered by the Special Rapporteur in submitting concrete questions to the Commission.

60. With regard to question I, he found it difficult to see the relevance of General Assembly resolution 1505 (XV). The Commission had discussed that resolution at its thirteenth session when planning its future work. It had experienced some difficulty, largely because the resolution was not addressed to the Commission, but stated what the General Assembly proposed to do itself. The Assembly had continued to act in accordance with that resolution. He did not wish to imply, however, that the Commission should entirely exclude from its discussions the thought underlying the resolution or, in particular, the eighth paragraph of the preamble. In fact, a "broader approach" had been quite characteristic of the Commission's work even before that resolution had been adopted; and its approach had remained broad thereafter, as was clearly shown by the way it had dealt with the law of treaties.

61. Resolution 1289 (XIII) had originated in a paragraph in the Commission's own report on its tenth session,⁹ which had dealt mainly with diplomatic intercourse and immunities; the resolution should therefore be interpreted primarily in that context. At its fifteenth session, the Commission had included in its report a recommendation for a winter session in January 1965, "in order to continue the consideration of the two topics which complete the codification of diplomatic law".¹⁰ The two topics in question were special missions and relations between States and inter-governmental organizations. Hence, as he understood that decision taken at the fifteenth session, they were regarded as parallel topics, at least for the time being.

⁹ *Yearbook of the International Law Commission, 1958, Vol. II, page 89, para. 52.*

¹⁰ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 38, para. 74.*

62. The implications of question II escaped him. The Commission had consistently abstained from taking any position regarding the application to international organizations of the various rules of substantive law which it had codified. It had made a reservation on that point when it had discussed, in the context of the law of the sea, the right of vessels to fly the flag of an international organization. The same position had been taken by the 1958 Conference on the Law of the Sea, which had included the following article in the Convention on the High Seas:¹¹

"Article 7

"The provisions of the preceding articles do not prejudice the question of ships employed on the official service of an inter-governmental organization flying the flag of the organization."

63. Thus no decision of principle had been taken on the question whether the application of the rules of the law of the sea to inter-governmental organizations constituted an independent subject or not.

64. The position was similar with regard to the law of treaties, to which, in spite of the many difficulties that had arisen, the Commission had consistently adopted the same approach. The same attitude had been adopted by the Sub-Committee on State Responsibility and the Sub-Committee on the Succession of States and Governments. The Commission itself had endorsed the decisions of those two Sub-Committees that their two topics should be treated exclusively with reference to States, leaving aside other subjects of international law such as international organizations.¹²

65. He did not believe the Commission was called upon to inquire whether relations between States and inter-governmental organizations constituted an independent subject or a collateral one related to other subjects. The Special Rapporteur should set out the questions which were exclusive to his subjects, leaving aside those that impinged on other topics, which the Commission could take up at a later stage, when it would also decide on the subject within the scope of which they would fall to be considered.

66. The whole question of international organizations was an extremely delicate one; even the term "inter-governmental organization" was a generalization. Like Mr. Amado, he was far from convinced that the topic was ripe for codification. For example, even on the question of treaties entered into by international organizations—the branch of the law in which, in all probability, most experience had been gained—the opinions of learned authors such as Schneider, Kasmé, Zemanek and Socini¹³ were divided; and, what was

¹¹ *United Nations Conference on the Law of the Sea, 1958, Official Records, Vol. II, page 135.*

¹² *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 36, paras. 54 and 57.*

¹³ Schneider, J. W., *The Treaty-making Power of International Organizations*, Geneva, 1959; Kasmé, B., *La capacité de l'Organisation des Nations Unies de conclure des Traités*, Paris, 1960; Zemanek, K., *Das Vertragsrecht der internationalen Organisationen*, Vienna, 1957; Socini, R., *Gli accordi internazionali delle Organizzazioni inter-governative*, Padua, 1962.

much more serious, the literature showed great divergencies in State practice and in the practice of organizations.

67. His reply to question I was, in principle, in the negative. With regard to question II, he thought that the Commission was not called upon to adopt either of the two approaches suggested. He would answer question III in the affirmative, subject to the general reservation he had made at the previous session that the Commission should not go into matters already dealt with in the Conventions on the Privileges and Immunities of the United Nations and the specialized agencies and in the Headquarters Agreements, unless the General Assembly gave an indication that it would welcome a re-examination of those matters in the light of the decisions reached at the Vienna Conference on Diplomatic Intercourse and Immunities.¹⁴ The study would, therefore, probably be confined to the remaining aspects of privileges and immunities. With regard to question IV, he agreed with Mr. Jiménez de Aréchaga, but hoped that the Special Rapporteur would choose to deal first with the part of the subject relating to the status of permanent missions. On question V, he was also in agreement with the reply given by Mr. Jiménez de Aréchaga.

68. Mr. YASSEEN said he was glad that the Special Rapporteur, by asking some specific questions, had given the Commission an opportunity of expressing its opinion on the line to be followed in the study.

69. With regard to the first two questions on the list, it was quite proper to refer to resolution 1289 (XIII), by which the General Assembly had invited the Commission to give further consideration to the question of relations between States and inter-governmental international organizations; but it was doubtful whether reference should also be made to resolution 1505 (XV), which had been intended for the Assembly's own use, and according to which the Assembly itself was to reconsider the programme of work on the codification and progressive development of international law. Technically, there was no direct link between the two resolutions. However, the Commission might, of course, be guided by the trend of thought in the General Assembly.

70. It was clear from resolution 1289 (XIII) that the Commission should consider the subject generally, and not confine itself to any particular aspect. The reason why the General Assembly had referred in that resolution to the study of diplomatic intercourse and immunities, consular intercourse and immunities, and *ad hoc* diplomacy, was that it wished the Commission to take advantage of the studies already made and of the Assembly debates on those subjects. In his opinion, the study should cover all aspects of relations between States inter-governmental organizations, which should be treated as an independent subject.

71. With regard to questions III and IV, he thought it was too early to establish an order of priority. The

study could begin with diplomatic law in its application to relations between States and international organizations, but the Special Rapporteur should be given ample latitude to deal with other matters in whatever order he thought best.

72. As to question V, if it was doubtful whether there were any general rules on the subject, or whether there were many such rules, then *a fortiori* it must be doubtful whether there were any rules concerning regional organizations. Those organizations were, by their very nature, special organizations; hence, it would be better to leave it to their member States to draw up different rules to meet their special needs. Thus it was doubtful whether codification of the international law concerning regional organizations was possible or desirable.

73. Mr. TUNKIN said that the Special Rapporteur had presented the problems involved in a manner that would facilitate discussion of the subject. The central question to be answered by the Commission was that of the scope of the subject for immediate study. It had many aspects, some of which came within the scope of the law of treaties, State responsibility or State succession. The Special Rapporteur should undertake the immediate study of what might be termed the "diplomatic" relations between States and inter-governmental organizations.

74. In question IV, the Special Rapporteur touched on the various aspects of the application of diplomatic law to relations between States and international organizations: the status of international organizations and their agents; the status of permanent missions; the status of delegations to organs of international organizations and the status of delegations to conferences convened by international organizations. On the last question, he should co-operate with the Special Rapporteur on special missions in order to avoid duplication of work.

75. At the present stage of the study, the field referred to in question IV seemed to be the only one in which the Commission could make a useful contribution to the codification and development of international law. It also appeared to be the intention of General Assembly resolution 1289 (XIII) that that should be the subject of immediate study. In that connexion, he agreed with the speakers who had pointed out that, in approaching that difficult and extensive subject, the Commission would be faced with the existing conventions, in particular, the Convention on the Privileges and Immunities of the United Nations. The Commission would have to consider whether it wished to make any recommendation for replacing the texts of those conventions by new texts.

76. Referring to question I, he said that there had certainly been no intention to confine the Commission to any specific aspect of the subject. With regard to question II, he urged that the Special Rapporteur should direct his attention to diplomatic law and leave the other aspects aside. Question III would then present no difficulty: the problem of priority would not arise. With regard to question IV, he thought that the order of priority between the two parts of the subject should be decided by the Special Rapporteur himself, though

¹⁴ *Yearbook of the International Law Commission, 1963, Vol. I, pp. 300-301, paras. 6-7.*

it would be preferable for him to deal first with the status of international organizations and their agents, and then with the status of permanent missions.

77. With regard to question V, he agreed with those members who thought that the Commission should base its conclusions on existing practice regarding relations between States and universal organizations, leaving aside the question of regional organizations.

The meeting rose at 1 p.m.

756th MEETING

Wednesday, 1 July 1964, at 10 a.m.

Chairman : Mr. Herbert W. BRIGGS

Relations between States and Inter-Governmental Organizations

(A/CN.4/161 and A/CN.L.104)

(continued)

[Item 5 of the agenda]

1. The CHAIRMAN invited the Commission to continue its consideration of agenda item 5.
2. Mr. EL-ERIAN, Special Rapporteur, said that since at the previous meeting he had confined himself to general remarks and to introducing question No. I of list of questions (A/CN.4/L.104), he now wished to explain his reasons for including question No. II, particularly as reference had been made to its relevance.
3. Questions No. II dealt with the approach to the subject. There were two possible methods of approach: the casuistic method, which consisted of studying every legal problem relating to inter-governmental organizations as collateral to the treatment of the same subject in its inter-State application; and the general approach, which would treat the subject of the legal status of inter-governmental organizations as an independent and integrated whole, welding together the different problems in question as components of a single entity. Those two methods would have different consequences both with respect to the scope of the topic and with respect to the underlying orientation in its treatment.
4. So far as the scope of the topic was concerned he said that, if the casuistic method was adopted, the result would be that the problems for consideration would be limited to those which had been given priority in the Commission's work on inter-State topics. The general approach would, on the other hand, leave room for the treatment of certain problems which might be peculiar to international organizations. If the general

approach was adopted, the order of priorities followed in the treatment of inter-State relations would not necessarily be transposed to the study of the topic of relations between States and inter-governmental organizations; the order of priorities as between the various questions involved in that topic would be decided on its own merits.

5. As to the underlying orientation in the treatment of the topic, he said the general approach would tend to reflect more adequately the specific characteristics and particular needs of international organizations than would a treatment that was patterned, more or less, on the study of the rules governing inter-State relations and their applicability to relations between States and international organizations.

6. Mr. CASTRÉN said that he would give his views on the last three questions asked by the Special Rapporteur.

7. Referring to question No. III he said that, when the Commission had discussed the topic at its previous session, he had expressed agreement with the Special Rapporteur's view that the general questions should be studied first, in other words, the general principles of the international personality of international organizations.¹ Several members of the Commission, however, had thought that it should first — or even exclusively — consider specific problems, such as that of diplomatic law as applicable to relations between States and international organizations. He still believed that the former approach was more suited to a systematic and logical treatment of the subject; that was also the approach which the Commission had chosen for dealing with the topic of State responsibility. It was true that that approach was harder, and if the Commission wished to arrive at practical results more quickly it should probably deal first with a specific question like that he had mentioned.

8. He would reply in the affirmative to question No. IV. There existed several conventions or other treaties concerning the status of international organizations, and some members of the Commission, as well as the Secretary, thought that it would not be advisable to propose new rules in that connexion with a view to the possible revision of the existing rules. The questions to which the Special Rapporteur had given prominence (status of permanent missions and of delegations) concerned precisely a matter for which rules had not yet been established, or at least not yet fully and clearly established, by treaty provisions or by customary law. Besides, a certain amount of practice had already grown up in that field, which might form the basis of some common rules.

9. With regard to question No. V, he thought the Commission should concentrate in the first place on international organizations of a universal character, but should not disregard those which did not belong to the United Nations family. During the discussions at the previous session and at the previous meeting several

¹ *Yearbook of the International Law Commission, 1963, Vol. I, summary record of the 718th meeting, paras. 8-12.*

members of the Commission had rightly argued that regional organizations were so diverse that uniform rules applicable to all of them could hardly be formulated. It would probably be better to leave those regional organisations great latitude to settle their own relations with Governments. If the Special Rapporteur succeeded in identifying certain general principles that were, or should be, applicable to all such organizations, the Commission might consider later whether it was desirable to prepare draft rules on the subject.

10. Mr. LIANG, Secretary to the Commission, said that the Secretariat was always concerned that the existing complex body of treaty structure on the subject of the privileges and immunities of the United Nations and its specialized agencies might be perturbed by premature recasting of the rules on the subject; such a recasting would necessarily have repercussions on existing instruments.

11. If a general codification were to be carried out, it would undoubtedly replace the general Convention on the Privileges and Immunities of the United Nations² approved by the General Assembly of the United Nations on 13 February 1946. He had himself had the honour of being a member of the Sub-Committee which had drafted the 1946 Convention; its chairman had been Judge Guerrero of El Salvador, who had subsequently been President and Vice-President of the International Court of Justice. The members of the Sub-Committee had been very conscious of the difficulties involved in reaching agreement on a delicate subject. They had also been fully aware of the difficulties in the way of achieving universal acceptance for such a convention. To some extent, factors arising from the international atmosphere had been responsible for the fact that the Convention had not been universally ratified. For his part, he considered it very unlikely that it would be possible to bring into being in the near future another convention having the wide scope and detailed provisions of the 1946 Convention. His doubts on that point were strengthened by the knowledge that some States which had enthusiastically supported the 1946 Convention had since given indications that they regarded the privileges and immunities granted therein as having been too extensive.

12. On the assumption, however, that a new general convention, codifying the privileges and immunities of international organizations, was to become a reality, the legal consequences would have to be considered. States would have to examine the problem from the point of view of the rules governing the modification of a treaty by subsequent treaty and those governing the problem of the incompatibility of the provisions of successive treaties. The Commission would no doubt recall the difficulties it had encountered when formulating those rules at recent meetings devoted to the topic of the law of treaties. The picture which thus emerged was not a very encouraging one.

13. He stressed that he was only referring to the subject of privileges and immunities, and not to the

other subjects mentioned in the Special Rapporteur's working paper. In that regard, he was sceptical with respect to the use of the expression "diplomatic relations" in the context of relations between organizations and States. Except in so far as privileges and immunities were concerned, there was little connexion between the two types of relations.

14. It would, of course, be possible for States to overcome to some extent the difficulty to which he had referred by means of the device embodied in article 25 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and article 30 of the 1958 Convention on the High Seas. Those two articles were couched in identical terms:

"The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States parties to them."³

15. The same device had been used in the Vienna Convention on Consular Relations 1963 (A/CONF.25/12),⁴ which contained the following article:

"Article 73

"*Relationship between the present convention and other international agreements*

"1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them.

"2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof."

However, if a provision of that type were to be included in a new convention on the privileges and immunities of international organizations, the usefulness of that convention would be greatly reduced and the legal situation immeasurably complicated. Moreover, the problems which arose in connexion with *inter se* amending instruments could not be avoided.

16. During the discussion, several members had emphasized the need to adopt a practical approach. That approach would indicate the advisability of studying those aspects of relations between States and international organizations which had not yet been fully developed. In that connexion, he had noted with satisfaction the reference in question No. IV of the Special Rapporteur's working paper to the status of permanent missions accredited to international organizations, a subject eminently suited for study. On the other hand, any examination of the status of international organizations and their agents would inevitably spread out into the sphere of privileges and immunities.

17. While it was proper for the Special Rapporteur to consider his topic in broad perspective, he cautioned that the subject of the relations between States and inter-governmental organizations covered virtually the

³ See *United Nations Conference on the Law of the Sea, Official Records*, Vol. II (United Nations publication, Sales No. 58.V.4, vol. II), p. 135 and p. 138.

⁴ See *United Nations Conference on Consular Relations, Official Records*, Vol. II (United Nations publication, Sales No. 64.X.1), p. 187.

² *United Nations Treaty Series*, Vol. I, p. 15.

whole of the law of international organizations. The relations between organizations and individuals accounted for only a minute fraction of that law.

18. In conclusion, he urged that, for practical reasons, the study should be confined initially to the subjects which were not adequately covered by existing agreements and which offered the prospect of bearing some fruit. That approach should be preferred to undertaking the immense task of examining the whole field of the relations between States and international organizations and attempting to codify subjects which were unlikely to yield fruitful results for the reasons which he had given.

19. Mr. ELIAS said that, at the fifteenth session of the Commission, it had received a report from the Chairman of its Sub-Committee on the Succession of States and Governments containing the following recommendation on the co-ordination of the work of the four Special Rapporteurs :

“ It is recommended that the four Special Rapporteurs (on succession of States and Governments, on the law of treaties, on responsibility of States and on relations between States and inter-governmental organizations) should keep in close touch and co-ordinate their work.”⁵

20. Those remarks remained as valid as when they had first been made early in 1963. It was true that the first draft on the law of treaties had since been largely completed and that it raised a number of issues of interest to the Special Rapporteur on the topic of relations between States and inter-governmental organizations. But the Commission had still to delimit the scope of the topics of State succession and State responsibility, and the Special Rapporteur would need to keep in close touch with the Special Rapporteurs for those two topics in order to avoid unnecessary duplication.

21. Turning to question No. I, he said it would be within the Special Rapporteur's rights to take a broad view of his field of work, at least in the initial stages. Gradually, he would limit himself to a number of subjects of a practical character that lent themselves to codification.

22. The answer to question No. V was connected with what he believed should be the next step, for, like Mr. de Luna, he thought that the first task was to define precisely what was meant by “inter-governmental organizations”. If that definition was formulated with sufficient clarity, the problem raised in question No. V would disappear. He believed that the Special Rapporteur should concentrate on universal organizations; that approach would not, of course, preclude appropriate references in the commentary or in footnotes to organizations other than those of a universal character.

23. His answer to question No. III would be that priority should be given to the subject of diplomatic law and its application to international organizations. Regarding the order of priorities, mentioned in question No. IV, he believed that the starting point should be

the status of international organizations and their agents; the Special Rapporteur could then proceed to study the question of the status of permanent missions.

24. With regard to question No. II, he drew attention to the suggestion by Mr. Tunkin that the Special Rapporteur should confine himself at that stage to dealing with diplomatic relations, leaving other subjects for later consideration.

25. The difficulties to which the Secretary had drawn attention should not deter the Special Rapporteur from suggesting possible lines of advance in relation to the matters dealt with in the 1946 Convention. Of course, the provisions of that Convention should be maintained in broad outline, but the Commission should investigate the practical possibilities of introducing desirable improvements by way of progressive development.

26. Sir Humphrey WALDOCK thanked the Special Rapporteur for clarifying the issues involved in a topic the codification of which was not only his task but that of the whole Commission.

27. If one were to accept the interpretation placed by most members upon General Assembly resolution 1289 (XIII), the topic appeared so broad as to involve almost a lifetime of study. Whatever view was taken regarding the interpretation of that resolution, it was clear that the topic could only be dealt with in successive stages. Inevitably, therefore, the question of priorities arose.

28. He agreed with the majority of the members that the topic should be treated as an independent subject, but thought that, at all stages during its consideration, the Commission would have to bear in mind the corresponding legal provisions governing inter-State relations.

29. On the subject of priorities, there appeared to be very general agreement that the Special Rapporteur should commence his work with a practical subject on which there existed an adequate body of practice on the part of States and international organizations, so as to provide a basis for certain clear rules. It would probably be easiest and most satisfactory to begin with the subject broadly described as “diplomatic law”. He agreed with many of Mr. Reuter's remarks regarding the independent character of each international organization, but that situation had not prevented some measure of “common law” from emerging. Perhaps the time was not yet ripe for a codification of the rules in the matter. He had examined the problem from the angle of the law of treaties and had not found it easy to formulate very definite rules on treaty-making by international organizations. Accordingly, and although some principles were emerging in the matter of treaty-making, it would be wiser to begin with the consideration of the subject of diplomatic law, which would be less speculative. At the same time, he considered that the Commission should not try to dictate too much to the Special Rapporteur with regard to the order in which he would study the various parts of the actual topic given priority by the Commission; he should be allowed considerable latitude in that respect.

⁵ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, annex II, para. 12.*

30. With regard to the remarks by the Secretary, he agreed that the Commission should beware of approaching the study of the subject as providing primarily the occasion for a revision of the 1946 Convention. The Commission had received no directive from the General Assembly to that effect and, no doubt, if the General Assembly had intended that such a revision should be carried out, it would have made its intention clear. However, the mere existence of the 1946 Convention should not deter the Commission from making a general study of the subject of the privileges and immunities of international organizations. The importance of not disturbing that Convention was realized by all, but since 1946 there had been considerable experience of its application and use should be made of that experience. The 1946 Convention would necessarily constitute a leading source and, even if the Commission's general study led it to suggest certain departures from that Convention, that would not necessarily mean that its system would be disturbed. As indicated by the Secretary, devices were available to States to avoid that result. When the Commission had completed its study, it would be for States to decide the political question as to what would be done with the Commission's work.
31. He believed it would be a great mistake to approach the topic without the intention of studying it thoroughly. With regard to the suggestion that the topic should be confined to universal organizations, he believed that it would be appropriate to focus attention primarily on general organizations which were open to a very large participation. However, it would be unfortunate to leave out the smaller organizations, whether of a revisional character or merely limited organizations; some of them had long been in existence and therefore had considerable experience. It should be remembered that many large organizations had been in existence for only a comparatively short time. Moreover, in any comparative study, the Special Rapporteur should cover as wide a field as possible; the Commission could always narrow down the scope of the study later. It would be ill-advised to begin with too narrow an approach to the subject.
32. He stressed that the ultimate fate of the Commission's work on the topic under discussion would involve a political decision. Bearing that fact in mind, the Commission should embark on a general study of the topic; it should give the Special Rapporteur instructions that were not too rigid and that would encourage and support him in the study of the first aspect of a very large topic.
33. Mr. RUDA thanked the Special Rapporteur for his working paper. The subject was a thankless one and the sources indicating the practice were sparse or too recent, which seemed to show that codification was hardly possible.
34. He would take the broadest approach to the questions asked by the Special Rapporteur, for two reasons. First, that was the intention, as he understood it, of resolution 1289 (XIII); while it was true that the General Assembly referred in the first paragraph of the preamble to the problem of so-called diplomatic law, in the operative part it explicitly referred the topic to the Commission in its general form. Secondly, surely the Special Rapporteur would not be able to tackle his task without first undertaking a series of general studies on the problems of the international personality and legal capacity of international organizations.
35. With regard to question No. II, he believed that the topic should be treated as an independent subject.
36. Commenting on question No. III, he said that, although the Special Rapporteur would no doubt be able to draft articles on diplomatic law more easily, he would probably have to study the theoretical general basis of the subject.
37. The two problems raised in question No. IV were parallel. They involved many complex side issues, such as the responsibility of international organizations for injury to private persons or government officials. That was a very delicate matter politically.
38. He was particularly interested in question No. V. In his opinion, the Commission could hardly ignore regional organizations, at any rate in a theoretical study. Nevertheless, because of the way in which the question was worded and because of the idea of priority inherent in the phrase "in the first place", he would say that the Commission should study either all international organizations or else only those of a universal character.
39. Mr. LACHS thanked the Special Rapporteur for his concise and clear working paper concerning future work on his topic. The discussion which had taken place on the working paper had shown how complex and rich the topic was. International organizations were acquiring a new status in international relations; their birth, constitution, international regulation, machinery, practice, decisions and attempts at law-making constituted interesting fields of study.
40. With regard to question No. II, he said the Special Rapporteur had indicated in his statement two possible methods of approach, which could be termed the subjective and the objective approach respectively. From the point of view of legal theory, a general approach was to be recommended, but the Commission was engaged on an eminently practical task — the codification of international law by means of international conventions. The Commission, far from being engaged in the exploration of theoretical issues, should prepare a draft that would not only serve practical needs, but would also hold out prospects in international relations.
41. For that reason, he urged that the Commission should adopt an empirical approach in its study of inter-governmental organizations and that it should seek to codify the rules that were mature for codification and likely to be codified in practice. In its early years the Commission had conducted some studies which, though valuable from the theoretical point of view, had not yielded any practical results. He therefore suggested that for the time being the Commission should confine itself to giving the Special Rapporteur a reply to question No. IV on the order of priorities. More specifically, he suggested that the Commission should recommend that the Special Rapporteur should

deal with the part of the topic relating to the status of permanent missions accredited to international organizations and delegations to organs of, and conferences convened by, international organizations. Without entering into any question of priorities, he suggested that the part of the subject relating to the status of international organizations and their agents should be deferred.

42. The empirical approach which he was suggesting did not require the adoption of any long-term plan. The Commission would not take any decision on the approach to the subject, its mode of treatment or even the order of priorities. The Special Rapporteur would simply be encouraged to deal with that aspect of his topic which offered the best prospects for codification.

43. With regard to question No. V, he thought that attention should be concentrated on organizations of a universal character. While agreeing with Sir Humphrey Waldock's remarks in so far as certain small organizations of a technical character were concerned, he definitely considered that regional organizations in the strict sense of the term should be omitted from the study.

44. He noted the Secretary's opinion that care should be taken not to tamper with the existing law on the privileges and immunities of the United Nations, lest the system of privileges and immunities in question suffer. In view of the conflicting tendencies which were discernible at present, States might well not be prepared to subscribe to all the privileges and immunities to which they had agreed in 1946.

45. With regard to the remarks by Mr. Elias drawing attention to the recommendation made by the Sub-Committee on the Succession of States and Governments on the co-ordination of the work of the four Special Rapporteurs, he suggested that a meeting of those Special Rapporteurs should be arranged at the end of the current session.

46. In conclusion, he advised a very careful and very limited approach to the topic and suggested that attention should be centred on one problem, namely, the first part of the subject of diplomatic law mentioned in question No. IV. In the light of the experience that would be gained from the work on that part of the subject, the Commission could proceed with its further work. Because the Commission's task was not to study doctrinal questions but to deal with the practical issues of codification and progressive development, he considered that the door should be opened for work on the most suitable aspect of the topic and that no door should be closed to the study of other aspects if the Commission so decided at a later stage.

47. Mr. BARTOŠ said that, as Special Rapporteur on the topic of special missions, he would refer to certain questions with which Mr. El-Erian would have to deal in the course of his study. The series of questions put by Mr. El-Erian showed that he had encountered a number of problems, which the Commission should ponder with a view to assisting him in his task.

48. At the risk of appearing heretical, he would say that the topic was one in which experience and practice

abounded and which the Commission should approach from the point of view not only of the codification but also of the progressive development of international law. Every year since 1945, legal opinions had been given, disputes had arisen and resolutions had been adopted by the General Assembly, on the subject of the application of diplomatic law to international organizations. One example was the question of the status of the United Nations and its agents in connexion with the Organization's armed forces, both in the countries where those forces were stationed and in the countries of transit. To cite another instance: the services responsible for technical assistance at the international level were requesting that certain general rules should be applied. Difficulties were constantly being encountered in connexion with the operations of UNICEF, and it would be remembered what problems had arisen over the winding up of the International Refugee Organization. He recognized that some of the blame was attributable to those who had drafted the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, for they had not adopted an outlook in keeping with the requirements of a modern organization. Some of the rules which they had laid down had been inherited from the League of Nations; they had not even regulated the status of permanent missions to the United Nations, which had remained unsettled until the third session of the General Assembly.

49. In his view, the law on the subject stood in urgent need of codification and at the same time of progressive development. The Commission had not shown an excessive predilection for pure codification; it had laid down rules rendered necessary by technical development. Like Mr. Reuter, he considered that the Commission was not strictly bound by any resolution and that it could take a very broad view. His personal approach to the problem was, however, pragmatic. What had been the purpose of the delegation of France in proposing the study? What had the General Assembly had in mind in adopting that proposal? The answer was that they had wished the legal status of international organizations to be settled and the rules governing relations with international organizations, among those organizations, between States and those organizations, and between States through those organizations, to be codified. For the time being, therefore, the Commission, while not adopting a theoretical position tending to restrict the scope of the study, should confine itself as far as possible to the most urgent questions. That would be his reply to question No. I.

50. On the subject of question No. II, his view was that the first step should be to define the legal status of international organizations. Naturally, it would be difficult to produce forthwith an absolute definition applicable to all such organizations. Although it was true that some of the problems could be settled in the context of the reports to be submitted by the Special Rapporteurs on such topics as State succession and State responsibility, others were peculiar to international organizations, and in their case Mr. El-Erian's report should make it possible to formulate general rules; one example was the question of the treaty-

making capacity of international organizations. Since the Commission had decided not to deal with international organizations in connexion with the law of treaties, he thought that the Special Rapporteurs concerned should meet with a view to demarcating the topics and perhaps persuading the Commission to reserve its earlier decisions, so that a subject of such importance would not be left on one side.

51. The subject of succession between international organizations (e.g. in the case of the International Refugee Organization), the dissolution of specialized agencies and the sub-division or amalgamation of such bodies, might at first sight appear to have some analogy with that of State succession, the formation of new States and the merging of existing States; but in fact it formed a separate subject, and the Commission would have to decide whether it should be dealt with in Mr. El-Erian's study or elsewhere.

52. The question of the responsibility of States and of international organizations was arising constantly. It had been settled by an advisory opinion of the International Court of Justice but, even so, half the problem had been left unsettled. Did the United Nations possess the capacity to bring an international claim? If so, before whom? and how far did that capacity extend? Could a claim be brought against an international organization?

53. It was therefore too early to say whether the topic was an independent one or whether it should cover other matters.

54. In the light of what he had said, his reply to question No. III was that the Commission should discuss the concept "international organization" and the concept of such an organization acting as an intermediary in relations between States or between other organizations.

55. With regard to question No. IV, he thought that the problem of the status of international organizations and their agents and that of the relationship between States within international organizations should be settled first. It was not yet clear what was meant when international organizations were described as centres for harmonizing the actions of nations in international affairs. One tended always to think of what was done within, or by, international organizations, and not enough about the States themselves. In matters concerning the Security Council, for example, one should consider not only the functioning of the Council but also the clash of the interests of States.

56. His answer to question No. V would be that the Commission should concentrate on organizations of a universal character. So far as regional organizations were concerned a distinction should be drawn between two types: first those having universal objects limited territorially; the Commission should take such organizations into account in drafting general rules. Secondly, there were organizations of narrower scope, which were connected with the interests of certain blocs and which were more in the nature of political unions. So far as the latter were concerned, the Commission should be careful to make no attempt to draw up any rules.

57. Mr. TSURUOKA said that he had little to add to Mr. Lach's remarks, with which he agreed in every respect.

58. The Special Rapporteur was to be commended for the careful way in which he had framed his questions, thus greatly facilitating the replies.

59. With regard to the first two questions, he took the view that, to begin with at any rate, the Commission should confine its studies to the particular subject of diplomatic relations. A preliminary general study would no doubt be required to throw light on the subject as a whole; but any draft articles that the Commission might prepare should deal only with the restricted subject of diplomatic relations between States and inter-governmental organizations. Indeed, the Commission might consider drawing up a separate set of draft articles on that subject. Later, the scope of the study might be widened, but for the time being, the Commission should deal with the most urgent problems.

60. His answer to questions Nos. III and IV would be that the Commission should adopt a strictly practical approach and deal first with the more straightforward aspects of diplomatic relations between States and inter-governmental organizations — in other words, privileges and immunities — which were ripe for codification and most likely to lead to a progressive development of international law. The Commission's object should be to formulate a legal instrument which would be acceptable to most States, easy to apply, and conducive to international co-operation in establishing legal stability. Any draft prepared by the Commission should be without prejudice to the existing conventions on the privileges and immunities of the United Nations and the specialized agencies. The Commission should endeavour to fill in the gaps in those conventions and to clear up the ambiguities which they contained, with a view to rendering them more effectual and to inducing Governments not yet parties to accede to them.

61. So far as question No. V was concerned, he considered that the Commission could disregard regional organizations and should concentrate on relations between States and organizations that were universal in character or scope.

62. Mr. TABIBI said he was pleased to find that his views accorded with those of the majority, in particular as far as the order of priorities was concerned.

63. Although he realized that the Secretariat had a wide practical knowledge of the way in which the Convention on the Privileges and Immunities of the United Nations operated, he could not agree with the Secretary that the Convention was so perfect that it should be left undisturbed. In fact, since its adoption, and that of the convention on the privileges and immunities of the specialized agencies, numerous changes had taken place both in the relations between States and inter-governmental organizations and in the functions and methods of work of those organizations. By way of illustration, he mentioned the world-wide ramifications of the Technical Assistance Administration and the Special Fund.

64. In practice, a great number of difficulties had arisen in the implementation of the Conventions, and they probably needed to be brought up to date to meet modern requirements. The study of those instruments by the Commission would in no way mean that they would be altered before general agreement was reached concerning their revision.

65. Mr. PAL associated himself with the praise expressed for the work already done by the Special Rapporteur, which gave great promise of the quality of his future reports. The subject was as yet totally unexplored, so much so that the task of the Special Rapporteur might well be likened to Gulliver's voyage to Laputa, an odd island floating in the air, oddly related to land below, functioning in that relationship with odd mechanism in an odd manner, and inhabited by the oddest-looking creatures whose eyes did not focus on anything before them. On a subject like that, in its present unexplored condition, the light which had previously been offered for guidance was certainly the best light; but he was not quite certain if it might not in the long run prove only darkness.

66. In the present unexplored condition of the subject, he did not feel in a position to offer to the Special Rapporteur guidance as to the questions asked and, in particular, as to where to begin. He suggested that Mr. El-Erian, after further thorough exploration of the subject, should submit his own suggestions in those respects for the Commission's approval. In the very light of the results of such study the Commission would then be in a better position to judge.

67. It would not be possible to disregard regional organizations altogether; provision for such organizations was made in Chapter VIII of the Charter, and they could be utilized to serve universal interests.

68. Mr. PAREDES said that the Special Rapporteur had shown commendable courage in tackling a problem which was both so difficult and of such contemporary importance. The questions he had asked deserved consideration.

69. With regard to question No. I, he considered that the Commission should have full freedom to choose what subjects should be studied, in what order and by what methods. He entirely agreed with Mr. de Luna that the Commission should first define the purpose of its study, in other words, should indicate to what organizations the rules to be drawn up by it would apply. Obviously, the status of organizations differed according to the purpose and constitution of each. The United Nations aspired to become a world government; other organizations, such as the Organization of American States, were forms of confederations of States of decidedly political nature. It would be convenient and easy for the Commission to deal in its study with the relations between States and inter-governmental organizations such as the United Nations and the Organization of American States, but in doing so it would make its draft unnecessarily complicated and would be in danger of leaving gaps in it if it also tried to deal with specialized organizations concerned only with some particular aspects of the relations among their members.

70. In reply to question No. II, he said that the Commission should regard the topic as independent and treat it as an independent subject. As, however, there were obviously links between that and other topics, the Special Rapporteurs concerned should confer to decide together what parts of the topic each was covering in his report; in that way, overlapping among the reports would be avoided and the study of the problem itself would become easier.

71. With regard to questions No. III and IV, he agreed with those members who thought that the Special Rapporteur himself was best qualified to settle the order in which the topics should be studied.

72. Mr. LIANG, Secretary to the Commission, said that he had in no way wished to suggest that the 1946 Convention on the Privileges and Immunities of the United Nations was sacrosanct and not open to examination. The difficulties which had arisen, and which had been mentioned by Mr. Tabibi, in connexion with its application might have been due either to the fact that many States had not become parties to it or to the fact that there had been some controversy between the parties about its applicability to certain situations. He had simply sought to direct attention to some problems that would arise if an effort were made presently to revise a complex system of agreements on privileges and immunities.

73. During the 15th session, at the 718th meeting, Mr. Rosenne had said that: "he was not at all certain that the Commission was empowered to take any action regarding the two Conventions [those on the privileges and immunities of the United Nations and of the specialized agencies] unless it had some specific indication that the General Assembly would welcome such action. If his doubts were shared by other members, he would suggest that the Commission should draw the attention of the General Assembly to the matter in its report".⁶ At the same meeting, Mr. Verdross had asserted that the question of the privileges and immunities of international organizations was beyond the Commission's competence.

74. If the result of a particular stage in the Commission's work on the relations between States and international organizations were a revision of the 1946 Convention, he also wondered if a specific mandate on the matter from the General Assembly would not be necessary. That, however, did not prevent the Commission from studying the above-mentioned Convention in connexion with its general programme of work on the subject.

75. Mr. ROSENNE said that the observations made by the Secretary and Mr. Tabibi impelled him to point out that to the best of his knowledge there had been no strong demand or a review of the 1946 Convention on the Privileges and Immunities of the United Nations either in the discussions leading to the adoption of General Assembly resolutions 1289 (XIII) and 1505 (XV) or in any debate either in the Assembly or in the

⁶ *Yearbook of the International Law Commission*, 1963, Vol. I, summary record of the 718th meeting, para. 7.

Commission itself concerning topics for future codification. Of course, that argument was not conclusive, and a number of problems had indeed arisen from the implementation of the Convention, but the gaps and imperfections discovered in the text had evidently not been of such magnitude as to induce States to call for its revision. The same was true of the Convention on the Privileges and Immunities of the Specialized Agencies and of the various headquarters and host agreements.

76. He wondered also whether the Commission was equipped to carry out such a review, for which the collections of texts in the Legislative Series⁷ would not suffice. It would be a delicate and possibly a difficult matter to obtain from the Secretariats of the organizations themselves, and from Governments, the requisite additional material.

77. On the question of competence he firmly remained of the opinion he had expressed at the previous session to which the Secretary had made reference. Given the circumstances in which the 1946 Convention had been adopted, he had grave doubts as to whether the Commission was competent on its own initiative to undertake any review of the Convention without some indication from the General Assembly that such a step would be welcomed. He emphasized that point because of his anxiety that the Commission should not enter into any conflict with the General Assembly of the kind that had occurred early on in its existence when serious differences between it and the General Assembly had arisen over their respective competence concerning matters falling within the Commission's Statute. Those disagreements had undoubtedly adversely affected some of the Commission's early work.

78. The discussion had revealed that there was a matter that could usefully be studied, namely the position of permanent missions — presumably primarily those accredited to the United Nations — although even that was to some extent covered by the 1946 Convention itself or by related instruments.

79. Mr. YASSEEN supported Mr. Lach's proposal that the Special Rapporteurs concerned should meet to demarcate their respective topics. The Commission should await the result of that consultation before it took a final decision on the matters to be considered in Mr. El-Erian's report. That would also be the best way of preventing overlapping between the various reports.

The meeting rose at 1 p.m.

757th MEETING

Thursday, 2 July 1964 at 10 a.m.

Chairman: Mr. Roberto AGO

Relations between States and Inter-Governmental Organizations

(A/CN.4/161 and A/CN.4/L.104)

(continued)

[Item 5 of the agenda]

1. The CHAIRMAN invited the Commission to continue its consideration of agenda item 5.
2. Mr. TABIBI said that he wished to reply to three points raised by Mr. Rosenne at the previous meeting.
3. The first point related to his (Mr. Tabibi's) statement at the previous meeting that the Special Rapporteur should study the defects and gaps of the existing Conventions on the privileges and immunities of the United Nations and its specialized agencies. Mr. Rosenne had suggested that there had been no agitation in the General Assembly for a revision of those Conventions. In fact, both the French delegation, which had sponsored the proposal that had ultimately become Assembly resolution 1289 (XIII), and a number of other delegations, had had very much in mind all the practical aspects of relations between States and inter-governmental organizations, and the questions touched upon by the Conventions on privileges and immunities were eminently practical. Of course, States did not often refer openly in United Nations debates to the difficulties which had arisen in the matter because of a desire not to embarrass the Secretariat or the host governments concerned; however, many of the problems which had arisen had been and still were the subject of protracted negotiations. In the circumstances, it was very desirable that the Special Rapporteur should examine the experience gained in the application of the Conventions in question, study the practice in the matter and the developments which had taken place since the Conventions had been concluded, and consider what could be done to fill any existing gaps and remedy deficiencies. In doing so, the Special Rapporteur would rely on the help and assistance of the Secretariat, which could make available to him its unrivalled experience and much valuable unpublished source material.
4. The second point raised by Mr. Rosenne was that of the relationship between the Commission and the General Assembly. On that point, he considered that the Assembly had left the Commission free to study the topic as it saw fit; however, the Commission, as a creation of the General Assembly, constantly reported to it on its work. The Commission would therefore report to the General Assembly any decision it might take on the question of priorities as between the various aspects of the topic.

⁷ United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations* (ST/LEG/SER.B/10 and 11), United Nations publication, Sales Nos. 60.V.2 and 61.V.3.

5. The third point concerned the differences existing between the various international organizations themselves. It was a fact that there were great discrepancies as between one organization and another. The various organizations had been created at different times and under different conditions. As a result, there were glaring differences in many respects. For example, he understood that in Geneva the Director-General of the International Labour Office enjoyed greater privileges than did the Secretary-General of the United Nations. Another example was the position of experts in the field, which varied considerably according to whether they were regarded as United Nations experts or, say WHO experts or UNESCO experts.

6. As was well-known in United Nations circles, one of the most difficult problems of the United Nations family was that of co-ordination, and the Administrative Committee on Co-ordination, consisting of the administrative heads of the specialized agencies under the chairmanship of the Secretary-General of the United Nations, had been set up precisely in order to try to unify the practice on various matters affecting all the organizations concerned.

7. Mr. TUNKIN said that there appeared to be general agreement that the most appropriate field for immediate study was that of the so-called "diplomatic relations" between States and inter-governmental organizations, covering the concrete subjects of the status of the organizations themselves, the status of permanent missions and that of representatives to international organizations.

8. Beyond that point, the Commission should not commit itself, but should leave for decision later the question whether the problem of treaties of international organizations would be dealt with under the law of treaties, or under the topic of relations between States and inter-governmental organizations. Similarly, no decision would be taken at the moment regarding the apportionment of the topics of State responsibility and State succession, in relation to international organizations, among the Special Rapporteurs concerned.

9. The subject, which was vast, would to some extent cover the same ground as existing Conventions, in particular the Conventions on the privileges and immunities of the United Nations and the specialized agencies. However, the subject covered, at least at the present stage, a good deal more, and the question of its actual relationship with existing Conventions could be left aside for the time being. It was equally premature to enter at present into the question whether specific instructions were needed from the General Assembly or not. The Special Rapporteur would be instructed by the Commission to study the problem of "diplomatic" relations between States and international organizations; when he had submitted his proposals, the Commission would see whether it needed any additional instructions from the General Assembly. The Commission would consider the matter in the light of the concrete questions studied and of their relationship with the existing conventions.

10. Mr. BRIGGS stressed that the topic of relations between States and inter-governmental organizations

covered a very vast and uncharted field. He believed that much exploratory work by the Special Rapporteur was still needed in order to uncover material that might serve for the purpose of drafting rules in the matter.

11. Personally, he would have preferred that prior consideration should be given to the topic in its relation to the law of treaties, but the majority view in the Commission appeared to be that "diplomatic law", in other words the subjects mentioned in question No. IV of the working paper (A/CN.4/L.104), should receive priority. Since the Special Rapporteur on the topic of Special missions had submitted a report on that topic (A/CN.4/166), it seemed appropriate that the Special Rapporteur on relations between States and inter-governmental organizations should deal with the subject of permanent missions to such organizations.

12. It was essential, however, to avoid two pitfalls. The first and gravest was that of attempting to define what constituted an inter-governmental organization. He had worked for some ten years with the Harvard Research and well recalled the insistence of the late Professor Manley O. Hudson and others that it was not necessary to define the term "State" for the purposes of the Harvard drafts. In fact, it had been possible to go ahead with the drafts without any such definition. All that had been done was to describe the sense in which the term "State" had been used in those drafts. Similarly, with regard to the topic under discussion, the Special Rapporteur would no doubt identify the types of organizations he had in mind but he should avoid attempting any definition or any theoretical discussion of the legal personality of international organizations; the subject should be approached on a purely practical basis.

13. In the second place, the Commission should avoid any attempt to rewrite such instruments as the Conventions on the privileges and immunities of the United Nations and of the specialized agencies and the United Nations Headquarters Agreement. He did not believe that it was even necessary to consult the General Assembly on that question. Obviously, the Special Rapporteur, in his study of "diplomatic law" in its application to relations between States and inter-governmental organizations, would consider the provisions of those treaties and could perhaps suggest possible improvements. However, there was a wealth of other material available for study.

14. Mr. BARTOŠ said he was glad to note that Mr. Tunkin and Mr. Briggs agreed with him that many legal questions affecting international organizations required to be studied — their constitutions, the different types of organization involved, their legal status, the relations between organizations and the relations of those organizations with States. On the other hand, he did not agree with the opinions expressed by Mr. Tunkin and Mr. Briggs on the subject of the status of the representatives of States and that of persons representing the organizations in their relations with States, which was dealt with in the two principal Conventions on the privileges and immunities of the United Nations and of the specialized agencies. He did not think that

the revision of those Conventions should receive priority; later, perhaps, after the Commission had come to some conclusions with regard to the legal status of the organizations and their agents, had worked out some general principles, and had considered how those principles applied to the existing Conventions, it might discuss the desirability of such a revision. Like Mr. Briggs, he took the view that the Commission had no need to ask the General Assembly for instructions on that point. The Commission had been asked by the General Assembly to study the topic and to determine as a result whether it was possible to codify and develop progressively the relevant rules. It was undoubtedly necessary to clear up certain points first. No member of the Preparatory Commission of 1945-46 had grasped the implications of so vast an organization. Subsequently, the disputes between the major Powers, the cold war and the Korean war had hampered the formation of any very clear doctrine. Some had visualized the United Nations as an ideal State; others had disagreed with that concept; and still others had asked themselves what would happen if the Organization disappeared. The fact was that the international organizations were a reality and international life would be unthinkable without them. Accordingly, he considered that the preliminary question of the legal status of those organizations should be studied first; that study would provide the basis or a subsequent examination of the practical aspects of the topic.

15. Mr. de LUNA said that the Special Rapporteur would have to frame at least an empirical definition of the meaning of "inter-governmental organizations". Unless he had such a definition in mind, it would be impossible for him to make a selection from among the enormous mass of situations and instruments available to him for study. As an example of a borderline case, he mentioned the *Comité International du Bois*, the membership of which comprised both Governments and private entities. The Special Rapporteur's definition would be adopted by the Commission purely as a working hypothesis and, while the Commission could well avoid taking sides on theoretical issues, it would have to decide what it meant by "inter-governmental organization" for the purposes of its work.

16. Mr. EL-ERIAN, Special Rapporteur, thanked the members of the Commission for their valuable comments and constructive criticisms. Those comments had dealt with a wide range of subjects of both a theoretical and a practical nature. Reference had been made to such matters as the place of inter-governmental organizations in contemporary international law, the impact of their widening activities on the complexity of international relations, the diversity of the various organizations in contrast with the comparative homogeneity of States, the difficulty of defining what organizations were covered by the topic, and the possible effect of the Commission's work on existing Conventions. Reference had also been made to the relations of the Commission with the General Assembly and the need, sooner or later, to request the Assembly's directives and views. He did not propose to comment on all those points, for that would require a very careful study of the records of the discussion. At that stage, he would

confine himself to some general remarks on a few points.

17. With regard to the relevance of the eighth paragraph of the preamble to General Assembly resolution 1505 (XV), it had been said that that passage was addressed to the Assembly and not to the International Law Commission. However, no matter to whom that passage was addressed, its object was clearly the work of the Commission and it related to the selection of topics for study by the Commission. The resolution had in fact been adopted in connexion with a discussion of the Commission's report on its future work.

18. With regard to the general Conventions on the privileges and immunities of the United Nations and the specialized agencies, some apprehension had been expressed both by members of the Commission and by a number of legal advisers of organizations with regard to the possible effect of the Commission's work on those privileges and immunities. He believed that undue emphasis had been placed on the idea of the possible replacing or rewriting of those conventions. What was envisaged was a general study of the whole question in the light of eighteen years' experience, to ascertain what kind of problems arose in practice and whether they were adequately covered by existing provisions. It was too early at that stage to consider whether the investigation would lead to any suggestion for the replacement, rewriting or supplementing of the existing Conventions, or to determine to what extent some of their provisions embodied customary rules of international law binding upon States even if not parties to the Conventions. It should be remembered that about half of the States Members of the United Nations were not parties to the 1946 Convention on the Privileges and Immunities of the United Nations and that only one-third were parties to the Convention on the Privileges and Immunities of the Specialized Agencies. Those Conventions were therefore by no means universal. Moreover, their application and interpretation had given rise to a very large number of problems which deserved careful study. It would therefore be a great mistake not to study the subject comprehensively.

19. With respect to question No. V in his working paper he believed that attention should be focused in the first place upon universal organizations, those described by French writers as *organisations à vocation universelle*. The organizations in question were chiefly those belonging to the United Nations family, but there was no intention to exclude the small number of other universal organizations. Regional organizations would not be excluded from the actual study; their valuable experience would have to be drawn upon. It should be remembered that the forerunner of all international organizations had been the European Danube Commission, a regional body. No attempt should be made, however, at that stage to formulate rules governing regional organizations, although any work done on universal organizations might well ultimately have some bearing on them, as some were modelled on the universal organizations.

20. With regard to the help of the Secretariat, he said 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 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.

21. On the subject of the Commission's relations with the General Assembly, he thought that it was too early at the present stage to consult the Assembly. The result of the Commission's work would be submitted to the General Assembly in due course and every opportunity would be provided for obtaining the opinions of all the organizations interested in the topic.

22. He agreed that the term "diplomatic law" was not a very satisfactory one in the context. The intention was to cover all the modalities of application of the legation system to the relations between States and inter-governmental organizations. States maintained representatives with the organizations, and the organizations themselves had sent representatives to States; and the question of the precise terminology to be applied to that institution would have to be faced.

23. The CHAIRMAN, speaking as a member of the Commission, said he had unfortunately not been able to be present at the interesting discussion on Mr. El-Erian's working paper. From the remarks by the immediately preceding speakers he gathered that the majority of the Commission considered that relations between States and regional organizations should not be dealt with in the report. In his view, that would be a very serious mistake. The international organizations were a complex phenomenon; they were extremely varied and those which did not have a universal character were by far the more numerous. In regional organizations, the tendency towards association was even stronger than in organizations of a universal character; the consequence was that treaties between regional organizations and States were more common than those between organizations of a universal character and States. If, therefore, the Commission were to confine itself to the topic of the relations of organizations of a universal character with States, it would be leaving a serious gap. Besides, relations with States were apt to follow a very similar pattern, whether the organization in question was of a universal or of a regional character. The Special Rapporteur would have to consider whether there were really any pronounced differences and to make suggestions based on his conclusions. In any case, it was an aspect of the question that should not be disregarded.

24. Mr. TUNKIN said that any draft convention to be prepared concerning the relations between States and inter-governmental organizations should be concerned with those of a universal character and not with regional organizations, though the experience of the latter could be taken into account in the study.

25. Mr. de LUNA said that, as he had stated before, the Commission could not disregard the regional organi-

zations. What it should do was to determine whether there were general rules applicable to all international organizations without distinction, though naturally there could be no question of substituting those rules for the constitutional rules governing those organizations, whether universal or regional.

26. Mr. BARTOŠ referred to the proposal made by Mr. Lachs at the previous meeting, which was that a small *ad hoc* committee should be set up, consisting of the Special Rapporteurs and the General Rapporteur, to consider whether there was any overlapping between their respective fields.

27. Sir Humphrey WALDOCK said that he had not been present during the discussion on Mr. Lachs's proposal and thought it premature. Little would be gained at the present juncture by a discussion among the Special Rapporteurs of the points at which their respective studies might overlap. Co-ordination of that sort could be undertaken later.

28. Mr. BRIGGS said that he was inclined to agree with the previous speaker but hoped that the question of treaties to which international organizations were parties would not be left out altogether: they would either need to be dealt with in the draft on the law of treaties or in the report on relations between States and inter-governmental organizations.

29. Mr. ELIAS, speaking as the member who had initiated the idea, said that he had not made as formal a proposal as Mr. Lachs but had simply wished to make sure that the Special Rapporteurs in their own good time would discuss the delimitation of the different topics in the way outlined in paragraph 12 of annex II to the Commission's report on its fifteenth session.¹

30. Mr. BARTOŠ pointed out that the Commission had taken the specific decision not to concern itself with treaties between international organizations and States; when the Commission had come to consider Mr. El-Erian's questions Nos. II and III, most of its members had taken the view that matters of substance should be left aside and dealt with as far as possible in the reports on such substantive subjects as State succession and State responsibility. Sir Humphrey Waldock no doubt considered himself bound by the Commission's first decision; but in its instructions to Mr. El-Erian the Commission had implied that anything concerning treaty law in relation to international organizations would be dealt with in the substantive reports. There was thus some inconsistency in the instructions given to the Special Rapporteurs, and its consequence would be that the subject of treaties entered into by international organizations would not be covered in the reports. Hence, there was a risk that such treaties would not be dealt with by the Commission.

31. Mr. YASSEEN said that his intention in supporting Mr. Lachs's proposal had been to facilitate a decision by the Commission. Mr. El-Erian had asked the

¹ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9.*

Commission to determine the scope, at least in certain respects, of the topic referred to him. Since it had become apparent during the discussion that the various subjects to be dealt with had certain points in common, he had decided that Mr. Lachs's proposal that the Special Rapporteurs should confer to ensure that their reports did not overlap was a sound one.

32. The CHAIRMAN said that, in the circumstances, he would suggest that the Special Rapporteurs should meet informally before the end of the session to discuss points concerning which each would wish to learn how the others were going to proceed.

It was so agreed.

Special Missions

(A/CN.4/166)

(resumed from the 725th meeting)

[Item 4 of the agenda]

33. The CHAIRMAN invited the Commission to examine the draft articles in the report on special missions (A/CN.4/166) article by article.

Article 1

34. Mr. BARTOS, Special Rapporteur, said that he had not given any explicit definition of "special mission" in article 1, but it was implied in paragraph 1. The Commission would have to decide whether special missions should be defined at the outset or whether the definition might be deferred and grouped with whatever other definitions might be required; that was the method usually followed by the Commission in writing its drafts.

35. In view of Mr. Tunkin's remark at the 724th meeting that special missions might have very broad functions he was deleting the words "special and" before "specific assignments". The first passage in paragraph 1 would then stress that special missions were intended for the performance of specific assignments. Complications of two kinds had arisen in practice where that condition had not been observed; on occasions, a State had declined to discuss with the members of a special mission any matters other than those within the terms of its assignment, and sometimes the sending State had objected that the special mission had acted *ultra vires*.

36. The second characteristic mentioned in paragraph 1 was the temporary nature of special missions.

37. The third point was that a State could not send a special mission to another State without the latter's consent. That was the fundamental principle of the article and it rested on practice. The Commission should give its view on that principle.

38. The Commission would also have to express its view concerning the principle stated in paragraph 2. Experience showed that special missions were used notably when no regular diplomatic or consular rela-

tions existed between States. There had even been cases in which States engaged in armed conflict had resorted to the procedure of the special mission in order to initiate negotiations for a truce, an armistice or peace. In addition, there were many examples in history of cases in which special missions had been instructed to prepare for the recognition of a newly created State; in such cases the special mission had served to establish diplomatic relations.

39. Mr. ROSENNE said that two rules set out in article 1, that a special mission had to be sent by a State and that there was no obligation on the other State to receive it, were entirely acceptable.

40. However, he did not consider it appropriate to lay such great stress on action *ultra vires* in paragraph (1) (b) of the commentary and in article 2. Such emphasis would introduce an element of rigidity into an institution which by its very nature should be flexible.

41. He agreed that definitions should be avoided, but questioned whether the Special Rapporteur had followed his own injunction inasmuch as he had included three very precise epithets in article 1, paragraph 1, namely "special", "specific" and "temporary". The Vienna Convention on Diplomatic Relations, 1961,² made no attempt to define diplomatic missions and only contained a partial description of their characteristics. He considered that articles 1 and 2 should be redrafted on rather different lines. Article 1 should specify the types of diplomatic missions to which the draft articles were intended to apply, making it clear that the draft would not cover those coming within the scope of the two Vienna Conventions on Diplomatic and on Consular Relations or missions that were the subject of host or Headquarters agreements or of any other special agreements between two States.

42. The content of article 1, paragraph 2, was important. Since, as pointed out in the last section of the draft (general and final clauses), article 45 of the Vienna Convention on Diplomatic Relations would apparently not be applicable to special missions, paragraph 2 of article 1 should be drafted more broadly and refer also to the continuing operation of special missions. He would go further and suggest that the draft should mention that special missions could also operate in cases of non-recognition.

43. The content of article 14 should be combined with article 1 so as to make it clear throughout that the draft articles were applicable to all special missions, whether sent to negotiate with the receiving State or merely operating in it.

44. Mr. de LUNA said that he approved both of the principles underlying article 1 and of its wording.

45. With regard to paragraph 2, the Special Rapporteur himself stated in the last sentence of paragraph (2) of his commentary that during the existence of the special mission, States were entitled to conduct through

² *United Nations Conference on Diplomatic Intercourse and Immunities*, Vienna, 2 March - 14 April 1961, *Official Records*, Vol. II (United Nations publication, Sales No. 62.X.1).

that mission relations which were within the competence of the general mission. That was a point of particular importance if no diplomatic or consular relations existed between two States. In such circumstances one of the Governments might send a special mission to settle problems which would normally be within the competence of the general mission under the pretext of dealing with a particular matter, and so avoid exposing itself to domestic political difficulties; once it was on the spot, the special mission in fact performed a more general task and prepared the way for the resumption of normal diplomatic relations. He suggested that the rule stated in paragraph 2 might be expressed in less categorical terms, and the competence of special missions would be more precisely defined if at the end of the paragraph a passage on the following lines were added: "In this case, States are entitled to conduct through the special mission relations which are within the competence of the general mission".

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

46. Mr. TABIBI said that the Special Rapporteur had prepared a scholarly and valuable report, the main purpose of which was to enable the Commission to complete its codification of diplomatic law and to facilitate the operation of a useful institution. The Commission should beware of establishing any rules that might hamper the smooth conduct of special missions, which were growing in number.

47. In general, he approved of article 1, paragraph 1, but he did not believe that such a strict requirement as formal consent by the receiving State should be imposed (analogous to the *agrément* needed for diplomatic missions proper, as such a requirement could cause unwarranted delays. Indeed in paragraph (1) (c) of the commentary the Special Rapporteur himself had recognized that such consent could be given informally. Surely, it would suffice if the draft provided that the sending State should notify the receiving State of its intention to send a special mission.

48. Some drafting change was needed in the first sentence of paragraph (1) (a) of the commentary to avoid unnecessary repetition. He could not agree to the proposition in the second sentence of paragraph (1) (a) of the commentary as it was inconsistent with modern practice. For example, Algerian representatives had been invited to the Belgrade Conference of non-aligned Powers; and the Bandung Powers had decided to invite to future meetings representatives of national movements from non-self-governing territories which had not yet attained independence, thus recognizing them as entitled to take part in negotiations.

49. He could likewise not subscribe to the statement in paragraph (1) (b) of the commentary, as there were cases where a special mission was sent to perform certain tasks, including the establishment of a permanent mission; for example, after India had attained independence, a special mission had been sent by the Government of Pakistan to Afghanistan.

50. Mr. JIMÉNEZ de ARÉCHAGA expressed his complete agreement with article 1, which threw a very

clear light on the problems involved. The consent of the State to which the Special mission was to be sent was necessary, even though that consent might be implied and not express. The question had arisen because the previous Special Rapporteur on the topic, the late Mr. Sandström, had dealt with the subject by indicating which of the articles on diplomatic relations applied to special missions and which ones did not so apply.³ So long as that approach had been followed, it had been appropriately stated that since no formal *agrément* was necessary for the sending of a special mission, the article on *agrément* did not apply to special mission. It was clear, however, that a special mission could not be sent to an unwilling State.

51. Accordingly, he favoured the text proposed by the Special Rapporteur, which removed any doubt there might exist on the point, and he did not think that the requirement of consent should be replaced by the requirement of notification.

52. Mr. YASSEEN said that article 1, paragraph 1, reflected existing international practice and well described the characteristics of a special mission: a special mission was sent by one State to another State, it was responsible for a specific assignment, it was temporary, and the consent of the State to which it was sent had to be obtained. The Special Rapporteur had been right not to specify the form in which such consent should be given, for it might even be tacit.

53. He was rather doubtful whether paragraph 2 should be kept. The rule stated in that paragraph was correct, but self-evident. Since States which had no diplomatic relations with each other could enter into and establish full diplomatic relations, they could manifestly also establish partial relations.

54. Mr. ELIAS said he found article 1 generally acceptable. However, on a point of drafting which was to some extent one of substance, he thought that, in the light of Mr. Tunkin's remarks during the earlier discussion, it would be preferable to replace the expression "temporary special missions" by "temporary missions".

55. With regard to Mr. Tabibi's remarks on political movements, he thought that the Special Rapporteur's commentary was a correct statement of the law. If a political movement gained recognition as a belligerent, it constituted a subject of international law; otherwise, the examples that could be cited were those of States which had not yet attained full independence but which — on political rather than legal grounds — had been allowed to send representatives to certain conferences. However, even where a political movement's representatives were allowed to participate in a conference, that did not necessarily mean that they became a special mission.

56. Paragraph 2 of the article, although it stated a fairly obvious rule, would be useful in order to remove all doubt regarding the existence of that rule.

³ See Mr. Sandström's report on *ad hoc* diplomacy in *Yearbook of the International Law Commission, 1960*, Vol. II, p. 108.

57. Mr. TABIBI explained, in reply to Mr. Elias, that he had not criticized the commentary from the point of view of legal theory, but merely pointed out that it was not advisable to include certain passages in a document to be submitted to the General Assembly. Moreover, a statement like that in paragraph (1) (b) of the commentary failed to take account of the practice, particularly at the United Nations, in which the line of demarcation between special missions, representatives to conferences and permanent missions, was very often indistinct. For example, the Ministers of Commerce attending the recent Conference on Trade and Development at Geneva had used the opportunity to carry on certain negotiations.

58. Mr. AMADO said that the articles submitted were admirably constructed and entirely served their purpose, that of giving form and body to the propositions submitted earlier by the late Mr. Sandström. The articles were intended to fill a gap left by the two Vienna Conventions, that on Diplomatic Relations and that on Consular Relations; they supplemented those Conventions and were not intended to solve all the diplomatic problems raised by the multifarious activities of modern times.

59. Article 1 was unexceptionable, and he could not see that anything could be added to or taken away from it. While he appreciated Mr. Yasseen's argument, he could not agree with his remarks concerning paragraph 2.

60. To discuss the commentary was premature; it was the Commission's practice not to write the commentary until it had finished debate on the articles themselves. In any case, the passage in the commentary to which Mr. Rosenne had referred was more or less a meditation of the Special Rapporteur's own.

61. The Special Rapporteur had been right to refrain from seeking to define the meaning of "special mission", for all definitions were dangerous.

62. Sir Humphrey WALDOCK asked whether the Special Rapporteur attached any special significance to the words "or consular" in paragraph 1. The essential point seemed to be the existence of regular diplomatic relations.

63. Mr. BARTOŠ, Special Rapporteur, explained that his thought had been the same as Sir Humphrey's before the special situation between the Federal Republic of Germany and Yugoslavia had been established. The Federal Republic received and sent special missions responsible for matters germane to consular relations; hence it considered that the severance of diplomatic relations had not involved the severance of all relations between the two States. Paradoxically, the consular sections of the two embassies had continued to function, one at Belgrade under the auspices of the French Embassy and the other at Bonn under those of the Swedish Embassy. He had thought that the phrase "diplomatic or consular relations" would be useful, but he would not insist on keeping it. He had long considered diplomatic relations and consular relations as forming an invisible whole, but several cases had led him to draw not only a theoretical but also a prac-

tical distinction between the two. Sometimes consular relations existed although diplomatic relations had not yet been established or had been severed.

64. Mr. TUNKIN suggested that the Secretariat should circulate to members of the Commission the text of the Vienna Convention on Diplomatic Relations, so that it could compare the Special Rapporteur's articles with the provisions of the Convention.

65. Mr. CASTRÉN said he conceded that it was not necessary that the draft should open with a definition of "special mission". It would, however, be desirable that the Commission should at its next meeting consider the question of definitions, in particular so far as they related to the head of a special mission and its members, for there seemed to be some lack of uniformity in the concepts in the various articles.

66. He agreed with Mr. Elias that the word "special" before the word "missions" should be deleted in paragraph 1. Secondly, while it was true that a State was not bound to receive a special mission, too much should not be made of the requirement of consent. In the light of Mr. Tabibi's remarks the Commission might insert the words "express or implied" before the word "consent", and might explain — perhaps in the commentary — that such consent could be given *ex post facto*.

67. Paragraph 2 should preferably be retained, even though it stated the obvious; if he recollected rightly, the Vienna Convention on Consular Relations, 1963, contained an analogous provision.

68. The Special Rapporteur had stated that political movements, and in particular insurgents, recognized as belligerents had the capacity to send special missions. If the Commission considered that that should be the meaning of the article, it would have to redraft it accordingly. Alternatively, it might decide that the draft should deal exclusively with special missions sent by one State to another.

The meeting rose at 1 p.m.

758th MEETING

Friday, 3 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Special Missions

(A/CN.4/166)

(continued)

[Item 4 of the agenda]

DRAFT ARTICLES ON SPECIAL MISSIONS

ARTICLE 1 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 1 in the Special Rapporteur's first report (A/CN.4/166).

2. Mr. TUNKIN said that, so far as essentials were concerned, he agreed with the Special Rapporteur's draft of article 1: a special mission was sent by one State to another, and the consent of the other State was doubtless necessary.

3. The Special Rapporteur had agreed to omit the words "special and" in paragraph 1; it was arguable, however, that the word "specific" should be omitted as well, for the assignments given to special missions might be quite vague and general, and practice showed that in many cases they were not specific. It was for the States to decide in each case whether the mission's assignment should or should not be spelt out in all particulars.

4. As he had said during the general discussion, the only distinctive feature of special missions was their temporary character. He had even suggested that the expression "temporary missions" should be employed.

5. Furthermore, the present drafting of paragraph 1 might give rise to doctrinal difficulties in the matter of the rights of States. To avoid that controversy, and also in order not to over-emphasize the element of consent (which might be either express or implied), the Drafting Committee might consider the following redraft: "A temporary mission is sent by one State to another State with the consent of the latter".

6. In all other respects he could accept the Special Rapporteur's text.

7. Mr. TSURUOKA suggested that the Commission should explain in the commentary on the article that the consent to the sending of a special mission should be given by the organs of the State which were authorized according to international law to express the will of the State; similarly, the proposal to send the special mission should emanate from the duly authorized organs. If that point was not made clear, disputes might arise which would not facilitate the task of special missions.

8. Mr. BRIGGS said that he was in complete agreement with the purpose of article 1. With regard to the formulation, he accepted paragraph 2 as it stood. He wished to make some observations, however, concerning paragraph 1.

9. In the first place, he noted that the Special Rapporteur had not employed the formula used in the Vienna Convention on Diplomatic Relations, 1961. Article 2 of that Convention stated: "The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent". Similarly, paragraph 1 of article 2 of the Vienna Convention on Consular Relations, 1963, stated: "The establishment of consular relations between States takes place by mutual consent". It would perhaps be of advantage to make like provision for the mutual consent of the States concerned in article 1, paragraph 1, of the draft on special missions.

10. In the opening words of the paragraph, he found the reference to "specific assignments" somewhat rigid. A situation could arise in which a special mission sent to attend a State funeral, for example, might take

the opportunity to engage in certain discussions, the specific purpose of which had not been among the mission's original purposes. He therefore suggested that some element of flexibility should be introduced into the provisions of paragraph 1, so as not to leave out the possibility of informal negotiations without formal consent. He thus supported Mr. Tunkin's suggestion in favour of greater freedom in respect of the tasks assigned to the special mission. It was undesirable to impose upon them an unduly rigid framework, since it was impossible to foresee all the tasks that would be included in a series of conversations.

11. On a point of drafting, he said he was not altogether satisfied with the term "assignment" used in articles 1 and 2 to translate the French term "*tâche*"; a more appropriate rendering should be found.

12. Agreeing with the remarks made by Mr. Rosenne at the previous meeting, he said it was undesirable to emphasize that any mission which exceeded the limits of its assignment would be acting *ultra vires*.

13. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with Mr. Tunkin that the essential characteristic of a special mission was that it was temporary; that characteristic was the key to the distinction to be made between the treatment of special missions and that of ordinary diplomatic missions. However, despite a certain preference for the expression "temporary missions", he realized that it might be difficult to drop the expression "special missions", which was in common use.

14. He also shared Mr. Tunkin's opinion regarding the word "specific".

15. Mr. YASSEEN said it was his understanding that Mr. Tunkin was opposed (not to the idea that the assignments of special missions should be described as "specific", but to the idea that they should be regarded as very specific. In his own view, since the sending of a special mission was subject to the consent of the receiving State, that State was entitled to know what was to be the mission's purpose; accordingly, its assignment would have to be specified to some extent.

16. Mr. de LUNA said he would prefer that at least in the title the expression "special missions" should be retained for it was in common use. But it was the adjective "temporary" which indicated the essential characteristic of the special missions under consideration, for the draft was so conceived as not to cover permanent special missions.

17. Mr. PAL, reading paragraph 1 of article 1 with paragraph 1 of article 2, said that the idea intended to be conveyed was no doubt that the assignment should not be vague and that the two States concerned should be clear what the mission's tasks would be. He did not believe that there was any difference of opinion in the Commission with regard to the substance of that idea, and hence the questions raised with regard to paragraph 1 of article 1 were largely questions of drafting and could be left to the Drafting Committee.

18. Mr. TSURUOKA supported the remarks made by Mr. Yasseen and Mr. Pal. The assignment of a special

mission should be specific, but that did not mean that it could not be general. When a special mission was led by a head of government and was received by another head of government, it was manifest that all kinds of questions might be taken up. But a special mission might be led by someone of lower rank. To facilitate the performance of its assignment, it was most desirable that that assignment should be specified in advance.

19. Mr. REUTER said that the members of the Commission were agreed as to the substance; the only questions which required clarification related to the terminology and could be settled by the Drafting Committee. In the title it would be dangerous to depart from the accepted term "special missions". It could hardly be laid down that the object of a special mission had to be defined rigidly; nevertheless, the assignment of a special mission should either be specified or else fit into a specific frame of reference.

20. Mr. ROSENNE said that the discussion on the term "special missions" used in the title of the draft reminded him of the problem faced by the Commission when it had dealt with the law of the sea and had been called upon to choose between the terms "territorial waters" and "territorial sea".

21. He believed it would be premature to try to reach a decision on the title until the Commission had considered all the draft articles on the topic under discussion.

22. Mr. RUDA thought that the title "special missions", which was the traditional term, should be retained.

23. In article 1, paragraph 1, he urged that both adjectives, "temporary", and "special", should be retained before the word "missions". The missions in question were temporary, as opposed to permanent diplomatic missions; they were also "special" by contrast with permanent missions, which were concerned with the whole range of diplomatic relations.

24. With regard to the assignment of the special mission, he agreed with Mr. Yasseen that the assignment should be specific. The State to which the special mission was to be sent should have a clear idea of the subject matter and of the negotiations about to be initiated; the fact that its consent had to be obtained necessarily implied that it should be informed of the purpose of the mission.

25. With regard to the suggestion by Mr. Briggs that a reference to the mutual consent of the two States concerned should be added, he pointed out that there was a difference between the case of special missions and that of permanent missions. The case envisaged in article 2 of the Vienna Convention on Diplomatic Relations was that of the establishment of diplomatic relations between two States which exchanged permanent missions; in that context, it was appropriate to refer to the mutual consent of those two States. In the case now under discussion, only one mission was involved, and what mattered was that the need for the con-

sent of the State to which the mission was to be sent should be indicated.

26. He thought that paragraph 2, although not perhaps indispensable, should be retained.

27. He supported article 1 as submitted by the Special Rapporteur, both in substance and in form.

28. Mr. AMADO said that, like Mr. Ruda, he thought that the word "specific" and the expression "temporary special missions" should be retained and that a reference to "mutual consent" would be out of place in the draft. The Commission should adopt the article as it stood.

29. Mr. PESSOU said that in his view article 1 was very satisfactory because it expressed in a simple way what had to be said. The Special Rapporteur has used the word "specific" to mark a contrast with the classic assignments of a permanent mission and to show that the assignment of a special mission was supplementary. One should not read too much into the word.

30. Mr. VERDROSS said that, for the same reasons as those given by Mr. Amado, he supported the text proposed by the Special Rapporteur.

31. Mr. EL-ERIAN congratulated the Special Rapporteur on his very precise formulation of article 1 and on his learned commentary to that article and expressed his support for the article under discussion.

32. The CHAIRMAN, speaking as a member of the Commission, said that there seemed to be some misunderstanding concerning the word "specific" or "specified". The principle, on which all the Commission's members certainly agreed, was that the special mission's assignment should be known to and accepted by the State receiving the mission; that State should not be taken by surprise. That was made clear in article 2. But he could not accept the idea that the purpose of the special mission must be limited. It was true that some special missions were sent to deal with a particular problem, a technical problem, but others, e.g. a mission led by a head of State, were sent to make a general survey of all political questions of concern to the two States. In the latter case the assignment given to the mission could be described as specific in the sense that it was known in advance that it would be very broad, but it was not limited to a particular purpose.

33. The question of consent was dealt with in article 2. The important element of article 1 was rather the occasional character of the special mission.

34. Mr. LACHS supported the Chairman's remarks. The limitation embodied in paragraph 1 of article 1 seemed superfluous, since the succeeding articles made provision for the consent of the State to which the mission was to be sent. The fact that its consent would have to be obtained implied that the State concerned would have to be aware of the purpose of the mission.

35. There could be many types of special missions. Some such missions were of an exploratory character and covered the whole field of relations between the

two States concerned; in many cases, a mission of that type was headed by an ambassador and not by a Head of State or Government. A special mission was also sometimes sent as a preliminary step to the establishment of diplomatic relations, and its assignment would then cover many problems.

36. Mr. AMADO said that, despite the arguments put forward by the Chairman and Mr. Lachs, he still thought that the word "specific" should be retained. Special missions were sometimes sent in cases where no diplomatic relations, and not even consular relations, existed between two States. Accordingly, the State which was to receive the mission should know why the mission was coming; the purpose of the mission should be specified, spelt out, defined. The phrase suggested by Mr. Reuter "a specific frame of reference" conveyed the idea well, he thought. As a compromise, he proposed that the opening passage of paragraph 1 should be replaced by the words "For specific purposes".

37. Mr. TUNKIN said he still held the view that the expression "For the performance of specific assignments" suggested rather a mission of a technical character with a strictly limited assignment. But there were much more important special missions whose assigned tasks were very broad and not specified in advance. For example, when two prime ministers met, all kinds of questions were sure to be discussed; the agenda for the discussion might not be drawn up until after the talks had begun.

38. He proposed that the Commission should proceed to consider article 2 and revert to article 1 later.

39. Mr. de LUNA said that, in logic, the comprehension of a term was in inverse ratio to the extension of its meaning. An assignment could be specific and at the same time very general. He approved the wording proposed by the Special Rapporteur.

40. Mr. TSURUOKA pointed out that, if the Commission should decide that article 2 would deal with the question of the assignments of special missions, then the first phrase in article 1, paragraph 1, should be deleted.

41. Mr. BARTOS, Special Rapporteur, replying to the comments made, said that with regard to the way in which the missions under considerations should be styled he had felt obliged to keep to the term "special missions", which had been used not only by writers but also by the General Assembly and which appeared in a text unanimously adopted by the Vienna Conference on Diplomatic Intercourse and Immunities. It was also the expression which the Commission had used in defining his own terms of reference. The Commission might consider using the term "temporary missions" in the body of the articles, but it would be preferable to retain the term "special missions" in the title.

42. The first specific question asked was whether the first phrase in article 1, paragraph 1, anticipated what was said in article 2 concerning the assignments given to special missions. Article 1 was essentially an introductory provision and contained an indirect definition of the special mission. In seeking to specify in the very

first article that the assignments given to a special mission should be "specific", he had been thinking in particular of the actions of Hitler, which he regarded as an illustration of a method by which a great Power might try to impose its will on other States, requiring them to send special missions to it without the purpose of those special missions being specified, and itself sending special missions with unrestricted freedom to settle any question. In modern times, chanceries were always anxious to know what task was assigned to a special mission. It had not been his intention, in using the term "specific assignments", to refer to technical or limited assignments; the special mission might even be directed to review the whole of the relations between two countries, but if so, its object should be specified in advance so that the State receiving the special mission would know what would be the subject of the talks. Even if a special mission was led by a head of State or a prime minister, the rule was that the two States concerned should have agreed in advance on a general agenda, though the agenda could be expanded as the talks proceeded. The Commission should draft provisions guarding against surprise action by a State. He did not insist on the use of the word "specific"; the Drafting Committee might perhaps find a more elastic wording which would nevertheless safeguard the negotiations. The question was important, and was linked to that of the consent of the State receiving the special mission.

43. So far as that consent was concerned, he could not accept Mr. Tabibi's criticism expressed at the previous meeting. In drafting his text he had wished to make a clear distinction between the notice of the arrival of the special mission — which was a technical matter, affecting rather security and protocol — and the consent of the receiving State, which had a legal and political significance. Cases had occurred in practice where such notice had been followed by a refusal; if the special mission had nevertheless arrived, it had sometimes been received out of pure courtesy, but it had not been able to negotiate, because the receiving State had not been under any obligation to negotiate in such circumstances. He was prepared to agree that the requirement of consent should not be over-emphasized and to accept a negative formulation, such as "on condition that the State does not refuse"; but he was not disposed to accept with enthusiasm the suggestion, made by Mr. Castrén at the previous meeting, that consent could be given *ex post facto*. It would be sufficient if the Commission's draft indicated that the consent could be implied, for a State which agreed to negotiate was by implication consenting to receive the mission. In paragraph (3) of the commentary on article 1 he had mentioned several ways in which the consent could be signified. On that point also the Drafting Committee might perhaps find more flexible wording.

44. Replying to another comment by Mr. Tabibi, he pointed out that the Commission's draft should deal solely with special missions as described in the literature and as they existed in State practice; in other words, temporary missions. It was not concerned with two other categories of missions, namely: special mis-

sions of a permanent character, such as those maintained by Australia in some countries to deal with immigration questions and those exchanged by States members of the NATO to deal with military questions; and missions to international organizations, which constituted a separate category and came within the scope of the topic for which Mr. El-Erian was Special Rapporteur.

45. With regard to the doubts expressed by Mr. Tabibi concerning the desirability of using the word "State", he agreed with Mr. Elias that the thought was praiseworthy and progressive. However, since the question was one of law, the Commission was bound to consider only missions sent by one State to another. Reference had been made to insurgents recognized as belligerents and said to be equivalent to a State. The example of the Bandung declaration, referred to by Mr. Tabibi, was not a novel case; during the First World War, the Polish movement had been recognized by the Allies as a subject of international law. In using the expression "subject of international law" in his commentary, he had been thinking in particular of two cases he had witnessed in his own country. The first was that of a special mission sent to Belgrade, purportedly on behalf of the Republic of Eastern Nigeria. The Government of the Federation of Nigeria had pointed out that the Republic of Eastern Nigeria was not a subject of international law and that any negotiation considered might serve the Central Government of the Federation of Nigeria; that point of view had been accepted by the Yugoslav Government. The second case was that of a treaty concluded between Austria and Slovenia concerning the movement of Austrian tourists in Yugoslavia — a treaty whose provisions were to be extended to Croatia. By a Note addressed to the Austrian Government, the Yugoslav Government had explained that, while Slovenia and Croatia had a very large measure of autonomy, they were not subjects of international law. Since the Yugoslav Government had agreed to conclude a treaty of the same tenor on behalf of Yugoslavia, the matter had been settled to the satisfaction of both countries. It was in the light of those situations that he took the view that special missions could be sent only by States. Mr. Tsuruoka had been right to emphasize that the State should act through the competent organ or service of the Government.

46. Several members had already replied to Mr. Briggs's suggestion that it might be of advantage to make provision for mutual consent, as in the two Vienna Conventions. Mr. Ruda had rightly pointed out that the draft was not concerned with the establishment of two permanent reciprocal missions: only one mission was involved, which was to be temporary, and there was no question of an exchange. A State expressed its will and that expression of will was accepted by the other State. Although in law the two situations were analogous, it would be stretching the language to use the term "mutual consent" in such cases.

47. Mr. de Luna had said that special missions should be clearly distinguished from ordinary general missions. He was prepared to acknowledge that it was one of the weaknesses of his report that it did not distinguish suf-

ficiently clearly between the two kinds of mission. The Commission could not, of course, impose a form of conduct on States and so interfere in their internal affairs; but it would have to find legal rules to ensure that there was no duplication and to provide a firm basis for the action of both types of mission.

48. He had answered at the previous meeting the comments made by Sir Humphrey Waldock and Mr. Yasseen on paragraph 2.

49. What he had wished to make clear in paragraph (1) (b) of the commentary was that special missions should act within a definite frame of reference; it could of course be broadened by the two parties, but the special mission would be acting *ultra vires* if it went too far beyond the limits of its assignment. The passage in the commentary was perhaps too rigid, and he was prepared to replace it by a more flexible expression. The Commission would have an opportunity of reverting to that question in connexion with another article; the point as of particular importance in that it affected special missions that negotiated a treaty in simplified form, in other words a treaty which did not require ratification.

50. Mr. CASTRÉN, noting the reference to insurrection in paragraph (1) (a) of the commentary, drew attention to paragraph III of the introduction, which spoke of Governments in the process of formation — in other words, Governments of "States about to be born" — and to the Special Rapporteur's opinion expressed in that paragraph that the political agents of such States should be accorded the status of special missions. Although he agreed with the Special Rapporteur, he wished to point out that the status of such States differed greatly from that of States which had been recognized and which were thus subjects of international law. Consequently, it was difficult to apply the general rules which the Commission was formulating in the former instance; it would be better to regulate the case of such agents by an *ad hoc* arrangement. He suggested that paragraph (1) (a) of the commentary which dealt with insurrection.

51. The CHAIRMAN, speaking as a member of the Commission, suggested that the Drafting Committee should consider the most controversial point and take into account Mr. Amado's suggestion and Mr. Tsuruoka's proposal that the article should not refer to "assignments", which were dealt with in article 2. The last part of paragraph 1 would then read "...States may send temporary special missions to other States with the consent of the latter".

ARTICLE 2 (The assignment of a special mission)

52. Mr. CASTRÉN said that in principle he accepted the ideas set out in the article, although it was perhaps too detailed. Paragraph 2, which was corollary to paragraph 1, might well be deleted, especially as it conflicted to some extent with paragraph 3 which, moreover, constituted an important exception to the provisions of paragraph 2. Since, however, States were always at liberty to organize their relations with one another otherwise than as provided in paragraph 2, on

condition that they mutually agreed to do so, paragraph 3 was also superfluous and its provisions were in any case covered by those in paragraph 1. Accordingly, he would propose that paragraphs 2 and 3 should be dropped.

53. Mr. VERDROSS said that he agreed with the views on which the article was based. Nevertheless, he thought that the rule laid down in paragraph 1 was not entirely correct. The terms of the assignment could no doubt be formulated by the sending State but could hardly be specified by that State alone. It would be more accurate to say that the assignment "is specified by agreement between the sending State and the receiving State".

54. So far as paragraphs 2 and 3 were concerned, he agreed with Mr. Castrén; the provisions in question were already covered by paragraph 1, since, if the assignment could be specified by an agreement, its scope could likewise be broadened or reduced by an agreement.

55. In paragraph 4, the words "shall be deemed" seemed unnecessary, especially as it was not clear by whom the assignment was to be "deemed to be excluded...".

56. Mr. ELIAS said that the four paragraphs of article 2 were acceptable but might need some redrafting if the initial phrase in article 1, paragraph 1, referring the phrase "special mission" should be qualified by the indefinite article. In paragraph 4, some adjective other than "regular" should be found to describe a diplomatic mission, lest be inferred that a special mission was irregular.

57. Mr. ROSENNE said that, in line with his previous observations concerning the concept of *ultra vires*, he considered that paragraphs 2 and 3 should be dropped. He also hoped that paragraph 4 might be dispensed with, since it might impinge upon internal administrative matters; furthermore, if retained it would need some modification so as not to exclude so categorically the possibility of a permanent mission dealing with some of the matters nominally coming within the assignment of a special mission. For example, there might be some overlapping in the functions exercised respectively by a large technical assistance mission and a permanent mission.

58. Mr. YASSEEN said that he endorsed the principles set out in article 2. In paragraph 1, however, he would prefer the wording proposed by Mr. Verdross, since in cases where the receiving State invited another State to send a special mission to discuss certain matters, it was the receiving State which specified the assignment of that special mission.

59. He did not think that there was much point in retaining paragraph 2, since what it stated could be directly inferred from paragraph 1.

60. On the other hand, he thought that it might be useful to retain paragraph 3, for it allowed for the possible amendment of the original agreement in such a way that, by a later agreement between the two States,

the assignment would be exceeded. The decision to that effect would depend on the consent of the two States concerned.

61. Mr. TSURUOKA said that he would accept Mr. Verdross's proposed wording of paragraph 1. His views on paragraphs 2 and 3 coincided with those of Mr. Yasseen.

62. With regard to paragraph 4, he said that the words "shall be deemed..." apparently referred to what happened when the assignment was not mutually agreed. He would prefer that paragraph to be deleted, since in most cases the decision depended on mutual consent between the two States, and the circumstances envisaged in paragraph 4 were somewhat exceptional.

63. The CHAIRMAN, speaking as a member of the Commission, said that while he endorsed the principle stated in paragraph 1, he would prefer Mr. Verdross's formula, although he thought that it would be better to replace the word "specified" by "established".

64. Paragraph 2 seemed to him to be implied in paragraph 1 and hence unnecessary.

65. On the other hand, he was not so sure that paragraph 3 was superfluous. Although it was true that the possibility of amending the mission's assignment by agreement would be inherent in the principle set forth in paragraph 1, it might be useful to say so, in order to forestall opposition to changes in the original scope of the assignment.

66. He was doubtful whether paragraph 4 was necessary, for the situation would largely depend on the circumstances. If a special mission was sent for a considerable time and had a definite assignment, the permanent mission did not normally concern itself with whatever was covered by that assignment. But it happened very frequently that a special mission was merely of a temporary nature, that preparations for it were made by the permanent mission and that some members of the permanent mission served on the special mission. There was therefore no need to lay down special rules in that respect.

67. Mr. LACHS agreed with the Chairman's observations and supported Mr. Verdross's amendment. He also subscribed to Mr. Yasseen's view that there should be some mutual accord between the two States as to the task of the special mission.

68. Paragraph 2 should be dropped, for a permanent mission might take over the functions of a special mission and indeed some officials of the former might serve on the latter.

69. Mr. TABIBI said that he entirely agreed with the purpose of article 2 but believed that paragraph 4 would have to be modified as it might create practical difficulties. In many cases, there was a close inter-relationship between permanent and special missions. For example, it was the practice of his Government to appoint ambassadors as heads of special missions who, being on the spot, could prepare their work in advance, were familiar with the institutions of the receiving

State and were well-placed to continue the work after the mission had left. Such a procedure could greatly facilitate the operation of special missions and should certainly not be ruled out.

70. Mr. de LUNA said that he accepted Mr. Verdross's suggestion in respect of paragraph 1; but he saw no reason why the word "specified" should be replaced by "established". In his view, "specified" was merely the opposite of "unspecified"; it was perfectly admissible to "specify" some general task that had not been closely defined.

71. He considered that paragraph 2 should be deleted and paragraph 3 retained. Paragraph 4 should be dropped, as it was dangerous; in his experience, special missions were always assisted in their task by the permanent diplomatic mission, where it existed. It was purely a question of internal organization and was a matter for the sending State.

72. Mr. TUNKIN said that, while in principle he approved article 2 he preferred Mr. Verdross's text for paragraph 1 as being more accurate.

73. Paragraphs 2 and 3 should be deleted. It was undesirable to carry regulation to extremes, and there was a risk that paragraph 3 might make it more difficult to alter the scope of the mission's assignment. Moreover, a more flexible way of solving the problem was provided in paragraph 1.

74. He thought that paragraph 4 should be dropped. Relations between permanent missions and special missions were so diverse that one could hardly draft a rule that would be rigid and yet would apply to every kind of situation.

75. Mr. BARTOŠ, Special Rapporteur, explained that two ideas were at the root of article 2: first, the assignment of a special mission was specified by the will of the two States, and, secondly, what was the respective competence of the special and of the permanent mission in relation to that assignment?

76. So far as the first idea was concerned, it was essential that the special mission should have an assignment, whether general or specialized. That assignment was "specified" — not "established" — by the sending and receiving States. The main point was that the consent of both States was required, and Mr. Verdross's wording was therefore preferable.

77. Paragraph 2 was in no way contradicted by paragraph 3, but it was not absolutely necessary and might be referred to the Drafting Committee.

78. In paragraph 3 he had wished to take into account what occurred in certain States in Northern Europe and in the United States of America where, before a special mission departed, a parliamentary committee laid down the terms of its assignment and where the leadership of such a mission was entrusted to an Ambassador-at-large. The question had arisen on several occasions whether the will of the State or Government in setting up the mission could be changed by the negotiators; in some cases the powers granted to the mission had been

disavowed and had even been held to have been infringed. It would therefore be preferable to retain paragraph 3 and to explain why that had been done. Governments would be at liberty to oppose the text.

79. Most members of the Commission seemed to be in favour of deleting paragraph 4. There were admittedly cases where the competence of the permanent mission was merged with that of the special mission, but it might not be. In the case of the USSR, for example, there were instances where the titular ambassador to the country concerned was not the head of the special mission; much depended upon the prominence of the person appointed to lead that mission. In the practice of Belgium, on the other hand, the titular ambassador was always the first plenipotentiary, even if the Foreign Minister — a member of the Cabinet — was a member of the mission. He did not wish to enter into such questions of precedence, but he still thought that, for the sake of stability in international relations, a rule should be laid down. The most radical solution would be to delete the words "shall be deemed" which Mr. Verdross had criticized. If the Commission was unable to reach a decision on that paragraph, it should be placed in brackets and the decision left to the States. In every Ministry of Foreign Affairs it often happened that doubts arose and that the question was asked whether the ambassador was to be the sole judge of the policy to be adopted; there were cases where the ambassador expressed his disapproval of the results of a special mission. Whatever view one took, the question was one that should be settled.

80. The CHAIRMAN, speaking as a member of the Commission, agreed with the Special Rapporteur that further reflection on paragraph 4 would be desirable and that the opinion of Governments on the point should be sought.

81. Mr. AMADO said that the Commission was breaking new ground; the Special Rapporteur was to be commended for having endeavoured to incorporate the rather elusive facts in an appropriate rule. The rule should be left to evolve in the course of time and should not be influenced by current events.

82. Mr. CASTRÉN noted that the Commission agreed that articles 1 and 2 should be referred to the Drafting Committee, which would decide whether paragraph 3 of article 2 should be retained in the draft.

The meeting rose at 12.50 p.m.

759th MEETING

Monday, 6 July 1964, at 3 p.m.

Chairman : Mr. Roberto AGO

Law of Treaties

(resumed from the 755th meeting)

[Item 3 of the agenda]

ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to resume its consideration of the articles proposed by the Drafting Committee.

ARTICLE 55 (*Pacta sunt servanda*)

2. The CHAIRMAN said that, in consequence of the Commission's decision at its 749th meeting, article 55 had been redrafted to read :

"A treaty in force is binding upon the parties to it and must be performed by them in good faith".

3. Since he understood that members desired to have a formal vote on each article, he called for a vote for the article 55 in that text.

Article 55 was adopted by 16 votes to none, with 2 abstentions.

4. Mr. PAREDES explained that he had abstained from the vote because he was opposed to the formulation of article 55. The purpose of the article was, first, to state that a treaty in force was binding upon the parties to it, and second, to declare that the parties must act in good faith. Both statements were undoubtedly true, but he could not accept the manner in which the article had been formulated. The position created by article 55 was similar to that which would arise if, in internal law, legislative provisions were to be enacted to the effect that the parties to every contract must carry out their contract and must act honestly and in good faith. Moreover, no indication was given of what was meant by "good faith".

5. Mr. BARTOŠ said that at the 748th and 749th meetings he had expressed himself in favour of the retention of the second sentence of the earlier draft of the article, which the Commission had decided to delete. That was why he had abstained.

6. Mr. CASTRÉN said that he had likewise expressed himself in favour of the retention of the second sentence ; nevertheless, he had voted for article 55 as redrafted.

7. Mr. EL-ERIAN said that his position was similar to that of Mr. Castrén. He had expressed a reservation during the discussion, but that reservation did not prevent him from accepting the article as a whole.

ARTICLE 57 (Application of a treaty in point of time)

8. Sir Humphrey WALDOCK, Special Rapporteur, said that article 57 had given rise to considerable difficulty. The Drafting Committee had adopted the following text for that article :

"1. The provisions of a treaty do not apply to a party in relation to any fact or act which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party, unless the contrary appears from the treaty.

"2. Subject to article 53, the provisions of a treaty do not apply to a party in relation to any fact or act which takes place or any situation which exists after the treaty has ceased to be in force with respect to that party, unless the treaty otherwise provides."

9. Mr. PAREDES said that he would support article 57, but wished to maintain two reservations which he had made when article 57 had been discussed for the first time.¹ The first reservation referred to the problem of treaties which were null and void. The question arose of the facts or acts which had taken place or situation which had arisen while the treaty was in force, before the claim for nullity had been made. In the case of such a treaty, all its effects must be erased, since the treaty was radically void and should be treated as though it had never been concluded.

10. His second reservation concerned the case where one of the parties failed to perform its undertakings under a treaty. He could not see how it was possible to maintain that the injured party would remain bound by its obligations under the treaty, notwithstanding the unwillingness of another party to perform the treaty.

11. Mr. de LUNA said that he could accept article 57, notwithstanding its reference not only to acts and situations, but also to "facts". The law was only concerned with acts and situations ; when it took cognizance of a "fact" the law contemplated it as an *acte juridique* (*acto juridico*). In the opinion of Roubier, the author of an outstanding monograph in two volumes on the subject (in municipal law) entitled "*Le droit intertemporel*", the law knew only acts and situations ; a fact, upon being taken into consideration by the law, became an *acte juridique*.

12. Although, for the reasons which he had explained, it would be more appropriate to drop the reference to facts, he would still be able to vote in favour of article 57.

13. The CHAIRMAN, speaking as a member of the Commission, pointed out that the expression "any situation which exists after the treaty has ceased to be in force", in paragraph 2, might give rise to misunderstanding. Was the reference to a situation which continued to exist or to a situation which began to exist after the treaty ceased to be in force ?

14. Sir Humphrey WALDOCK, Special Rapporteur, explained that article 53 dealt with the legal conse-

¹ See summary record of the 730th meeting, paras. 34 to 38.

quences of the termination of a treaty and set forth the permanent legal effects of a treaty while it was in force. It might be necessary, in the light of the discussion of article 57, to make some adjustment to the language of article 53.

15. The point might be covered by referring, in article 57, both to a situation which existed and to a situation which continued to exist.

Paragraph 1 of article 57 was adopted unanimously.

Paragraph 2 of article 57 was adopted unanimously.

Article 57 as a whole was adopted unanimously.

ARTICLE 58 (The territorial scope of a treaty)

16. The CHAIRMAN said that the Drafting Committee proposed the following text (including a new title) for article 58:

"The territorial scope of a treaty

"The scope of application of a treaty extends to the entire territory of each party, unless the contrary appears from the treaty."

17. The Commission would no doubt be interested to learn that the International Labour Conference had that same morning adopted an instrument for the amendment of the ILO Constitution which contained a passage reminiscent of the Special Rapporteur's original draft of article 58 (A/CN.4/167). The instrument was a long one and included the following passage for incorporation into the ILO Constitution by way of amendment:

"With a view to promoting the universal application of Conventions to all peoples, including those who have not yet attained a full measure of self-government, and without prejudice to the self-governing powers of any territory. Members ratifying conventions shall accept their provisions so far as practicable in respect of all territories for whose international relations they are responsible".

18. Mr. TUNKIN expressed the hope that the Commission would make a greater contribution than the International Labour Conference to the progressive development of international law.

19. The CHAIRMAN explained that the object of the amendment just adopted by the International Labour Conference was to deal solely with the existing situation. It was to be subject to review in five years' time.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that he was still somewhat uneasy regarding the use of the expression "the entire territory". He recalled that recent conferences which had debated the so-called colonial clause had adopted a form of words along the lines of his original proposal.

21. Mr. ROSENNE said that he shared the Special Rapporteur's uneasiness and would be grateful if anyone could explain to him the exact meaning of the expression "the entire territory".

22. Mr. TUNKIN said that there had been a protracted discussion of article 58 in the Commission. The

Drafting Committee had also discussed the text of the article at considerable length. That Committee's intention, in the text as proposed, had been to reflect the opinion of the majority in the Commission.

23. Mr. BARTOŠ said that he would be compelled to abstain in the vote on article 58, which was still as vague as it had been in the form considered at the 749th meeting, when he had expressed his opposition to it.

24. The CHAIRMAN stressed that article 58 no longer had any real relevance to the situations with which the amendment adopted by the International Labour Conference was mainly concerned. Nevertheless, from the point of view of Mr. Rosenne and Mr. Bartoš, the article still had a certain usefulness, especially in cases where some parts of a State's territory were subject to a special regime or were self-governing, as were, for example, certain British and certain Danish islands. In such cases, where a convention established, for example a procedure for safeguarding human rights, or an extradition procedure, it was important to make it clear that the convention would apply to the whole of the State's territory so that the State could not argue that the convention did not apply to a certain part of its territory.

25. Mr. BRIGGS said, in reply to the question by Mr. Rosenne, that the meaning of article 58 was when a State became a party to a treaty, that treaty was applicable throughout the whole of its territory unless otherwise indicated.

26. Mr. PESSOU said that he was fully satisfied with article 58, which was very concise and very precise. The main clause set forth the principle, and the subordinate clause allowed for derogations which would be pertinent, in particular, in the case of federal States or of States some of whose territories had a special status.

27. Mr. PAREDES said that, as pointed out by the Chairman, the purpose and intent of the amendment to the ILO Constitution was completely different from the purpose of article 58. In the ILO, there was a trend towards ensuring the universal protection of certain human rights; there was a sort of aspiration for a universal rule of conduct. In the case envisaged in article 58, the question which arose was that of the effects of a treaty for the contracting States.

28. When the original text of article 58 had been discussed, his views had been completely different from that of a number of other speakers. His opinion then had been that, unless a treaty was expressly made extensive to a colonial or trust territory, it would have to be taken that the treaty applied only to the metropolitan territory of the contracting State. It should be remembered that a trust territory or a colony often had an administration and a legislation separate from the metropolitan country's. Normally, where a country with possessions or trust territories subscribed to a treaty, it did so primarily to safeguard its own interests and having in view its own legislation. There were, of course, cases where the treaty could be of interest to the colonies and trust territories but in those cases the treaty would be made applicable to them.

29. The redraft of article 58 made no reference to "territories for which the parties are internationally responsible". However, he would have to abstain from voting upon it because he believed that it still contained that same idea. Even in a country without colonies, the scope of application of a treaty did not extend to the entire territory of the State. After all, even such countries might have outlying territories, such as islands, which had a distinct legislation or a separate administration; the State, when entering into the treaty, would not have those territories in mind.
30. Accordingly, he did not believe that a treaty could be applied to all the territories for which a State was responsible. What the article could state was that a treaty was applicable to the territory that formed the substratum of the legal personality of the State, but not to the dependent territories.
31. For those reasons, he would abstain from voting on the text of article 58 as proposed.
32. Mr. YASSEEN pointed out that the text of article 58 as proposed by the Drafting Committee differed entirely from that originally proposed by the Special Rapporteur (A/CN.4/167). The original article had contemplated, in particular, the colonial clause, in other words, the possibility of extending the effects of a treaty to territories other than the national territory. The redraft tended rather to provide for the possibility of narrowing the area of the treaty's application. Understood in that way, the article was justified, and was useful in a general convention on the law of treaties. The application of some treaties could be restricted to a part of the territory of a State which was a party to the treaty, but the general principle, in the case of a treaty whose application was connected directly with the territory, was that it should apply to the whole of the territory. He would vote for the article.
33. Mr. AMADO said that during earlier debate the Chairman, Mr. Tunkin and Mr. Bartoš had pointed out that there were treaties whose application had nothing to do with the territory of States. Mr. Yasseen had just defined the kind of treaty with which the article was concerned. It might perhaps be desirable to add that definition in the text in the form of a reservation such as "if a treaty has a territorial application". In any case, he would vote for the article.
34. The CHAIRMAN said that it was implied in the text that the article related solely to treaties capable of being applied territorially.
35. Mr. de LUNA said that the purpose of article 58 was quite contrary to that of the amendment to the ILO Constitution. Article 58 was intended to state that a treaty applied to the entire territory of each party; in that manner it was intended to exclude the proposition that a treaty could normally apply outside the national territory of the parties. Article 58 also made it clear that if a party intended to exclude a part of its territory from the application of the treaty, it would have to do so by way of an express provision in the treaty. In that connexion, he referred to the example of Spain's entry into GATT. The question had then arisen of the Canary Islands, which were part of the national territory of Spain but which constituted a free zone for customs purposes.
36. For those reasons, he did not share the misgivings expressed by Mr. Paredes and could support the provisions of article 58 on the territorial scope of a treaty.
37. Mr. TSURUOKA said that he accepted article 58 as drafted, but wished to make the following reservation: if a State found it impossible in law or in fact to apply a treaty in a region which it regarded as an integral part of its territory, the rule set forth should not have the effect that the State in question was regarded as responsible for the non-application of the treaty in that region.
38. The CHAIRMAN said that the Commission would certainly discuss that question in the context of State responsibility; a State could not be held responsible for what happened in a region which it regarded as its own but in which it did not effectively exercise control.
39. Mr. ROSENNE thanked Mr. Briggs and the Special Rapporteur for their explanations, and also the other speakers who had contributed to the discussion raised by his question. In spite of those explanations, he was not altogether satisfied regarding the clarity of the provisions of article 58. Nevertheless, he would vote in favour of that article, while reserving his right to revert to the matter at a later stage.
40. Mr. EL-ERIAN said that he found article 58 acceptable as a precise general formulation of the rule in the matter. The Commission had decided to include in the draft articles a provision on the territorial scope of treaties, and he recalled his remarks during that debate on the question of the definition of the territory of a State. He thanked the Drafting Committee for preparing a text which avoided a formula that had given rise to difficulty.
41. The CHAIRMAN said he wished to explain that the article related solely to the territory of the State itself, and not to the territories for whose external relations the State was responsible. The new article in the ILO Constitution regulated a temporary situation with which the Commission had decided not to concern itself in its draft.
42. Speaking as a member of the Commission, he congratulated the Drafting Committee on having succeeded in finding a sufficiently flexible wording for the last phrase in the article.
43. Sir Humphrey WALDOCK, Special Rapporteur, said that some of the explanations which had been given during the discussion had complicated rather than clarified the issue from his point of view.
44. With regard to the final proviso of the article, he urged that a broad view should be taken. It was sufficient that a contrary intention should appear from the treaty. Under the terms of that proviso, it was not necessary that the contrary intention should be stated expressly in the treaty. In many cases, the intention

of the parties to exclude certain territories from the operation of a treaty would result from the *travaux préparatoires* and could be a matter of interpretation. For example, in certain treaties concluded by the United Kingdom, the exclusion of the Channel Islands resulted only from the preamble of the treaty. With regard to certain treaties signed by the Soviet Union, and also by the Byelorussian SSR and the Ukrainian SSR, the exclusion of those States from the USSR signature was implicit; otherwise the situation would be that two signatories contracted on behalf of one and the same territory.

45. Mr. TUNKIN said that he had given an explanation regarding the position of the Ukrainian SSR and the Byelorussian SSR when the Commission had discussed article 58 at the 731st meeting.

46. The CHAIRMAN put to the vote article 58 as proposed by the Drafting Committee.

Article 58 was adopted by 16 votes to 1, with 1 abstention.

ARTICLE 61 (General rule limiting the effects of treaties to the parties)

47. The CHAIRMAN invited the Commission to consider the Drafting Committee's text for article 61:

"A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon a State not party to it [without its consent]."

48. Mr. VERDROSS said that the language of article 61 should conform to that used in article 55; the first phrase should therefore read "a treaty in force is binding only upon the parties".

49. With regard to the second part of the sentence, he maintained the objections which he had voiced during the general debate, at the 750th and 751st meetings, and would therefore be obliged to abstain in the vote on article 61.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that the words "in force" had been inserted in article 55 for a special reason which would not apply in the case of article 61.

51. Referring to the suggestion that the words "is binding on" should replace the word "applies" he said that since articles 55 and 61 dealt with different matters, it did not seem essential to use the same wording in both. Furthermore, the expression "is binding" was used primarily in connexion with an obligation.

52. The Drafting Committee had inserted the words "without its consent" in square brackets as one way of overcoming the logical inconsistency which some members claimed existed between articles 61 and the next three articles. The Drafting Committee submitted that phrase for decision by the Commission.

53. Mr. CASTRÉN said that, despite his earlier doubts, he was prepared to accept the proposed new wording of article 61 as a compromise provided that the

words "without its consent" formed part of it. By the addition of those words, which had been suggested by Mr. Ruda and Mr. Tunkin and had later been supported by the Chairman, the article would provide an introduction to the immediately following articles; the words in question would provide the necessary link between articles 61, 62 and 62A, and would improve the wording of article 61, which was too categorical.

54. Mr. YASSEEN said that he was prepared to accept the article, which was very well drafted, provided that the words "without its consent" were not included. Without those words, the articles was a statement of positive international law. There was no need to provide, by means of those words, an introduction to the subsequent articles for those articles did not deal with exceptions, since in order that the effect of a provision could be extended to third States a supplementary agreement was necessary.

55. Mr. EL-ERIAN said that the title and text of article 61 as proposed by the Drafting Committee were acceptable to him. In his opinion there was no need for the addition of the words in square brackets.

56. Mr. BARTOŠ said that he would be unable to vote for the first part of the article since the statement which it contained was incorrect: there were cases where provisions binding only on the parties were applied to other States. So far as the second part of the sentence was concerned, his view was that a treaty could not of itself impose an obligation and that articles 62 and 63 constituted exceptions wholly at variance with that phrase. He could not vote for the article unless the words "without its consent" were included.

57. Mr. ROSENNE said that as he had indicated during the general discussion that he had no strong views about the theoretical issues covered in the four articles dealing with the effects of treaties on non-parties, he would abstain from voting on the inclusion of the words in square brackets. Nevertheless, he thought that in the article those words should preferably not be included.

58. Mr. PESSOU said that he had previously suggested that the article should be drafted on the following lines: "A treaty is binding only on the contracting parties; it cannot constitute a direct source of rights and obligations for non-party States"; nevertheless, he would support the text as it stood.

59. Mr. TSURUOKA said that he endorsed the principle laid down in article 61. He was inclined to favour the retention of the words "without its consent" since they reflected existing custom more accurately.

60. Mr. TABIBI said that he was in agreement with the content of the article but was not in favour of the inclusion of the words in square brackets.

61. Mr. BRIGGS pointed out that articles 55 and 61 dealt with different matters and the differences in wording were deliberate.

62. Article 61 was concerned with the application of a treaty between the parties, and articles 62 and 62A with the obligations or rights which might arise out

of a provision of a treaty as distinct from an entire treaty; he saw no contradiction between the former and the latter two.

63. He was not in favour of including the words in square brackets.

64. Mr. de LUNA said that he would abstain in the vote on article 61 if the words "without its consent" were retained. The Commission had decided that the article should be drafted in neutral terms that would not favour either of the two opposing doctrines. If the article included the words "without its consent", it would seem to be ruling against those who held that a right could be conferred on a non-party State, although that State was not obliged to make use of the right.

65. The CHAIRMAN said that in any case the text would be clearer if the words in question read "without the latter's consent". Had the Drafting Committee considered the possibility of solving the problem by inserting the words "as such" before the words "neither imposes any obligations..."?

66. Sir Humphrey WALDOCK, Special Rapporteur, considered that the words in square brackets were neutral, whereas to say that a treaty "as such" did not confer any rights upon a non-party State would underline the point rather more heavily.

67. Mr. BRIGGS believed it would be preferable to vote on the Drafting Committee's text as it stood rather than to attempt to amend it in the Commission.

68. Mr. TUNKIN said that it could accept the inclusion of the words in square brackets as they were non-committal.

69. Mr. RUDA said that he had suggested the words "without its consent" for the sake of logic; it was surely anomalous to lay down a categorical rule in article 61 and then to contradict it immediately afterwards in the next articles.

70. Mr. YASSEEN said that considerations of logic caused him, for his part, to regard the words in question as unnecessary. The Commission was dealing with a series of rules that were complementary to one another; article 61 laid down a general principle and was followed by two articles under which the extension of the effect of a treaty required an agreement. Those two articles would be superfluous if the words "without its consent" were allowed to stand, since they simply stressed that the effect of a treaty could be extended to third States by consent.

71. Mr. AMADO said that even on grounds of symmetry he could not agree to the retention of the words "without its consent".

72. Mr. BARTOŠ said that he was still convinced that, since articles 62 and 63 openly contradicted article 61, it was absolutely necessary to herald those articles by some such expression as "as such", "as a general rule" or "without the latter's consent".

73. The CHAIRMAN suggested that three votes should be taken: first, on the principle, in other words on the text as far as the words "a State not party to it"; secondly, on the words "without its consent", and lastly on the article as a whole.

74. Mr. BARTOŠ, supported by Mr. RUDA, pointed out that, in United Nations practice, a vote was first taken on the disputed passages in a text and then on the text as a whole.

75. Mr. ROSENNE suggested that provisional votes be taken, first on the text up to the square brackets, and then on the last three words. Such a procedure was sometimes followed in organs of the General Assembly.

76. Mr. TUNKIN supported Mr. Rosenne's suggestion as a means of avoiding a vote first on the words in square brackets.

77. Mr. PAL considered that the words in square brackets were tantamount to an amendment and should be voted on first.

78. The CHAIRMAN observed that those words were not an amendment but an alternative. He then put to a preliminary vote the text of article 61 up to the brackets.

There were 16 votes in favour, none against, and 3 abstentions.

In the preliminary vote on the words in square brackets there were 8 votes in favour, 3 against, and 7 abstentions.

79. The CHAIRMAN put to the vote formally the words in square brackets.

Those words were adopted by 10 votes to 5, with 4 abstentions.

Article 61 as a whole, including the words in square brackets, was adopted by 14 votes to none, with 5 abstentions.

80. Mr. TABIBI asked for the inclusion of a footnote in the report stating that he would have supported article 61 but for the inclusion of the words in square brackets.

81. Mr. LACHS said that, though he had voted for article 61 and later for article 62, he wished it to be recorded that they were not applicable to aggressor States, which were not covered by the articles.

82. Mr. TUNKIN associated himself with Mr. Lachs's reservation and said that the point should be mentioned in the Commission's report as one which should be taken up under subject of the responsibility of States.

83. Sir Humphrey WALDOCK, Special Rapporteur, said that the point could be dealt with in the commentary.

ARTICLE 62 (Treaties providing for obligations for States not parties)

84. The CHAIRMAN invited the Commission to consider the text of article 62 proposed by the Drafting Committee:

“An obligation may arise for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound.”

85. He questioned whether the words “the parties intend the provision to be the means of establishing that obligation and” were necessary.

86. Mr. TUNKIN pointed out that the assent of the non-party State was not sufficient; it was necessary to state that the parties to the treaty intended the provision to be the means of establishing the obligation.

87. Sir Humphrey WALDOCK, Special Rapporteur, explained that the passage criticised by the Chairman had been included deliberately to remove any impression that an obligation was being imposed upon the third State. Two elements had to be present for the obligation to arise, first, the intention of the parties and, secondly, the consent of the third State. One objection to the deletion of the passage would be that, without it, the article might be taken to mean that third States of their own volition could decide to participate in a treaty.

88. The CHAIRMAN, speaking as a member of the Commission, suggested that the passage might be amended to read “if such was the intention of the parties and if the State in question has expressly agreed to be so bound”. One could hardly talk of a provision as being “the means of establishing that obligation”, for an obligation could be created only by a meeting of two wills.

89. Mr. BRIGGS said that, as far as the English text was concerned, it exactly expressed what the Drafting Committee had intended.

90. The CHAIRMAN suggested that the words “so intend” might be substituted for the words “intend the provision to be the means of establishing that obligation and”.

91. Mr. ROSENNE pointed out that such a modification would entirely defeat the purpose of removing any implication that an obligation could be imposed upon a State not party to a treaty.

92. Mr. AMADO asked to what the word “*ce*” in the phrase “*par ce moyen*” referred. Should the phrase read “*par le moyen de cette disposition*”?

93. Mr. CASTRÉN pointed out that the word “*expressément*” was missing in the French text after the word “*consent*”; the English text read “expressly agreed” and the French text should be altered to conform to it.

94. Mr. YASSEEN said that the Commission had decided to translate the English word “arise” by the French word “*naître*”; but the word now used in the French text was “*découler*”.

Article 62 was adopted subject to a review of the wording by the Drafting Committee.

ARTICLE 62 A (Treaties providing for rights for States not parties)

95. The CHAIRMAN invited the Commission to consider article 62 A as proposed by the Drafting Committee:

“1. A right may arise for a State from a provision of a treaty to which it is not a party if (a) the parties intend the provision to accord that right either to the State in question or to a group of States to which it belongs or to all States, and (b) the State expressly or impliedly assents thereto.

“2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.”

96. Mr. BARTOŠ said that he had some misgivings about the use of the word “accord”, which suggested condescension.

97. The CHAIRMAN agreed; it would be more correct to say that a right was “offered”. He added that, in the French text, the word “*découler*” should again be replaced by “*naître*”.

98. Sir Humphrey WALDOCK, Special Rapporteur, suggested that perhaps language modelled on that of the previous article might be more suitable, e.g. “intend the provision to be the means of creating rights in favour of...”. To introduce the concept of an offer would be to destroy the compromise reached in the Commission.

99. The CHAIRMAN suggested that the passage should read “intend that right to be accorded”.

100. Mr. de LUNA said that the Drafting Committee’s text represented a compromise; he would abstain in the vote if that text was replaced by language that was not genuinely neutral.

101. The CHAIRMAN pointed out that the language he had suggested was entirely neutral, and not inconsistent with the articles just adopted by the Commission.

102. Mr. TUNKIN said that in his view the text was practically neutral. The intention of the parties to accord the right and the requirement of the assent of the State concerned were two elements that should be taken together. The Commission should be able to accept the Drafting Committee’s text.

103. Mr. BARTOŠ said that, possibly because he came from a small country, he was still inclined to dislike the words “to accord”; he would prefer some other verb.

104. The CHAIRMAN suggested that the words “to accord” should be replaced by the words “to confer”, on the understanding that the words “from a provision” should be replaced by “as a result of a provision”.

Article 62 A, paragraph 1, was adopted by 18 votes to none, with 1 abstention.

105. Mr. VERDROSS said that he had abstained in the vote because he could not accept the proposition that the consent of the non-party State was required to bring the right conferred into existence.

106. Mr. BARTOŠ referring to paragraph 2, said that he would be unable to support the paragraph because, in creating the rights in question, the parties to a treaty sometimes laid down conditions that went beyond what objective international law entitled them to prescribe.

107. Mr. RUDA said that he would abstain in the vote on paragraph 2 for the same reasons as those given by Mr. Bartoš.

Article 62 A, paragraph 2, was adopted by 17 votes to none, with 2 abstentions.

Article 62 A, as a whole, was adopted by 15 votes to none, with 3 abstentions.

108. Mr. BARTOŠ explained that he had voted for article 62 A as a whole because it was the practice in the United Nations to vote for the text as a whole if one had voted for one part of it and abstained on another.

109. Mr. RUDA said that his vote was explained in the same way as that of Mr. Bartoš.

ARTICLE 62 B (Revocation or amendment of provisions regarding obligations or rights of States not parties)

110. The CHAIRMAN invited the Commission to consider the text of article 62 B proposed by the Drafting Committee and reading :

“When an obligation or a right has arisen under article 62 or 62A for a State from a provision of a treaty to which it is not a party, the provision may be revoked or amended only with the consent of that State, unless it appears from the treaty that the provision was intended to be revocable.”

111. Mr. AMADO said that in the French text the words “*a découlé*” should be replaced by “*est né*”.

112. Mr. YASSEEN said that in his view the words “intended to be” had no justification.

113. The CHAIRMAN proposed that the words “intended to be” should be deleted and that, in the French text, the word “*ressorte*” should be replaced by “*découle*”.

114. Mr. BARTOŠ said he could accept the article as so amended, on the understanding that the passage “unless it appears from the treaty that the provision was revocable” corresponded to positive international law and on condition that the States which had stipulated the revocability of the provision had been entitled to do so ; they could not revoke a right which already belonged *ex jure* to the third State.

115. Mr. de LUNA said that he agreed with Mr. Bartoš, but added that the clause in question was a general one applicable to all treaties.

116. Mr. PAREDES said he approved Mr. Bartoš's observation, but would go even further. He had in mind the case of a State on which a right had been conferred and which, in consequence, had had to perform certain acts and adopt certain procedures in order to conform with the treaty. Such a State would thereby have established a particular situation which it was entitled to regard as stable, and it might find itself in a difficult position if the parties to the treaty sought to withdraw from it the right which they had previously conferred on it. It would be wrong if a State which had done no more than accept a right offered to it was placed in a subordinate position.

117. Mr. LACHS said that the commentary should mention that rights in favour of third States having their source outside the treaty which was merely declaratory of them existed independently of it.

118. The CHAIRMAN confirmed that all the reservations expressed would be recorded in the summary record ; he felt, however, that they were prompted by an excess of caution. If the parties to a treaty offered to a State a right which that State knew it already possessed, then all that was necessary was for that State to draw attention to the fact that it already possessed the right in question.

119. Mr. BARTOŠ said that his own reservations had been prompted, not by excessive caution, but by historical experience.

Article 62B was adopted by 14 votes to none, with 3 abstentions.

120. Mr. EL-ERIAN reiterated his reservation concerning article 62 B and the revocation of rights having their source outside the treaty.

The meeting rose at 6 p.m.

760th MEETING

Tuesday, 7 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Welcome to the Legal Counsel

1. The CHAIRMAN welcomed the Legal Counsel of the United Nations and said that he had informed him of the Commission's decisions regarding the organization of its future sessions.
2. Mr. STAVROPOULOS, Legal Counsel, thanked the Chairman for his words of welcome and said that the valuable work of the Commission was being followed with great interest at United Nations Headquarters.
3. He had been glad to learn of the Commission's decision to change its programme. The Commission had acted wisely in adopting its decisions on an *ad hoc* basis and he felt confident that the outcome would be satisfactory.

Law of Treaties

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

4. The CHAIRMAN invited the Commission to resume its consideration of the articles proposed by the Drafting Committee.

ARTICLE 65 A (the effect of severance of diplomatic relations on the application of treaties)

5. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had adopted the following revised title and text for article 65 A:

"The effect of severance of diplomatic relations on the application of treaties"

"1. The severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty.

"2. However, such severance of diplomatic relations may be invoked as a ground for suspending the operation of the treaty if it results in the disappearance of the means necessary for the application of the treaty.

"3. Under the conditions specified in article 46, if the disappearance of such means relates to particular clauses of the treaty, the severance of diplomatic relations may be invoked as a ground for suspending the operation of those clauses only."

6. In his previous and much shorter draft in document A/CN.4/167/Add.2 the question with which article 65A was concerned had been covered by means of a cross-reference to article 43, on supervening impossibility of performance. The Drafting Committee had considered, however, that article 43 was not well adapted for dealing with the particular point and that it would be best, at least at the present stage, to spell out the rule. At a later state of its work, when it reviewed the articles on second reading, the Commission could consider whether article 65A should be more directly related to article 43.

7. The CHAIRMAN, speaking as a member of the Commission, said that the Drafting Committee's redraft of article 65A spoke only of the case where the application of a treaty had become impossible because its performance presupposed the existence of diplomatic relations. It did not cover the case where the application of the treaty was impossible because of the atmosphere created by the severance of diplomatic relations.

8. From the drafting point of view, he thought that the expression "*défaut des moyens nécessaires*" was not perhaps entirely satisfactory in the French text of paragraph 2.

9. Mr. YASSEEN said that although the Drafting Committee's text was more complete than the Special Rapporteur's original text, it still dealt with only one part of the question and disregarded cases where the application of a treaty had to be suspended, not because of the disappearance of the diplomatic organ, but because of the abnormal state of relations between two countries which was reflected in the severance of diplomatic relations.

10. In paragraph 2, he suggested that the word "means" might be replaced by the word "organs".

11. Mr. BARTOŠ suggested that the words "means necessary" should be replaced by the words "appropriate channels", which would indicate more accurately that relations could continue through other States or through an international organization.

12. Mr. AMADO expressed support for Mr. Bartoš's suggestion, for the object was to ensure the application of the treaty.

13. The CHAIRMAN, speaking as a member of the Commission, said that he preferred the word "channels" to the word "organs"; for example, in the case of a request for extradition, the "organ" was the Ministry of Justice, and the diplomatic mission was the channel through which the request was transmitted.

14. Sir Humphrey WALDOCK, Special Rapporteur, said that there had been some discussion in the Drafting Committee on the possibility of referring to "organs" or "channels". In English, the term "means" adequately rendered the intended idea.

15. He did not favour the adjective "appropriate" or "proper" before the proposed word "channels". In order to meet the point raised by Mr. Bartoš he suggested that the words "means necessary" should be

replaced by "necessary channels" in paragraph 2 of article 65A. The adjective "necessary" was the appropriate one to use in connexion with the problem of impossibility of performance. In paragraph 3, the word "means" would be replaced by "channels".

Article 65 A, with those amendments, was adopted unanimously.

16. Mr. YASSEEN said that he had voted for article 65A because, although containing a gap, it nevertheless dealt with one part of the subject; he hoped that the conference to which the Commission's draft would be submitted would fill the gap.

17. The CHAIRMAN said that, even if the members of the Commission were not completely satisfied with an article, they should cast a positive vote whenever possible in order to give more weight to the text prepared by the Commission.

18. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the Commission was adopting only a preliminary draft; when the articles were discussed again, Mr. Yasseen would have the opportunity to suggest improvements not only to article 65A but to article 43 on supervening impossibility of performance.

Special Missions

(A/CN.4/166)

(resumed from the 758th meeting)

[Item 4 of the agenda]

DRAFT ARTICLES ON SPECIAL MISSIONS

ARTICLE 3 (Appointment of the head and members of the special mission)

19. The CHAIRMAN invited the Commission to consider article 3 in the Special Rapporteur's first report (A/CN.4/166).

20. Mr. BARTOS, Special Rapporteur, said that the idea underlying article 3 was that, by contrast with the appointment of the head and members of a permanent mission, that of the head and members of a special mission was not subject to *agrément*. However, in the light of practice provision had to be made for exceptions, for, firstly, the *agrément* was necessary if the States had agreed in advance that they would agree on the choice of the persons who would serve on a special mission; and, secondly, independently of the possibility of declaring a person *persona non grata*, the receiving State might — often for objective reasons — dislike the choice of a particular person as a member of a special mission. That principle and those exceptions were laid down in paragraph 1 of the article.

21. Paragraph 2 mentioned some of the matters which might be regulated in the prior agreement between the two States. It often happened in practice that the choice of the head or members of a special mission was restric-

ted because those persons were required to possess certain technical or other qualifications and the receiving State asked that they should be of a certain rank in order that the negotiations could be conducted at the appropriate level.

22. Mr. TABIBI said he was in full agreement with the provisions of article 3. However, he could not accept certain passages of the commentary. In the first place, he doubted the wisdom of retaining paragraph (3), which referred to the views of Mr. Jiménez de Aréchaga; he did not believe there was any room in the commentary for the expression of the personal views of a member of the Commission.

23. He also disagreed with paragraph (7) of the commentary. It would be ill-advised even to mention the possibility of a consultation on the selection of the person appointed to a special mission; any suggestion to that effect would be tantamount to an encroachment on the sovereign rights of the sending State. The position of the receiving State was fully safeguarded, because its consent would have to be obtained either in the form of a memorandum giving recognition to the special mission or in the form of a visa on the passport of each of its members.

24. Mr. de LUNA said he approved the principle by which the Special Rapporteur had been guided, and that he did not share Mr. Tabibi's misgivings. The practice was indeed as set forth in article 3, and it did not seem that the sovereign rights of States would be infringed through its application. However, since the possibility of declaring a member of the mission *persona non grata* was dealt with in article 4, the phrase in brackets at the end of article 3, paragraph 1, should be deleted for it related to a question that came within the terms of article 4. Moreover, by reason of its position in the article, the phrase gave the impression that, before a State could declare a member of a special mission *persona non grata*, the other State must first have requested the *agrément* for the appointment of the mission's members. But that was not what happened in practice; as soon as a State received notification of the membership of the special mission, it was entitled to declare a member of that mission *persona non grata*.

25. Mr. CASTRÉN associated himself with Mr. de Luna's proposal that the bracketed phrase at the end of paragraph 1 should be deleted; the receiving State did not always have advance notice of the special mission's membership, and the sending State was not bound to notify the other State, in advance, of the names of all the special mission's members. If such notification on the part of the sending State was required, then the receiving State would of course be entitled to object to the choice of the persons appointed, but such an arrangement would come close to the system of *agrément*, which the Special Rapporteur had specifically wanted to avoid. Preferably, the provision should be so worded that the receiving State would be free to safeguard its interests in that respect by exercising the right to declare a particular member of the special mission *persona non grata*, as was provided in the Vienna Convention on Diplomatic Relations. Accord-

dingly, the provisions of article 4 of the Special Rapporteur's draft should be expanded on the model of that Convention.

26. Besides, States were at liberty to agree, in any form they jointly chose, that the *agrément* was necessary either in a specific case or more generally. To express that idea, the last part of article 3, paragraph 1, should be redrafted in broader terms, such as "unless it is otherwise provided", no reference being made to a prior special agreement.

27. Paragraph 2 should be similarly redrafted in broader language, the words "the prior agreement may provide" being replaced by the words "The sending State and the receiving State may agree". In addition, he thought the remainder of the sentence gave the receiving State too much power with regard to the mission's membership. It might be sufficient to say that it could be agreed that the head or certain members of the mission should belong to a specified category of State representatives or officials. However, he was not convinced that the paragraph was necessary. Was it desirable to specify in an international convention everything that the States could do by common accord, or would it not rather be preferable merely to specify what they were entitled to do even without the prior consent of other States, what they should do in a particular situation, and what they were forbidden to do?

28. Mr. ROSENNE said that he was in general agreement with the Special Rapporteur's view that the *agrément* was not necessary in the case of special missions. He had not been convinced by the arguments put forward by Mr. Jiménez de Aréchaga in paragraph 7 of his memorandum¹ in support of the view that the *agrément* should be required. Such a requirement could lead to complications, for instance, in the technically possible case (contemplated in paragraph (5) of the Special Rapporteur's commentary to article 1) of a mission appointed by the receiving State. Another reason for not requiring *agrément* was that a special mission could be designated to operate in the territory of a third State (the case covered in the Special Rapporteur's article 14).

29. He thought that the legitimate interests of the territorial State (or the receiving State) were quite adequately covered by the provisions of article 4. That being said, he doubted the necessity for retaining article 3 in its present form. Paragraph 1 of the article embodied a purely negative proposition and paragraph 2 merely stated that it was possible for States to make certain agreements, something which States were always free to do so long as they were not proposing to contravene peremptory rules of international law.

30. In his view, there was a very direct relationship between the consent given by a State to receive a special mission and the notification and composition of the

mission. He therefore suggested that the whole problem dealt with in article 3 should be covered by means of a small insertion in article 2, which would make that article cover not only the assignment of a special mission, but both the assignment and the composition of a special mission; in that manner, it would be made clear that the composition of the special mission should be notified to the receiving State. Any further details on the subject would be covered by the provisions of article 6. Difficulties would arise if article 3 were retained with its emphasis on the purely negative proposition that the *agrément* was not required.

31. Mr. BRIGGS said that he agreed with the proposition in article 3 that *agrément* was not necessary. However, he thought the word "normally" in paragraph 1 should be omitted. There was nothing in the commentary to indicate that any State other than the sending State was qualified to appoint the head of the special mission and its members.

32. He suggested that paragraph 1 should be reworded along the following lines:

"In the absence of any prior agreement to the contrary, a sending State is free to appoint the head of the special mission and its members, and it is unnecessary to request *agrément* for their appointments".

33. He added that he was not at all certain that paragraph 2 was necessary.

34. Mr. TUNKIN said that in his view article 3 was acceptable as a whole. However, he supported Mr. Briggs's suggestion for the deletion of the word "normally" in paragraph 1, because that word weakened too much the rule set forth. That rule was that the *agrément* was not necessary, but that a prior agreement could provide what would be the level of the mission, who would be its head, and what persons would be members of it. If the word "normally" was deleted and if the clause was introduced by some such words as "except as previously otherwise agreed", the entire passage following the word "appointments" could be omitted.

35. Paragraph 2 was not necessary, for its substance was already contained in paragraph 1, either in the wording used by the Special Rapporteur or in that which he had just proposed. In any case, it was almost impossible to specify everything that States could do by mutual agreement.

36. Mr. PESSOU considered that the receiving State should have advance knowledge of the membership of the special mission. Elementary courtesy required the sending State to notify it of the names of the persons who were to serve on the mission. The idea of notification should, therefore, be retained.

37. Mr. TSURUOKA said that, so far as substance was concerned, he agreed with the previous speakers. The consent of the receiving State, in the form of an *agrément*, was not necessary; but that State was entitled to know, if it so wished, how big the mission would be, what its membership would be, and who would be its

¹ Yearbook of the International Law Commission, 1960, Vol. II, p. 116.

head; it should be given an opportunity to object to the choice of a particular person. That was the rule expressed in article 3, and it was a rule conforming to practice. The prior agreement referred to in the article was not merely the agreement which preceded the proposal to send the special mission; it was also the agreement resulting from the negotiations concerning the sending and receiving of the special mission. He could accept article 3, subject to a few drafting changes.

38. Mr. AMADO said that he approved article 3 and would accept the wording suggested by Mr. Tunkin; he wondered, however, what matters would be covered in the prior special agreement mentioned in that article: the sending of the special mission, the manner in which it would be received, and the names of the persons serving on it? Or other matters as well?

39. The CHAIRMAN speaking as a member of the Commission, said that the same question had occurred to him; on reflection, it seemed obvious to him that, since the rule was that the sending State freely appointed the head and members of the special mission, the prior agreement could only be a derogation from that rule, to enable the receiving State to have a say in the appointment of the persons in question. That prior agreement concluded between two States could provide that the States would not send special missions to one another without mutual agreement on the persons who would serve on them, or it might relate only to a particular mission. It was not easy to make provision for everything that might be covered by such an agreement, and he was therefore inclined to accept the formula proposed by Mr. Tunkin, subject to the replacement of the phrase "the sending State is free to appoint" by the words "the sending States appoints". He likewise thought that paragraph 2 should be omitted, for it was dangerous to try to specify what could form the subject of the prior agreement; that provision would before long be superseded by practice.

40. With regard to the question of notification, he was sorry to say that he disagreed with Mr. Castrén; inasmuch as the sending State appointed the head and members of the special mission and as the receiving State was free to object to the appointments, notification was essential. That idea should be introduced in article 3 or, as Mr. Rosenne had suggested, in article 2.

41. Mr. VERDROSS said that he likewise favoured the deletion of the word "normally" and accepted the wording proposed by Mr. Tunkin for paragraph 1; he would, however, suggest that the following proviso should be added: "unless the other party declares that the person appointed is not acceptable". That proviso was based on a passage in article 9 of the Vienna Convention on Diplomatic Relations, which made a distinction between the declaration that a diplomatic agent (other than the head of mission, for whom an *agrément* was necessary) already arrived was *persona non grata* and the declaration that a person not yet arrived was not acceptable.

42. Mr. RUDA said that he was in agreement with the idea contained in article 3, but thought that that

idea was indissolubly linked with the provisions of article 4; the sending State was free to appoint the head of the special mission without any need to request *agrément*. However, that rule was subordinated to the condition specified in article 4 that the territorial or receiving State could at any time notify the sending State that it regarded the head or any other member of the mission as *persona non grata* and refused to accept that person. The use of the words "at any time" made it clear that the notification in question could be given not only after the arrival of the mission but even before it set out.

43. He noted from paragraph (2) of the commentary to article 3 that the Special Rapporteur agreed with the late Mr. Sandström's views that a State was not obliged to receive an undesirable person even in the capacity of a member of a special mission and that it could therefore object to his being sent or, if he arrived notwithstanding, refuse all contact with him. Accordingly, it was necessary to refer to notification in article 3, in order that the intended idea should be fully expressed.

44. With regard to the drafting of the article, he found himself in agreement with Mr. Tunkin.

45. Mr. PAL said that there appeared to be general agreement on the substance of article 3, which, he thought, could therefore be accepted subject to some drafting improvements.

46. Commenting on paragraph 2, he said that, since it was expressed in inclusive and not in exhaustive terms, its provision would probably do no harm. However, if the majority of the members favoured the omission of paragraph 2 and the inclusion of its idea in paragraph 1, he would accept the view of the majority.

47. Mr. de LUNA said that in his view the requirement of notification was logical, but pointed out that notification of the membership of the special mission was required by paragraph 1 of article 7.

48. Mr. CASTRÉN explained that he had not meant to contend that notification was not necessary in the case of the head and principal members of the special mission; he was merely opposed to the idea that prior communication of the complete list of the mission's members, including staff of lower rank, should be required.

49. Mr. TSURUOKA suggested that article 3 should begin with the words "Except as otherwise agreed"; that wording would make it clear that there could be derogations from the rule set forth in the article.

50. Mr. YASSEEN said that in his view the Commission could retain paragraph 1 in the form proposed by the Special Rapporteur, except for the word "normally". The paragraph reflected the international practice; in particular, the clause providing that the receiving State could object to the selection of the person appointed stated a right which was uncontested in practice. Articles 3 and 7, taken together, said all that

needed to be said on that subject; namely, that the sending State was free to appoint the members of the special mission but that the other State could also express its views on the selection of those persons.

51. He doubted, however, that paragraph 2 should be retained; the idea expressed in it was correct but did not need to be stated.

52. Mr. BRIGGS said that, if the suggested deletion of the words "is free to [appoint]" were accepted, the clause would convey the wrong meaning. The sending State was in any case free to appoint the head of the special mission and its members, but that freedom could be limited by prior agreement. He urged the retention of the expression "The sending State is free to appoint".

53. Mr. YASSEEN added that the formula "the sending State appoints" would place too much emphasis on the competence of the appointing organ; that was not really the question, however, for the point was not to affirm that the State "appoints" but rather whether the State was free to appoint a particular person of its choice.

54. Mr. TUNKIN suggested that the Commission could conveniently use, for the purpose of article 3, the terminology of article 7 of the 1961 Vienna Convention on Diplomatic Relations, which stated that the sending State "may freely appoint" the members of the staff of the mission.

55. Mr. BARTOŠ, Special Rapporteur, noted that the members of the Commission agreed that the formal prior *agrément* of the receiving State was unnecessary in the case of a special mission. Accordingly, article 3 laid down the general rule that the sending State was free to appoint the head of the special mission and its members and it indicated that that rule could be departed from by special agreement. Whether the opening passage of the article should contain the word "normally", or the words "except as previously otherwise agreed" — the formula proposed by Mr. Tunkin — or the words "except as otherwise agreed" — the formula proposed by Mr. Tsuruoka — was therefore merely a question of drafting.

56. In reply to Mr. Amado, he explained that the prior agreement was an agreement concerning the exercise of the freedom referred to in paragraph 1. He hoped that the Drafting Committee would find a satisfactory formula to express that idea.

57. He found it difficult to proceed by analogy with the rule laid down in article 7 of the Vienna Convention on Diplomatic Relations, referred to by Mr. Tunkin. The Vienna Convention laid down a general rule which was the opposite of that proposed in his draft article 3. It would surely be paradoxical, in the drafting of a clause stating that as a general rule the *agrément* was unnecessary, to rely on article 7 of the Vienna Convention.

58. With regard to the question of notification, on which the Chairman and Mr. Castrén disagreed with him, he said that Mr. Pessou had rightly remarked that

courtesy required the State sending the special mission to notify its composition to the other State, even in cases where the despatch of that mission was the subject of an agreement. In articles 6 and 7 of his draft, notification was regarded more from the procedural angle, not as a practical rule, whereas in article 3 it was regarded from the legal point of view. Was there an obligation to notify? Was notification a prior condition that had to be fulfilled before the receiving State could exercise its right to object? He was willing to include the idea of a duty to notify in his draft, but he would prefer it to appear in article 4.

59. Mr. de Luna's question concerned the possibility of declaring a person *persona non grata*; he would answer the question when the Commission came to consider article 4.

60. He himself had felt some doubt about the phrase which he had placed in brackets in paragraph 1 and he would not object to its deletion. Mr. Verdross's reference to article 9 of the Vienna Convention was well-founded.

61. Some members had said that paragraph 2 was unnecessary. He felt obliged to point out that in almost all cases, whether the special missions were political or technical, a distinction was drawn between a sending State's freedom to appoint the members of the mission and the limitation of the choice of the persons. Mr. Tunkin had even said that it might be stipulated in the prior agreement that certain specified persons would form part of the mission. But one should not confuse the case described in paragraph 2 with the right to declare a member of the mission unacceptable or *persona non grata*. When a State took such action it often did so for subjective reasons or for reasons connected with the relations prevailing between the two countries at the time, whereas paragraph 2 laid down a rule, evolved by practice, under which the two States by common agreement limited the choice of the persons who were to serve on the mission. That practice did not infringe the sovereignty of States; it was merely a way of facilitating contact between the two States concerned and of contributing to the mission's success. If political questions were to be discussed, the members of the mission should preferably be persons of some standing; if the matters to be discussed were technical, the request was usually made that the members of the mission should be experts. Paragraph 2 would help to remove any disagreement that might occur in that connexion. He was not convinced that the substance of paragraph 2 was already covered by paragraph 1.

62. Mr. TABIBI had said that there was no need to refer in paragraph (3) of the commentary to Mr. Jiménez de Aréchaga's views; in his (Mr. Bartoš's) opinion that was a technical question which could be settled by the Commission when it had considered the rest of the draft. With regard to the remarks concerning paragraph (7) of the commentary which stated that, in practice, States asked to be consulted on the selection of the person, he said he had often come across instances of such requests. It often happened that, as a result of such consultations, it was decided not to send

a particular person possessing the necessary qualifications because, for some special reason, the choice of that person was likely to upset public opinion in the receiving State; it could also happen that a particular person was sent, not because he was specially qualified in the subject in question, but because of his personal standing. In any case, such consultations between States should not be regarded as an encroachment on their sovereignty. It was a diplomatic and political question rather than a legal one.

63. Mr. TUNKIN said that he wished to clear up a misunderstanding; in mentioning article 7 of the Vienna Convention, he had not intended to refer to its substance, but merely to its language ("the sending State may freely appoint...").

64. Mr. TABIBI thanked the Special Rapporteur for his very full reply. However, he was not satisfied on one point: he could not agree that there was any general practice with regard to consultation. There existed a State practice regarding the notification of the sending of special missions, but there was no such practice with regard to consultation. Where the relations between the two States were good, there would of course be no problem. However, if those relations were not good, it was undesirable to give the receiving State a pretext for creating problems and putting the blame on the sending State.

65. A provision stipulating the requirement of notification would, he thought, provide a sufficient safeguard, combined with the right of the receiving State not to accept a person; however, any statement of a requirement of consultation would limit the sovereignty of the sending State and would not conform with the established practice.

66. Mr. BARTOŠ, Special Rapporteur, agreed with Mr. Tabibi that the practice was exceptional, not general. The misunderstanding had perhaps arisen because the words *en pratique* in the French text of the second sentence of paragraph (7) of the commentary had not been rendered in the English text.

67. The CHAIRMAN suggested that article 3 should be referred to the Drafting Committee, which would consider the various suggestions made with regard to paragraph 1 and decide which was the best; it would also review the comments made on paragraph 2 and decide whether it should be deleted.

It was so agreed.

ARTICLE 4 (Persons declared *persona non grata*)

68. The CHAIRMAN invited the Commission to consider article 4.

69. Mr. BARTOŠ, Special Rapporteur, said that, in the light of the debate on article 3, he proposed to redraft article 4 in the following manner: after the words "at any time" the words "after it has been notified of the composition of the special mission", would

be added, secondly, before the words "*persona non grata*" the words "not acceptable, and, after his arrival, as", would be added.

70. The CHAIRMAN, speaking as a member of the Commission, said that it might be simpler to replace the passage following the words "the special mission" by the following text: "... that it refuses to accept the head or any other member of the mission or that it regards him as *persona non grata*".

71. Mr. VERDROSS, referring to the second sentence in article 4, said that the sending State was not obliged to appoint any other persons in place of the person declared *persona non grata*; it might refuse to discuss the matter, or might decide not to replace the person declared *non grata*.

72. Mr. AMADO pointed out that in such circumstances there would be no special mission. It was important to include a provision to the effect that the sending State was free to designate a replacement.

73. Mr. YASSEEN suggested that the words "shall appoint" should read "may appoint".

74. Mr. BARTOŠ, Special Rapporteur, said that the first sentence of the article was based on two parallel propositions. In the first place, if there was prior consent, the person concerned could not thereafter be declared unacceptable, but that person might at any time become *persona non grata*. It sometimes happened that the receiving State changed its mind at the last moment with respect to the appointment of a person whose selection it had approved; such a procedure was contrary to the rules of courtesy and should be prohibited in law.

75. Secondly, the declaration of a person as *persona non grata* was an established institution in international law applying both to permanent and to special missions.

76. The second sentence of the article expressed a subsidiary idea. He had not intended to make it a mandatory rule and he was prepared either to delete the sentence or to adopt Mr. Yasseen's suggestion.

77. Mr. AMADO said that the question of a State's good faith should not be overlooked. It might happen that a Government decided *bona fide* to include in a special mission to another State a person whom that State was unable to accept. It was therefore necessary to provide that he could be replaced by some one else.

78. Mr. CASTRÉN said that article 4 should be redrafted so as to conform more closely to the corresponding article of the Vienna Convention on Diplomatic Relations (article 9 of that Convention). In commenting earlier on article 3 he had pointed out that the right of the receiving State to declare the members of a special mission *persona non grata* or not acceptable should be unqualified, exactly as was laid down in the Vienna Convention. Even if there had been prior agreement with regard to the composition of the special mission, it was always possible that some event might occur

which would give the receiving State good reason to withdraw its consent and to refuse to accept one or more of the members of the special mission. He therefore proposed that the first part of article 4 should be deleted (up to and including the words "member of the mission") and that the rest of the sentence should be redrafted on the lines just suggested by the Special Rapporteur. The article should then include a new sentence worded in the same way as the last sentence of article 9, paragraph 1, of the 1961 Vienna Convention, viz "A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State".

79. The last sentence of article 4 as it stood should be deleted. The receiving State could not insist that the sending State should replace the person concerned by some one else. The mission could continue its work without that person. Besides, the sending State had the right to recall the special mission if, for instance, the person declared *non grata* was the head of that mission.

80. The CHAIRMAN, speaking as a member of the Commission, said that his impression was that article 4 postulated two situations which could not both be dealt with in the same sentence. A declaration by a State that it could not accept a particular person was made before that person's arrival and could not be made if prior consent had been obtained; whereas the declaration that a person was *non grata* could be made later and arose out of that person's behaviour: in that case, the fact that prior consent had been given was immaterial.

81. He therefore thought that it would be better to draft two separate sentences, each relating to one of those situations. It would at all events be preferable to replace the words *l'autre Etat* in the French text by the words *l'Etat de réception*.

82. The last sentence of the article was perhaps hardly necessary. The sending State would certainly replace the person concerned; on the other hand, serious incidents might have occurred and it might have been decided not to proceed with the mission. The words "shall appoint" were in any case too categorical.

83. Mr de LUNA agreed with the Chairman and with Mr. Castrén. He recalled a case where the head of a special mission concerned with technical assistance who was to have been sent by one State to another had, before setting out, made statements concerning underdeveloped countries that had been regarded as offensive by the receiving State, which had then declared him *persona non grata*.

84. Mr. TSURUOKA said that he, too, thought that two cases should be differentiated: the case where the special mission had already arrived and where, if prior consent had been given, the receiving State could not refuse to accept the person concerned; and the case where, after the arrival of the mission, one of its members was declared *persona non grata*, whether or not there had been prior consent. Perhaps the expression *persona non grata* should be used only in connexion with the head of the mission, "not acceptable" being

used only for the other members of the mission. The expression *persona non grata* should certainly be used, for it implied that the receiving State was not bound to give reasons for refusing to receive the person concerned.

85. The last sentence of the article might be replaced by some other formula; the refusal to accept a particular person did not necessarily put an end to the special mission.

86. Mr. BARTOS, Special Rapporteur, said that the Vienna Conference on Consular Relations, 1963, had decided, for democratic and equalitarian reasons that a declaration that a person was *non grata* or not acceptable could apply to all the members of a mission, including even the subordinate or service staff, irrespective of rank.

87. Mr. RUDA fully endorsed the Special Rapporteur's conception of article 4 but considered that the text should be amplified by a provision, modelled on a passage in article 9 of the Vienna Convention on Diplomatic Relations, to the effect that the receiving State was not required to give reasons for declaring any member of a special mission *persona non grata*. That particular point had not been covered in the Commission's original draft on diplomatic relations and had been added at the Conference itself. An analogous provision also appeared in the Convention on Consular Relations, 1963.

88. Mr. TUNKIN believed that article 4 covered a situation analogous to that contemplated in article 9 of the Vienna Convention on Diplomatic Relations and should reproduce the same principles. The receiving State could withdraw its consent to any member of a special mission even before the mission's arrival.

89. Mr. TSURUOKA noted that under article 9 of the 1961 Convention, the expression *persona non grata* could apply to the head of the mission or to any member of the diplomatic staff of the mission. It was possible to use the expression *persona non grata* in situations where the *agrément* had been requested, as in the case of the head of a diplomatic mission, but he doubted whether that expression was appropriate in the case of a special mission for whose head no formal *agrément* had been given.

90. Mr. TUNKIN said that, during the discussion on Mr. Sandström's report² the Commission had considered the possibility of applying the expression *persona non grata* only to cases where heads of mission and diplomatic staff were affected, the expression "not acceptable" to be used in cases involving other staff.

91. Mr. AMADO said that he could not see how a person could be declared not acceptable if he had

² For discussion of relevant passages in the Sandström's report (A/CN.4/129), see the summary record of the Commission's 567th meeting in *Yearbook of the International Law Commission, 1960, Vol. I.*

actually arrived in the receiving State. It was worth noting, moreover, that the word *grata* in the expression *persona non grata* was etymologically related to the word *agrément*.

92. Mr. BARTOŠ, Special Rapporteur, said that the Vienna Convention on Diplomatic Relations distinguished between persons for whom the *agrément* was necessary — heads of missions — and other persons, *viz*, the members of the diplomatic staff. During the discussion on the Convention on Consular Relations, ideas had changed and the two categories previously differentiated had been treated as one. In his view the question was a technical one; if the Commission did not approve of the terms used in the Convention on Consular Relations, it could use some other word.

93. Mr. ROSENNE said that the Commission was faced with the choice between the system laid down in article 9 of the Convention on Diplomatic Relations and that of article 23 of the Convention on Consular Relations. Personally, he would favour the former, as special missions essentially belonged to the diplomatic field. However, if the majority preferred the latter as a later expression of opinion of a diplomatic conference, he would abide by such a decision. The proposition that, once prior consent had been given in the form laid down in article 4, the right to declare a person *non grata* or not acceptable was excluded, could not be entertained because that right was an independent one having its source outside the initial agreement to receive members of the mission, which in ordinary diplomatic intercourse was always given in some manner, even if only in the form of a visa.

94. Mr. TSURUOKA said that in his view it would be preferable to incorporate both expressions — *persona non grata* and “not acceptable” — in the article, for, although some special missions were of a decidedly diplomatic and political character, others were of a purely technical nature.

95. Mr. BARTOŠ, Special Rapporteur, said that he had studied the practice in force in France and in the United States. In both a distinction was drawn between a declaration that a person was *non grata* and the practice of refusing to include in the diplomatic list the name of a person appointed to a diplomatic post. His own preference would be for a solution on the lines of that suggested by Mr. Tsuruoka, namely to use both expressions without giving an explanation and to leave their interpretation open. The only possible conclusions would then be that a State was at liberty to decline to admit a particular person into its territory.

96. The CHAIRMAN suggested that the article should be referred to the Drafting Committee, which would decide whether the Vienna Convention on Diplomatic Relations should be followed in whole or in part and whether the idea contained in paragraph (1) of the commentary should be incorporated in the text of the article. The Drafting Committee would also consider what attitude the receiving State could adopt if the sending State refused to take the action requested.

It was so agreed.

97. Mr. ROSENNE said that he had assumed that article 4 would be redrafted on the model of the whole of article 9 of the Convention on Diplomatic Relations or of the whole of article 23 of the Convention on Consular Relations.

The meeting rose at 1. p.m.

761st MEETING

Wednesday, 8 July 1964, at 10 a.m.

Chairman : Mr. Roberto AGO

Special Missions

(A/CN.4/166)

(continued)

[Item 4 of the agenda]

DRAFT ARTICLES ON SPECIAL MISSIONS

ARTICLE 5 (Appointment of a special mission to more than one State)

1. The CHAIRMAN invited the Commission to consider article 5 of the Special Rapporteur's report (A/CN.4/166).

2. Mr. BARTOŠ, Special Rapporteur, said that article 5 of his draft was modelled on article 5 of the Vienna Convention on Diplomatic Relations, 1961. Since the end of the Second World War, some States had adopted a practice of sending goodwill missions, and even economic missions of a general character, to more than one State in the same region; but it could happen that the receiving State, for political reasons, declined to accept the mission on the ground that it had previously visited some other State, or even that it was subsequently to visit several other States.

3. He proposed to replace the word “appointment” in the title of the article by the word “sending”, which would be more correct.

4. Mr. de LUNA said that, in general, he approved the article and the commentary. The provision was a useful one, since a “blanket” appointment was a lack of international courtesy which receiving States usually resented. He agreed that the word “sending” would be better in the title.

5. The CHAIRMAN thought that the word *simultané* in the French text of the title should be omitted since it might create difficulties.

6. Mr. ROSENNE said that article 5 was acceptable but the phrase "with the same assignments" was not necessary having regard to the manner in which the Commission had decided special missions should be sent and accepted.

7. He wondered whether there was any special reason for not using in the final proviso the language of article 5, paragraph 1, of the Vienna Convention on Diplomatic Relations which read: "unless there is express objection by any of the receiving States".

8. Mr. YASSEEN said that the article filled an obvious need. He pointed out, however, that the assignments of a special mission sent to several different States sometimes varied in accordance with the problems which existed between the sending State and the various receiving States. Consequently, he thought that the words "with the same assignments" were unnecessary.

9. The title might well be altered to read "sending of the same special mission to more than one State".

10. Mr. CASTRÉN said he liked the French text of the title; the English text did not include the word "simultaneous". In the body of the article, the word "simultaneous" was not used, and the last sentence of paragraph 2 (a) of the commentary made it clear that, when special missions were sent to more than one State successively, the consent of each receiving State had to be obtained. It was true that there might be cases where it would not be appropriate to send the same special mission to several different States and where the last States to be visited might refuse to accept the mission in accordance with the rule laid down in article 1. But it would certainly be excessive to require the consent of the States in which the special mission had already completed its assignment before it could pursue its activities in the other States. The commentary was not very clear on that point.

11. He therefore proposed that the article should be amended to read:

"A State may accredit the same special mission simultaneously to more than one State, provided that none of the States concerned objects expressly."

His proposed text omitted the words "with the same assignments" because, as a general rule, a special mission had specific assignments and it might moreover be difficult to say whether the mission was in fact carrying out the same assignments in all the different countries. The proviso in his amendment with the word "expressly" was based on a similar clause in article 5, paragraph 1, of the Vienna Convention on Diplomatic Relations.

12. Mr. PESSOU thought that the idea contained in the expression "with the same assignments" should be retained; perhaps the word "assignments" should be replaced by the word "functions", which would correspond more closely with the facts.

13. Mr. PAL said he could accept the substance of article 5 but believed it should be reformulated on the

lines of article 5, paragraph 1, of the Vienna Convention according to which the receiving State had to be notified of the fact that the mission was being sent to more than one State.

14. Mr. BRIGGS agreed with article 5 and considered that the title was accurate at least as far as the English text was concerned. The words "with the same assignments" should be dropped and the proviso at the end replaced by that contained in article 5, paragraph 1, of the 1961 Vienna Convention.

15. Mr. YASSEEN said that he was opposed to the adoption of the formula used in the Vienna Convention on Diplomatic Relations. In the case of a permanent mission, and in particular of its head, the *agrément* was required, whereas it was not required in the case of a special mission. It was for that reason that any objection to the sending of a permanent mission had to be "express", but where special missions were concerned the situation was different.

16. The CHAIRMAN, speaking as a member of the Commission, thought that the words "with the same assignments" might create difficulties. Since the assignment was specified by the sending State—with the consent of the receiving State—it might happen that, out of three or four successive receiving States, some might be prepared to agree to a certain assignment and others a slightly different assignment. Furthermore, the assignments given to a special mission might vary slightly with the relations prevailing between the sending State and each of the States it was to visit in succession. On the other hand, it was also true that, in the case of a given mission, its assignments were broadly speaking the same. It was possible therefore that the formula was too rigid and inconsistent with the fact that the consent of each receiving State was required.

17. The idea behind the proviso was clear enough but the language used might give rise to misunderstandings: it might be thought that each receiving State was entitled to object to the special mission visiting the other States. The form of words used in the Vienna Convention on Diplomatic Relations was less ambiguous.

18. Mr. LACHS associated himself with the Chairman's comments and pointed out that a special mission might be given different assignments to perform in different States: that possibility should certainly not be excluded. As far as the proviso was concerned, he pointed out that a State could only object to receiving a mission in its own territory, but could not speak for other States even if its reason was that relations between the States concerned were strained or that there was some difficulty over recognition.

19. Mr. YASSEEN proposed that the last passage in article 5 should be replaced by the words "each of those States may object in so far as it is concerned".

20. Mr. RUDA said that he agreed with the substance of the article. It was understandable that a receiving State should have a right to object to a mission with the same assignment being sent to several States.

21. Mr. AMADO said that the article dealt with a particular type of special mission, and the words "with the same assignments" should not be deleted without due reflection.

22. Mr. BARTOŠ, Special Rapporteur, said that the differing opinions on the text reflected differences of opinion on the substance. In the phrase "the same special mission", did the word "same" mean that the persons serving on the mission were the same or that its assignments were the same? He was inclined to favour Mr. Ruda's interpretation, which was that the mission was one which dealt with the same questions in several different countries. In order to facilitate the adoption of the article, he was prepared to drop the words "with the same assignment"; but he preferred Mr. Yasseen's suggestion, since it was impossible to repeat the wording of article 5 of the Vienna Convention on Diplomatic Relations, which dealt with an entirely different question.

23. In reply to the Chairman's remarks on the final proviso, he said that provision should be made to cover the case where, after a mission had completed its work in one State, that State announced that it would be an unfriendly act if the mission were subsequently to proceed to some other State.

24. Referring to the suggestion by Mr. Castrén and Mr. Rosenne that the objection (if any) had to be express, he said that there would be one difficulty: there could only be an express objection if there had been prior notification. It might perhaps be provided in another paragraph that the sending State was under an obligation to notify the receiving States in advance of the dispatch of the same special mission.

25. He was inclined to favour Mr. Pessou's suggestion that the word "assignments" should be replaced by the word "functions", since the former necessarily implied the achievement of a task.

26. The CHAIRMAN, speaking as a member of the Commission, said that in his view the words "the same special mission" would suffice, without the words "with the same assignments", which would to some extent limit the sending State's freedom to make changes as time went on in the scope of the mission. He found Mr. Yasseen's proposal with regard to the final passage entirely acceptable.

27. Mr. EL-ERIAN fully supported the principle underlying the article and considered that the proviso enabling the receiving State to object should form part of the article.

28. Mr. CASTRÉN said that he still believed that the wording was too general. Mr. Yasseen's proposal did not offer a solution, since it was somewhat vague and open to different interpretations. The language of the Vienna Convention on Diplomatic Relations was preferable.

29. Mr. YASSEEN said that he had accepted the article on the understanding that notification would be required, as the Special Rapporteur had just said.

30. The CHAIRMAN suggested that the article should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 6 (Composition of the special mission)

31. Mr. BARTOŠ, Special Rapporteur, introducing his draft article 6, said that the composition of a special mission differed from that of a permanent diplomatic mission. A special mission very often comprised a number of persons, several of whom were collectively or individually empowered to express the will of the sending State. A permanent diplomatic mission, on the other hand, was always personified by the head of mission or by the *chargé d'affaires* or *chargé des affaires* replacing him. Paragraph 4 was based on article 11 of the Vienna Convention dealing with the size of the mission.

32. Mr. VERDROSS pointed out that, if a mission consisted of a single person, it could hardly be said that it was "composed of its head and as necessary, of members of the mission." He proposed the following text:

"The mission is composed of a single person or of its head and other members of the mission. It may also have a staff."

33. Paragraph 2 could be simplified by replacing the words "and the receiving State shall pass... through him" by "and to whom the receiving State shall address its communications".

34. Paragraph 4, too, was very complicated. It might be redrafted to read:

"Except as otherwise agreed, the sending State is free to determine the size of the special mission. The receiving State may however require that the number..."

35. Mr. de LUNA approved Mr. Verdross's proposals.

36. He had misgivings about paragraph 1. In the absence of definitions, the terminology had to be interpreted by reference to the context. What was implied in the distinction that was apparently made between the members of the mission and its staff? Article 7, paragraph 2, which made the same distinction, did not provide any definition either. Moreover, if paragraph 3 of article 6 were read in conjunction with paragraph (3) of the commentary, one gained the impression that the word "staff" meant subordinate or technical staff which could be recruited locally and did not include diplomats or experts.

37. It might be preferable to use the language of article of the Vienna Convention on Diplomatic Relations, so as to ensure that not only the rules but also the terminology employed were uniform with that Convention. He would propose the following wording for paragraph 1 of article 6: "The special mission is composed of a single person, or of its head and, as necessary, of members of the diplomatic staff, the administrative and technical staff and the service staff".

38. Mr. TABIBI agreed with the remarks of the two preceding speakers concerning paragraph 1, the first sentence of which might be reworded to read: "The special mission is composed of one or more members". The functions of the head of the mission would be stated in the full powers.
39. It should be made clear in paragraph 2 that there was a difference between statements issued on behalf of the Government represented by the special mission and those issued to the Press by public relations officers or persons specially designated for the purpose.
40. It was desirable not to introduce in paragraph 3 any rigid rules as to who was authorized to make valid statements on behalf of the State.
41. Mr. AMADO said that he did not find the second sentence of paragraph 1 satisfactory. He agreed with the amendments proposed by Mr. Verdross to paragraph 2, but, in addition, he thought that the words "regarded as" should be deleted and that the words "authorized to make statements" should be followed by the words "and to take decisions". The kind of "flying mission" which the Commission was discussing, although very common (e.g. in connexion with the "Alliance for Progress"), had no administrative staff. He would prefer a formula which was less suggestive of permanence but which was clearly drafted.
42. The CHAIRMAN, speaking as a member of the Commission, said that, in fact the article was concerned only with one type of situation, that where the mission was composed of several persons and where a head of mission should be appointed. It was not necessary to consider cases in which the mission consisted of a single person, but it was necessary to state that, where the mission comprised several individuals, the sending State should appoint a person to lead it.
43. In general, he had the impression that the Special Rapporteur had been over-conscientious and had gone into too much detail, particularly with regard to the question of full powers. Special missions varied greatly: what would happen if a special mission consisted of the Head of State and the Minister for Foreign Affairs. Should the latter be denied the right to make statements, even in cases where the Head of State was not perhaps constitutionally responsible?
44. Mr. BARTOŠ, Special Rapporteur, said that, in drafting the articles, he had not given consideration to special missions led by the Head of State or by the Minister for Foreign Affairs. He proposed to draft a special chapter covering cases where the mission was headed by persons of such eminence.
45. Mr. ROSENNE said that he was in agreement with the fundamental principles underlying article 6 but had some doubts as to their presentation. It would be preferable if the same terminology for describing the different categories of personnel were used as in the 1961 Vienna Convention; that usage would probably simplify matters when the Commission came to consider the privileges and immunities of special missions.
46. He shared the Chairman's doubts about paragraphs 2 and 3 and questioned the need to retain them: no attempt had been made in the Vienna Convention to go into such detail. In some cases the work of special missions would culminate in a treaty, and in such cases the partial definition of the full powers contained in article 1 of the Commission's draft on the law of treaties¹ and the rules indicating when full powers were required, laid down in article 4 of that draft (the drafting of which had occasioned difficulties in 1962) would apply. In some respects the content of paragraphs 2 and 3 of the article under discussion went beyond existing practice and might hamper the work of special missions.
47. Unlike article 11 in the Vienna Convention, the provision contained in paragraph 4 apparently left it exclusively to the sending State to determine the size of the mission: that reversal of approach would have to be justified.
48. Mr. EL-ERIAN said that article 6 dealt with three matters: the composition of a special mission, the full powers and the size of the mission. He suggested that the three matters might form the subject of separate articles.
49. The CHAIRMAN, speaking as a member of the Commission, observed that the matters dealt with in article 6 were closely interconnected; he would be reluctant to divide them among several articles.
50. Mr. YASSEEN said he had no objection to the substance of paragraphs 1 to 3, which he merely found a little too elaborate. He would accept M. Verdross's proposals concerning the wording of those paragraphs, especially paragraph 1.
51. Paragraph 4 was not modelled on article 11 of the Vienna Convention on Diplomatic Relations, and he was glad that it was not. Under article 11 of that Convention, the receiving State was master of the situation because it could limit the size of the mission to what it considered reasonable. It would be going too far to introduce a similar provision in the draft on special missions. An even balance should be struck between those missions so far as their size was concerned. A mission which came to a foreign country for a short time could, of course, communicate with its capital, but did not enjoy the same facilities as its opposite numbers, who had behind them the entire governmental apparatus of the receiving State. Accordingly, he doubted the usefulness of the passage starting with the words "or unless the receiving State". The initial part of the paragraph, as far as the words "by agreement", would be amply sufficient to meet the requirements of international relations.
52. Mr. CASTRÉN said that in his view the article was necessary, and *grosso modo*, he accepted its wording although some, at least, of the suggestions made by previous speakers were well-founded. He had only one

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

comment to make. Paragraph 2 provided that the head of the special mission was authorized to make statements on the mission's behalf, but it appeared from paragraph 3 that other members of the special mission were also authorized to make such statements at the same time as the head of mission or, in some special cases, in his stead. In order to eliminate that apparent contradiction, it might be desirable to add in paragraph 2, after the words "regarded as", the word "normally" or the word "primarily".

53. Mr. VERDROSS, replying to the Chairman, maintained that paragraph 1 in the form proposed by the Special Rapporteur indeed related—more particularly on account of the words "as necessary"—both to the case where the special mission comprised only one member and to the case where it comprised several members. Accordingly, his own proposal with regard to that paragraph was valid.

54. He supported Mr. Yasseen's suggestion concerning paragraph 4. There was a difference between the case contemplated in that article and that dealt with in article 11 of the Vienna Convention on Diplomatic Relations. In paragraph 4 of the article under consideration, the words "failing a contrary arrangement" would suffice.

55. The CHAIRMAN, speaking as a member of the Commission, explained that, when commenting on paragraph 1, he had been thinking that the paragraph could be amended in such a way as to relate solely to the case where the special mission comprised several members.

56. Mr. TUNKIN said that there was no provision in the Vienna Convention analogous to that contained in paragraph 1, but the latter might be regarded as useful in a draft dealing with special missions.

57. Paragraph 2 was unnecessary and paragraph 3 was excessively complicated. It should only deal with the case where the head of a special mission was prevented from carrying out his functions and could be modelled on article 19 of the 1961 Vienna Convention, with appropriate modifications.

58. Paragraph 4 could be greatly shortened as it only needed to stipulate that, in the absence of any arrangement to the contrary, the sending State was free to determine the size of the special mission.

59. The CHAIRMAN asked the Special Rapporteur whether, in the light of the discussion, he might simplify article 6 by reducing it to two paragraphs, one dealing with the composition of the special mission and the problems which arose when the mission comprised several members, and the other incorporating the substance of the present paragraph 4. The rule concerning the case where the head of the special mission was prevented from performing his functions might form the subject of a separate article.

60. Mr. ROSENNE, referring to paragraph 4, said that despite the difference of emphasis between it and article 11 of the Vienna Convention of 1961, the purpose

of the two provisions was the same. It was important to protect the receiving State against having to admit excessively large special missions, and he could not accept the shortened form for paragraph 4 suggested by the previous speaker.

61. Mr. RUDA said he agreed with Mr. Rosenne. It was necessary to take into account the size which special missions were apt to take at present. Special missions were both numerous and varied; in paragraph 86 of his report, the Special Rapporteur had listed no fewer than fourteen main categories of special missions. From his own experience, he could say that there were quite a few more.

62. With regard to the size of special missions, he pointed out that those sent in connexion with the "Alliance for Progress" often included hundreds of persons; under the draft articles proposed by the Special Rapporteur, those persons would enjoy many privileges and immunities. In cases of that type, it would be a genuine imposition upon the receiving State not to enable it to require the number of members of the special mission to be kept within the necessary limits.

63. He strongly supported the retention, as proposed by the Special Rapporteur, of the idea which was contained in paragraph 4 and which was similar to that embodied in article 11 of the 1961 Vienna Convention on Diplomatic Relations and article 20 of the 1963 Vienna Convention on Consular Relations.

64. Mr. LACHS considered that the article could be very much condensed if a great deal of its content were transferred to the commentary.

65. As far as paragraph 4 was concerned, it was important to take into account the rights and obligations of both the sending and the receiving States.

66. Mr. BARTOŠ, Special Rapporteur, said that he was convinced that it was necessary, in order to satisfy the needs of the modern international community, to retain the ideas reflected in the various paragraphs of article 6.

67. He might, however, consider dividing the article into three separate articles. The first would provide that the special mission could consist of one or several members (an idea which had already appeared in the 1960 draft by Mr. Sandström), and it would deal with the composition of special missions consisting of several members. He had not made any distinction between diplomatic, technical and subordinate staff, because there were no general rules on that subject so far as special missions were concerned; moreover, he had thought that that question would be settled by the definitions, which were to be drafted later. However, he was prepared to deal with that question if the Commission so wished.

68. A second article would relate to the question of representation and the authority to express the will of the State. A rule on that matter, which gave rise to very many disputes between States was essential. The question was a purely legal one: what were the powers

of the negotiators? The State which contested the validity of a negotiator's powers could declare that the outcome of the negotiations was void.

69. The Commission could, if it so wished, formulate a rule for cases where the head of the special mission was prevented from performing his functions, but he personally did not think that it would be reasonable to introduce the notion of *chargé d'affaires ad interim* in the draft on special missions.

70. A third article would deal with the question of the size of the special mission. There were two conflicting views on that point. According to the first, it was the sending State which, in the light of its needs, determined the number of members of the special mission; while according to the other view, the receiving State was not obliged to accept an unlimited number of members of the special mission, even if there was no prior arrangement on the subject. The question had very often arisen in practice and had been studied by the two Vienna Conferences of 1961 and 1963. At the Vienna Conference on Consular Relations, the more recent of the two, only a few States had upheld the first thesis. The United Kingdom delegation, which had at first defended it, had, on instructions from its Government, modified its position in the course of the Conference. In that respect, he had followed the opinion expressed by the majority of States. Neither of the two views was illogical, but the question was how to reconcile the interests of States. Since there was no universal rule on the matter, it was open to the Commission to develop the law; it was for the Commission to decide.

71. He proposed that he should draft three articles on the lines he had indicated and submit them to the Commission for consideration.

72. The CHAIRMAN suggested that preferably the Special Rapporteur should draft two articles, because the subject matter he proposed to deal with in the third article could be covered in the first.

73. Mr. BARTOŠ, Special Rapporteur, said that he was at the Commission's disposal. The substance of article 6 could be divided between two articles. The first would comprise the present paragraph 1, somewhat amplified, and the present paragraph 4, with provisions modelled on article 20 of the Vienna Convention on Consular Relations, the last instrument to have been adopted by the majority of States. The second article would incorporate the substance of the present paragraphs 2 and 3.

74. Mr. TUNKIN said that it very often happened that the head of the special mission returned home for consultations, and that in his absence another member of the mission became the provisional head of the mission. There was certainly an analogy between that case and that of an embassy's *chargé d'affaires ad interim*. One might say that the replacement was head *ad interim* of the special mission.

75. Mr. BARTOŠ, Special Rapporteur, said that the validity of such delegated authority had been contested

on the ground that the person in whom powers had been vested could not delegate them. In general practice, what happened was rather that several members of the special mission simultaneously held full powers to express the will of the State. The first need was to ensure the validity of legal acts performed by special missions. The Commission had already drafted a rule concerning the representation of States in its draft articles concerning the conclusion of treaties;² but special missions accomplished all kinds of other acts, such as *constatations*, acknowledgement of debts, validation of certain documents, etc. He had based himself on the ordinary practice; the Commission could, of course, formulate a rule which departed from that practice, but he would not advise it to do so.

76. Mr. AMADO said that, while he understood Mr. Tunkin's arguments, he would be reluctant to regard the person replacing the head of a special mission as a *chargé d'affaires ad interim*, for it was an essential feature of a special mission that it was temporary and to some extent itself existed *ad interim*. True, it very often happened that, when a special mission was led by a head of State, the head of State was replaced after a certain time by one of his ministers. But all those questions were not so complex that they could not be dealt with in a single article. It was difficult to do better than as the Special Rapporteur had proposed.

77. Mr. TUNKIN said it would be regrettable if the Commission imposed unnecessary and even dangerous restrictions on States when the current practice was that the head of a special mission, while continuing to be head of the mission, was, when absent, temporarily replaced by another member of the mission authorized to act in his stead.

78. Mr. BARTOŠ, Special Rapporteur, said that he did not oppose the idea that the head of the special mission could be replaced by a member of the mission; what he was opposed to was the idea that such replacement should be treated on a par with the institution of the *chargé d'affaires ad interim*. In a permanent mission only one person held the powers at a particular time — the head of mission when he was present and the *chargé d'affaires ad interim* when the head of mission was absent. On the other hand, it might happen in the case of a special mission that the head and other members of the mission were authorized to act simultaneously. Accordingly, his proposal would not limit the freedom of States; in fact, its effect would be to increase that freedom.

79. Mr. TUNKIN said that his proposal had not been that the term *chargé d'affaires ad interim* should be used, but simply that use should be made of the idea underlying that institution.

80. The CHAIRMAN, speaking as a member of the Commission, suggested that the Special Rapporteur should incorporate in the second of the articles intended

² *Ibid.*, pp. 161 et seq.

to replace article 6 the idea which was expressed in article 4, paragraph 1, of the Commission's draft on the law of treaties. That provision would apply in cases where the special mission was led by a head of State, a head of Government, or a Minister for Foreign Affairs, and in that way the Commission would not have to settle the question of the distribution of powers within a special mission headed by a person of lower rank.

81. Mr. BARTOŠ, Special Rapporteur, said he accepted that suggestion, and he pointed out that the rule incorporated in article 4, paragraph 1, of the draft on the law of treaties appeared in the rules of procedure of the General Assembly and of the Councils of the United Nations.

82. Mr. BRIGGS said that the discussion had been sufficiently detailed to permit referring directly to the Drafting Committee the new draft articles which the Special Rapporteur would prepare; the Drafting Committee would examine those draft articles and report to the Commission.

83. Mr. CASTRÉN pointed out that one question of substance remained to be settled: whether the "unless" clause of the present paragraph 4 should be retained. Not all members had expressed their views on that point.

84. Mr. de LUNA said he thought that all those who had said nothing on the subject approved the qualifying clause proposed by the Special Rapporteur.

85. The CHAIRMAN put to the vote the principle of the clause, starting with the words "or unless the receiving State" in the existing paragraph 4, on the understanding that the Special Rapporteur would modify that provision to bring it into line with article 20 of the Vienna Convention on Consular Relations.

The principle was adopted by 13 votes to none, with 3 abstentions.

86. The CHAIRMAN suggested that the Commission should ask the Special Rapporteur to draft two new articles to replace article 6, and to submit them direct to the Drafting Committee.

It was so agreed.

ARTICLE 7 (Notification of arrival and departure)

87. Mr. BARTOŠ, Special Rapporteur, said that his draft article 7 was of a purely technical character, having its equivalent in the two Vienna Conventions of 1961 and 1963. He did not think that it would elicit many comments from members of the Commission.

The meeting rose at 12.55 p.m.

762nd MEETING

Thursday, 9 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Special Missions

(A/CN.4/166)

(continued)

[Item 4 of the agenda]

DRAFT ARTICLES ON SPECIAL MISSIONS

ARTICLE 7 (Notification of arrival and departure) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 7 in the Special Rapporteur's first report (A/CN.4/166).

2. Mr. VERDROSS said that the article was purely technical and presented no serious problems. He suggested that the wording of paragraph 1 should be simplified by deleting the word "regular" before the words "permanent mission" and also the words "in the regular way".

3. Mr. CASTRÉN said that he accepted the ideas expressed by the Special Rapporteur in the article. However, the title should be "Notifications" or "Notifications concerning special missions", because the article did not deal solely with notifications of the arrival and departure of the special mission.

4. He asked why, at the end of paragraph 1, the Special Rapporteur had preferred the expression "the persons accompanying them" to the expression "members of the family" which was used in the Vienna Convention on Diplomatic Relations, 1961.

5. Paragraph 2 was too elaborate and should be shortened.

6. While accepting the substance of paragraph 4 he pointed out that if that provision, which appeared in brackets in the draft, was maintained, it might affect the interpretation of paragraph 1. In the proposed wording, paragraph 1 did not state clearly whether the various notifications had to be given before the arrival and departure of the persons concerned. Under the Vienna Conventions, advance notice was generally required. In paragraph (2) of the commentary, the Special Rapporteur referred to preliminary notice, without specifying whether such notice was mandatory in all cases, mandatory in certain cases only, or optional. The inference to be drawn from paragraph 4 of the article seemed to be that preliminary notice was not necessary in the case of persons other than members of the armed forces.

7. Mr. ROSENNE said he agreed that article 7 should be simplified. In that connexion, he recommended a closer adherence to the language used in article 10 of the 1961 Vienna Convention on Diplomatic Relations or to that of article 24 of the 1963 Vienna Convention on Consular Relations. In particular, he suggested that the opening words of paragraph 1 should be couched in completely impersonal terms, so as to state that the Ministry of Foreign Affairs of the receiving State "shall be notified", without specifying by whom. The Commission should take into consideration the case of a special mission to a country where the sending State had no permanent diplomatic mission; the notification would then be made by some other means.
8. Mr. TUNKIN said that he found article 7 on the whole acceptable. It was quite correct to provide that the sending State should inform the receiving State of such matters as the composition, arrival and departure of, and any changes in, the special mission. However, the formulation in article 7 was unduly detailed and much too rigid.
9. With regard to paragraph 1, he agreed with the suggestion for the adoption of the language of the 1961 Vienna Convention since there might well be no permanent diplomatic mission of the sending State in the receiving State. In addition, the requirement that the notification should be made "in the regular way" seemed unduly rigid. The notification in question was in practice not always made by means of a diplomatic note; the whole matter depended largely on the level and importance of the special mission. In some cases, a mere telephone call might be sufficient. The whole matter could be left to the States concerned.
10. Paragraph 2 could be deleted. The idea of notification could be embodied in paragraph 1; and the question who was qualified to make changes in the composition of the special mission was a purely internal one for the sending State.
11. He supported the retention of paragraph 3, but suggested that paragraph 4 should be dropped since the requirement of notification applied not only to persons who were members of the armed forces but also to civilians.
12. Mr. BARTOŠ, Special Rapporteur, said that the article could, of course, be simplified and redrafted on the basis of article 10 of the Vienna Convention on Diplomatic Relations. However, there were two difficulties in practice. First, whereas the permanent mission was known even before its arrival, the special mission was not known to the receiving State until it had been presented. Secondly, it was a question in dispute between States whether the head of a special mission had the right to give the notification, or whether only the head of the permanent mission had that right. He personally thought it necessary to specify that the notification should be given in a particular form, that form being, while not excessively rigid, nevertheless fairly well defined. In particular, it did not seem to him to be sufficient to give the notification by telephone; notifications so given sometimes led to embarrassing and even ridiculous situations, as when, for example an unauthorized person announced to the Ministry of Foreign Affairs, by telephone, the arrival of a special mission and the Ministry made arrangements to receive the mission formally, but the mission did not arrive. Notification was necessary for practical reasons as well. The receiving State would wish to give instructions to the frontier police and to the Customs authorities to facilitate the mission's entry; and sometimes, moreover, advance notice was necessary to reserve hotel rooms or apartments.
13. According to his draft of paragraph 1, notification was to be given by the regular permanent mission; the word "regular" was not useless, for there also existed specialized permanent missions. He would agree to the use of a more flexible wording, such as "through the diplomatic channel".
14. At the end of paragraph 1 he had intentionally used a formula differing from that appearing in the Vienna Convention on Diplomatic Relations, because often the head of a special mission was accompanied by his private secretary, or his doctor, or by a member of his family not normally forming part of his household (e.g. a married daughter). A fairly comprehensive rule was necessary for special missions, which generally stayed for only a very short time in the receiving country.
15. Replying to Mr. Castrén's question whether the notification should be given in advance, he said he had not thought it necessary to reproduce the rule incorporated in article 10, paragraph 2, of the Vienna Convention on Diplomatic Relations; that rule was uncertain because it began with the phrase "Where possible.". However, he was prepared to introduce a similar provision in article 7.
16. With regard to paragraph 2, he said that the exception concerning the case of the replacement of the head of the mission was of some importance. Such replacement, like the final departure of the whole mission, should be notified through the diplomatic channel.
17. He did not insist on the maintenance of paragraph 4 which he had placed between brackets mainly to show that the question dealt with in the paragraph might arise. Many States required regular prior notice of the arrival of members of the armed forces, but other States regarded that rule as obsolete.
18. Mr. CASTRÉN suggested that the Commission should explain in the commentary on the article why the formula used to describe the group of persons accompanying the members of the mission differed from that in the Vienna Convention on Diplomatic Relations.
19. Mr. de LUNA supported Mr. Castrén's suggestion.
20. With regard to notification, by telephone, he said that some chanceries allowed that form of notification, subject to confirmation through the diplomatic channel.
21. The deletion of paragraph 4 would not prevent States which wanted to be told in advance of the

arrival of members of armed forces from requiring such notification to be given, but it would be better not to require all States to conform to that rule.

22. The CHAIRMAN thought that, so far as the form of the notifications was concerned, the Drafting Committee would be able to find a formula both sufficiently flexible and sufficiently precise, based on article 10 of the Vienna Convention on Diplomatic Relations.

23. Speaking as a member of the Commission, he thought that the Drafting Committee should in that respect draft rules which were neither too detailed nor too rigid, for it would be strange if more stringent requirements were laid down for special missions than for permanent diplomatic missions. The Drafting Committee should be guided more by the Convention on Diplomatic Relations than by the Convention on Consular Relations, for relations through special missions were closer to diplomatic than to consular relations.

24. Speaking as Chairman, he suggested that article 7 should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 8 (Precedence)

25. Mr. BARTOS, Special Rapporteur, said that he had divided the rules concerning precedence into two categories; article 8 contained those relating to special missions in general, and article 9 those relating to special ceremonial and formal missions.

26. With regard to the rules in articles 8, he had taken the view that the order of precedence could not be established according to the order of presentation of credentials. He had accordingly adopted as an objective criterion the alphabetical order of the titles of the States in the English versions in use at the United Nations. The official list of States Members of the United Nations had even been supplemented, for the purposes of conferences held under United Nations auspices, by the names of non-member States. By means of that criterion the principle of the sovereign equality of States would be respected.

27. In making provision for the case where the special mission met only organs of the receiving State, he had not wished to opt for either of the two opposite conceptions of the role of the receiving State; he had merely incorporated a reservation in paragraph 3. The substance of that paragraph could be transferred to the commentary.

28. Paragraph 4 stated that the order of precedence among the members of a special mission should be determined by the head of the special mission.

29. Paragraph 5 dealt with the question of precedence in cases where there was contact between two special missions. Formerly, special missions had almost always been composed of career diplomats, and even in modern times the States of Latin America customarily gave a provisional diplomatic rank to the members of a special mission. But that practice was not general; often a

senior official, or a professor, served on a special mission in that capacity. It might perhaps be better not to formulate a rule on that subject, and instead to leave it to the various delegations to settle those questions according to the rules of courtesy. The Commission could, therefore, decide to delete paragraph 5.

30. Mr. AMADO thought that in paragraph 1 the word "titles" should be omitted. It would be better to say: "... shall follow the alphabetical order of their respective States according to the rule adopted [or: according to the criterion established] by the United Nations".

31. Mr. BARTOS, Special Rapporteur, proposed the following wording: "... shall follow the alphabetical order of States in use in English at the United Nations".

32. Mr. de LUNA considered that the Special Rapporteur was right in deciding (by contrast with Mr. Sandström's draft)¹ not to determine the order of precedence of special missions either according to the order of presentation of credentials or according to diplomatic rank. He approved the idea of generalizing the rule adopted by the United Nations, with the reservation, however, that the alphabetical order might not always be the English alphabetical order. In many cases, the official protocol list of the receiving State could be used. That list regulated the order of precedence among the permanent missions accredited to a State. Why, then, should it not also be used for special missions? He proposed, therefore, that paragraph 1 should be amended on the following lines: "... shall, except in cases where the established rule of an international organization is to be applied, follow the alphabetical order of States used in the official protocol list of the receiving State". A problem would arise in the case of the special mission of a State which had no diplomatic relations with the receiving State and whose name, therefore, did not appear on the receiving State's official list. It would probably be unnecessary to encumber the text with a rule covering that situation; the question should be settled without difficulty simply by inserting the name of the country in the official list of the receiving State.

33. Mr. BRIGGS supported the method proposed in paragraph 1. He preferred the uniformity that would be introduced by that method to the lack of uniformity which would result from the system advocated by Mr. de Luna.

34. He agreed with the proposed deletion of paragraphs 3 and 5.

35. With regard to paragraph 2, he suggested that the rule therein mentioned should apply not only to two special missions but also to two or more special missions.

36. Mr. CASTRÉN said he approved the ideas contained in article 8 and the way in which they were expressed.

¹ *Yearbook of the International Law Commission, 1960, Vol. II, p. 108.*

37. In order to stress the difference between article 8 and article 9, the title of article 8 might be changed to: "General rules governing precedence".
38. He suggested that, in order to bring article 8 into line with article 9, the word "several" before "special missions" in paragraph 1 should be replaced by the words "two or more".
39. Paragraph 2 seemed unnecessary; the case there contemplated was already covered by paragraph 1.
40. The substance of paragraphs 3 and 5 could be transferred to the commentary.
41. Mr. PESSOU said that he shared Mr. de Luna's opinion. The alphabetical order in use at the United Nations was not a perfect criterion; it might, in particular, raise problems with regard to the order of precedence among States which were not Members of the United Nations.
42. Mr. ROSENNE supported the suggestion by Mr. de Luna which would not interfere with the introduction of an objective criterion into the rule embodied in paragraph 1. The difficulties that would arise under the system proposed in article 8 were well illustrated by the case mentioned by a previous speaker, of the Holy See, which in some lists of the United Nations appeared under that name and sometimes as "Vatican City".
43. He agreed with Mr. Castrén that the contents of paragraph 2 were covered by paragraph 1. However, paragraph 2 by itself was not entirely satisfactory. The provision should take the form of a residual rule, which would apply only in the absence of any other agreement. For example, the practice in the International Court of Justice was to give precedence to the representatives of the plaintiff State, and the host State, in the case of an international arbitration taking place in its territory, might wish to follow a similar practice.
44. Mr. RUDA said that he had no objection to the English language as such, but thought that a more objective criterion could be found by using, as suggested in the penultimate sentence of paragraph (24) of the commentary, the order of the names of States used in the official diplomatic list of the receiving State. As an illustration of the difficulties that might arise from an attempt to change existing practices, he pointed out that at meetings held in South America, it was customary to follow the order of the Spanish names of countries and, for example, to place the United States representative under the letter "E" (for Estados Unidos), in other words high in the list; if the order of the English names were to be used, that representative would drop to a much lower place.
45. Mr. YASSEEN said he approved the idea underlying the article; the alphabetical order was in conformity with the nature of the institution of special missions and with the principle of the sovereign equality of States. But he shared the opinion of Mr. de Luna, Mr. Pessou and Mr. Ruda with regard to the use of the English alphabetical order. The practice of the English alphabetical order could perhaps be regarded as a general rule valid for large international conferences, but it was hardly workable in the case of a meeting in which most of the special missions were not English-speaking. The addition of the words "in principle" between "shall" and "follow" would show that the rule allowed for exceptions, and it would be possible to explain its scope in the commentary.
46. Mr. LIANG, Secretary to the Commission, said, in connexion with the point raised by Mr. Rosenne, that, in conferences convened by the United Nations such as the two Vienna Conferences, it was invariably the Holy See which took part. However, in certain specialized agencies such as the Universal Postal Union, because of the function performed by the agency concerned, the participant appeared to be the Vatican City State.
47. Mr. TUNKIN expressed his agreement with the idea contained in article 8. He had, however, some doubts regarding the formulation, even of paragraph 1. In a conference, it was clear that the alphabetical order would be followed, but the draft under discussion did not deal with conferences but with special missions. In the case of two special missions, one headed by the head of the Government of a country and another by the under-secretary for foreign affairs of the other, it would be strange to give precedence to the latter over the former because of the alphabetical order of the names of the countries. However, if an alphabetical order were to be suggested it would not seem correct to impose a particular language; it would be more appropriate to refer to the language used in the diplomatic list of the receiving State.
48. He agreed with Mr. Castrén that the problem dealt with in paragraph 2 was already covered by paragraph 1.
49. Since the Commission appeared to be agreed that paragraphs 3 and 5 should be omitted, he would refrain from commenting thereon.
50. Referring to paragraph 4, he thought it was not altogether correct to say that the order of precedence among the members of the staff of the special mission was determined by the head of the mission. The notification would perhaps be made by the head of mission, but the actual decision as to the precedence among the members of the mission was an internal one for the sending State; it might well be decided by the Government itself.
51. Mr. TABIBI said that he had no personal interest in the matter under discussion because, regardless of the language or the alphabet used, Afghanistan was always first on any list.
52. He thought, however, that the question of precedence was of some importance, because the matter could lead to difficulties. He therefore supported the Special Rapporteur's proposal; whatever one's sentiments about the English language as such, it could not be denied that it was very widely used as a language of communication all over the world, and in particular in Asia and Africa.

53. The CHAIRMAN, speaking as a member of the Commission, said that in the matter of the precedence of special missions an alphabetical order had to be followed in order to forestall the risk of disputes. But the Commission could hardly specify that that alphabetical order must always be in a particular language.

54. Article 8, as proposed by the Special Rapporteur, was sound in the context of a draft concerning special missions at a level lower than the "summit". But it could happen that several special missions, one of them headed by a head of State, came together. Would even in such a case the order of precedence follow the alphabetical order? Or might it not be preferable to make provision for possible exceptions?

55. Mr. BARTOŠ, Special Rapporteur, said that he accepted Mr. Castrén's suggestion concerning the title of article 8.

56. He also accepted the suggestion that the word "several" should be replaced by the words "two or more" before the words "special missions" in paragraph 1.

57. Even where the alphabetical order was followed, disputes concerning the order of precedence were frequent. He had taken the view that the practice of the United Nations constituted an established rule. Obviously the Commission could propose some other rule in its stead. There would be some objection to following the alphabetical order of the protocol list of the receiving State, for the name used in that list was not always that asked for by the State concerned. In practice, therefore, some difficult questions might have to be settled. That was why he hesitated to draft a provision under which the receiving State could replace an objective order of precedence by some other order.

58. After thanking Mr. Tunkin for his pertinent remarks on paragraph 4, he said that he would redraft the provision to say simply that the head of the special mission "shall submit a list giving the order of precedence"; he agreed that the list was usually drawn up by the Ministry of Foreign Affairs. It was always important to pay attention to matters of form, for, although form was not necessarily connected with substance, substance was always to some extent dependent on form.

59. With regard to the question of possible differences in the relative standing of the heads of a number of special missions, to which Mr. Tunkin and the Chairman had referred, he did not think that that was a good reason for abandoning the use of alphabetical order as an objective criterion. In reality the special position of a head of State or of the head of a Government would always receive recognition out of courtesy; but it would be a departure from the rules drawn up by the Congress of Vienna to say that some persons took precedence on grounds other than those of diplomatic rank. In the United Nations, delegations led by a head of State had no special privileges in the matter of precedence. It was a question of choice between the courtesy due to a head of State, a Prime Minister or

a Minister for Foreign Affairs and the rule of the equality of States. In the case covered by article 9, the rule of the Court of St. James's in fact constituted a departure from the Vienna Regulations of 1815. The Commission was therefore free to propose a special rule for special missions. He had no strong views on the point, apart from the wish to safeguard the principle of the equality of States. Furthermore, what rule would be followed in practice when there were two special missions, one led by the Prime Minister of a small State and the other by the Deputy Prime Minister of a great Power?

60. He thought it would be safer to rely on the principle of alphabetical order and that it would be more practical to use the English alphabetical order. The addition of a proviso such as "except as otherwise agreed" would suffice to allow exceptions to the rule.

61. The CHAIRMAN thought that the use of a flexible formula of that kind would help to solve the problem: reference might also be made in the commentary to cases where the mission was led by a head of State. With regard to the question of precedence among the other members of the mission, referred to in paragraph 4, it would probably be preferable to replace the words "shall be determined by the heads of the missions" by the words "shall be determined by the sending State", for the list of the names of the other members of the mission was in most cases drawn up either by a government department or by a permanent delegation.

62. Mr. YASSEEN said that it was necessary to stress the principle of the equality of special missions, which was directly derived from the principle of the sovereign equality of States; he was therefore in favour of following the rule of the alphabetical order. With respect to the question of precedence in cases where there were several special missions, some led by a head of State and others by heads of Government or ministers, he referred to the procedure followed at the Conference of Non-Aligned Countries held at Belgrade in 1961, where even Foreign Ministers leading their delegations had, like the heads of State, taken the chair in rotation. The chairmanship at such gatherings did not depend entirely on precedence but was closely connected with it.

63. The CHAIRMAN suggested that article 8 should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 9 (Precedence among special ceremonial and formal missions)

64. Mr. BARTOŠ, Special Rapporteur, explained how the question of precedence between special missions of a ceremonial and formal nature arose. In principle, *ad hoc* ambassadors extraordinary took precedence over titular ambassadors extraordinary and over ministers plenipotentiary. But it often happened that important persons such as Prime Ministers preferred not to use the style of *ad hoc* ambassador for they regarded

themselves as belonging to a higher category than ambassadors in general. Should they be placed in a special category together with members of ruling families, presidents of parliaments and other notabilities? And should special precedence be accorded to ambassadors who did not have the title of an *ad hoc* ambassador? Cases had occurred where heads of special missions had left a ceremony in protest.

65. Experience had shown, moreover, that it was becoming increasingly difficult to apply the rule followed since the Vienna Regulations of 1815, under which precedence depended on the time when credentials had been presented; nor was it possible to take the time of arrival as a guide.

66. It was necessary to provide rules on the point, for it gave rise to extremely difficult problems, particularly in certain regions. Unless the Commission wished to abandon the attempt, it was essential to go into detail.

67. The CHAIRMAN doubted whether a question of international law was really involved; to a large extent, it might be rather a question of the rules of protocol, which did not need exhaustive codification.

68. Mr. BARTOŠ, Special Rapporteur, suggested the adoption of a brief and flexible expression such as "the precedence among special missions of a ceremonial and formal nature shall be governed by the protocol in force in the host country".

69. The CHAIRMAN suggested that article 9 should be referred to the Drafting Committee with the request that it should be guided by the Special Rapporteur's last proposal.

It was so agreed.

ARTICLE 10 (Commencement of the function of the special mission)

70. Mr. BARTOŠ, Special Rapporteur, drew attention to the difference between the commencement of the function of a special mission and that of the function of a regular permanent mission. In the case of the regular permanent mission, two dates were material — that of the establishment of the mission and that of the entry into function of the head of mission and the diplomatic staff. In the case of special missions, the two events usually coincided, and the mission's functions began when its members entered into contact with the authorities of the receiving State or with the other special missions. For many years it had been the practice for the special mission to be introduced to the authorities of the receiving State by the regular diplomatic mission, but of late such official introductions had no longer been the absolute rule; the prior presentation of credentials was no longer required and notification was regarded as sufficient.

71. Sending States frequently complained of discrimination: they asserted that in the absence of prior agreement, special missions of the same standing or having comparable functions were received in a noti-

ceably different manner by the authorities and organs of the host State. The problem could not be solved on the basis either of the Vienna Regulations or of the rules at present applicable to permanent diplomatic missions. Consequently, in formulating article 10, he had endeavoured to lay down a general rule corresponding with modern practice.

72. Mr. LACHS said that article 10 broadly reflected practice and as usual the Special Rapporteur had prepared a most valuable commentary. There were cogent reasons for not imposing on special mission rigid rules of protocol in regard to official presentation and the presentation of letters of credence or full powers. The relationship between paragraphs 1 and 2 on the one hand and paragraph 3 on the other should be more clearly brought out in the text. The Commission might recommend that States should adopt the rules in the first two, and might draft paragraph 3 in less categorical terms allowing for exceptions by agreement between them.

73. Mr. VERDROSS said that everything depended on paragraph 1. If that paragraph was accepted, then logically paragraph 2, which was a negative formulation of paragraph 1, should form part of the commentary, not of the article.

74. Mr. CASTRÉN said that he, too, had thought that paragraph 2 should be omitted, but perhaps it might be possible to merge the two paragraphs by making a reference at the end of paragraph 1 to the presentation of credentials or full powers.

75. Mr. BARTOŠ, Special Rapporteur, said that paragraph 2 was not merely the inverse of paragraph 1. The most serious difficulties arose when it had to be decided at what moment the special mission had commenced its function. It might be possible to replace those paragraphs by a single paragraph which would begin with the existing wording of paragraph 2 and would then go on to say "it shall commence when the special mission or special missions enter into official contact...".

76. With regard to paragraph 3, he agreed with Mr. Lachs's remarks; the second part of that paragraph should be replaced by the words "in accordance with paragraph 1".

77. Mr. TUNKIN agreed with the foregoing remarks made by the Special Rapporteur. He questioned the need for paragraph 3, since rules for the reception of special missions were a separate matter and had nothing to do with the commencement of their functions.

78. Mr. AMADO endorsed Mr. Tunkin's comments. Furthermore, in paragraph 2 the phrase "contingent upon official presentation by the regular diplomatic mission" was somewhat ambiguous. Obviously, the intention was to refer to presentation by the regular diplomatic mission to the Government of the receiving State, but the passage was far from clear. Perhaps the words *subordonné à* in the French text could be replaced by the words *conditionné par*.

79. Mr. PESSOU thought that paragraph 2 should be maintained, perhaps by amalgamating the first two paragraphs in the following form: "The special mission shall commence when it has entered into official contact with the organs of the host State through the presentation of letters of credence or full powers".

80. Mr. BRIGGS agreed that paragraphs 1 and 2 should be merged and shared Mr. Tunkin's view concerning paragraph 3. The Vienna Convention of 1961 dealt in two separate articles with the taking up of diplomatic functions and the application of uniform rules for the reception of diplomatic missions.

81. Mr. BARTOS, Special Rapporteur, accepted Mr. Amado's suggestion for paragraph 2.

82. Paragraph 3 could be approached from two different points of view: either it dealt with reception in general, in which case it might form the subject of a separate article; or it was concerned with the establishment of uniform rules applicable to the commencement of the function of all special missions. Perhaps the paragraph might be redrafted to read: "The host State shall prescribe uniform rules for the reception and functioning of all special missions of the same kind". If it should be decided to delete the paragraph, the idea of non-discrimination should not be dropped but should form the subject of an article to be added at the end of chapter I.

83. The CHAIRMAN suggested that article 10 should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 11 (End of the function of the special mission)

84. Mr. BARTOS, Special Rapporteur, said that the question of the end of the function of a special mission should be regarded in a different way from that of the end of a permanent diplomatic mission; it was impossible to say that the latter had concluded or accomplished its assignment at the time of its termination.

85. Sub-paragraph (a) applied equally to all diplomatic missions, for there might be diplomatic missions of limited duration. An agreement between the parties to prolong the duration of the mission would not necessarily take the same form as the agreement under which the mission had been set up; it might be in simplified form.

86. Sub-paragraph (c) dealt with the suspension of the work of a special mission. Did a mission continue to exist when such a formal suspension occurred, or did suspension necessarily mean that the mission had terminated? The question was answered in two different ways in practice. The host State always took the view that the mission had ceased to exist, whereas the sending State took the opposite view and maintained that, although no longer performing its work, the mission retained its privileges and immunities.

87. In making the list which appeared in article 11, he had based himself on Satow and on practice. There might be cases where a mission's functions ceased for

other reasons — hence his use of the words *inter alia* — but they arose either when a mission ceased to exist or when it had placed itself beyond the control of the State which had sent it.

88. The CHAIRMAN, speaking as a member of the Commission, said that since the list drawn up by the Special Rapporteur was virtually exhaustive, it would be better to substitute "in particular" for "*inter alia*", which implied that there were many other reasons for the end of the function.

89. With regard to sub-paragraph (a), he thought some reference should be made to cases where the duration of the mission had been fixed in advance; he suggested that the beginning of the sub-paragraph might be redrafted to read "Upon the expiry of the agreed term of duration...".

90. Apart from sub-paragraph (c), all the sub-paragraphs from (a) to (g) dealt with the end of the function. It was in sub-paragraph (c) that the real problem was referred to, that of suspension. If a mission arrived in the receiving State and it was then decided to suspend its work for a few weeks, in the course of which it would make some preliminary studies, it could not be said to have ceased to exist during that period. Accordingly, sub-paragraph (c) should preferably form a separate and more cautiously-worded paragraph.

91. Mr. BARTOS, Special Rapporteur, said that both views were held: some considered that in such circumstances the mission ceased to exist and that its work, if resumed, would have to be entrusted to another mission sent for that purpose, while others took the view that the mission remained in existence and that its work had merely been interrupted.

92. Mr. RUDA said that the text of article 11 could be simplified by dropping sub-paragraph (d) and (e) both of which were covered by sub-paragraph (b). He suggested that some other expression than "*inter alia*" could be used in the opening sentence.

93. Mr. BRIGGS queried whether the interruption of the negotiations should lead to the end of the function of a special mission. Perhaps it would be preferable to delete sub-paragraph (c) and deal with the matter elsewhere.

94. As far as the English text was concerned the expression "*inter alia*" was more precise than "in particular" and would be rendered by the word *notamment* in French.

95. Mr. LACHS said that there were three reasons why the functions of a special mission might come to an end; the temporal covered in sub-paragraph (a), the substantive covered in sub-paragraph (b) of which sub-paragraphs (d) and (e) were only illustrations that could with advantage be transferred to the commentary, and the subjective, which depended upon the intention of the parties and which was covered in sub-paragraphs (f) and (g). In regard to the last he said there might be cases where a sending State recalled a special mission while at the same time wishing to give the impression that the negotiations would continue later.

96. He agreed with the Chairman's comments on sub-paragraph (c) and would go further in suggesting that it should be omitted altogether, as it did not come within the scope of any of the three reasons he had enumerated. The point could be covered in the commentary.

97. Mr. AMADO said that he could not agree that there should be a reference to the interruption of a mission in an article entitled "End of the function of the special mission". "Interruption" and "suspension" were not necessarily synonymous with "end". The special mission might merely be pausing for reflection. It would therefore be necessary either to adopt Mr. Lachs's suggestion or to draft a separate article concerning the interruption or suspension of a special mission's functions.

98. The CHAIRMAN, speaking as a member of the Commission, said that cases of suspension and interruption could hardly be regulated otherwise than by a provision stating that the end of the mission's function took place by agreement between the States concerned. There might be cases where both States intended that the suspension of the mission's work should entail the end of the mission, but there might be others where both States agreed that the mission should remain where it was in order to be in a position to resume its work.

99. Mr. YASSEEN said that, in his view, there were three decisive factors — the duration of the mission, its assignment and the will of the parties. The first factor was referred to in sub-paragraph (a) and the second in sub-paragraph (b); sub-paragraphs (d) and (e) were therefore unnecessary.

100. The will of the parties — the third factor — could be referred to in a single sub-paragraph, which would naturally give preference to the host State, because, being in a privileged position by reason of its territorial jurisdiction, it was entitled to terminate all special missions. The sub-paragraph might say that a special mission came to an end upon notification by the host State that it regarded the mission as having terminated, or by virtue of an expression of will by either State.

101. Mr. CASTRÉN supported the speakers who had suggested the deletion of sub-paragraphs (b), (d) and (e), for the reasons given by them.

102. Mr. ROSENNE said that he was in general agreement with the article and could support the suggestions for its simplification. On what was perhaps a drafting point he asked whether it was the function or the special mission itself that came to an end.

103. Mr. BARTOŠ, Special Rapporteur, said that he was prepared to incorporate the substance of sub-paragraphs (d) and (e) in sub-paragraph (b).

104. With regard to sub-paragraph (c), he illustrated the case by referring to what happened when there was a change of Government. If the new Government of the host State had not yet decided whether the mission should continue or be interrupted and if the Government of the sending State was equally doubtful,

was the mission to be regarded as still in existence, even during that period of indecision? It might be preferable to draft a separate paragraph stating that the functions of the special mission could be interrupted or suspended by the will of the two parties or of either of them; such a provision would show that the situation he had described could occur and should not be confused with the cessation of a special mission's functions.

105. Referring to Mr. Yasseen's suggestion, he said that notification of the recall of a mission and a notification by the receiving State that it regarded the mission as having terminated were two different things both in politics and in law; they represented two different kinds of diplomatic *démarche* one of which was more serious than the other. The Vienna Convention on Diplomatic Relations provided for notification of the termination of the functions of a diplomatic agent.

106. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with the Special Rapporteur's view that a notification terminating a special mission from a foreign country was an extremely serious step.

107. Mr. de LUNA said that he fully shared the Special Rapporteur's views.

108. The CHAIRMAN suggested that article 11 should be referred to the Drafting Committee.

It was so agreed.

Appointment of a Member of the Drafting Committee

Mr. Obed Pessou was appointed a member of the Drafting Committee in replacement of Mr. Reuter, who had had to leave before the end of the session.

The meeting rose at 1 p.m.

763rd MEETING

Friday, 10 July 1964, at 10 a.m.

Chairman: Mr. Herbert W. BRIGGS

Later: Mr. Roberto AGO

Special Missions

(A/CN.4/166)

(continued)

[Item 4 of the agenda]

DRAFT ARTICLES ON SPECIAL MISSIONS

ARTICLE 12 (Seat of the special mission)

1. The CHAIRMAN invited the Commission to take up article 12 in the Special Rapporteur's report (A/CN.4/166).

2. Mr. BARTOS, Special Rapporteur, said that he had changed paragraph 3 of article 12 to read :

"... it may have its principal seat either at the place where the Ministry of Foreign Affairs of the receiving State is situated or at a place of its own choice".

3. He said that, so far as the seat was concerned, special missions differed from regular permanent missions in a number of respects. Permanent missions, being accredited to the Government of the host country, were located in the capital or at the seat of Government; any exceptions to that arrangement were the subject of mutual agreement between the sending State and the host State, as was laid down in the Vienna Convention on Diplomatic Relations. By reason of the nature of their work, special missions were, however, sometimes established at a place other than the seat of Government. Frequently, their work necessitated constant movement from place to place of the detachment of travelling groups. Paragraph 3 explained where the main seat of the mission was to be located in such circumstances.

4. He offered alternative wording in paragraph 2, but the express or tacit consent of the host State was required in any case.

5. The question whether *ad hoc* missions were free to choose the place where they would establish their seat and whether they had the right to set up their offices wherever they wished in the receiving State should probably be answered in the negative. Some States were not prepared to permit it for practical reasons, and other States did not wish special missions to establish themselves in certain parts of their territory. Besides, the idea that a mission should have a fixed place of residence had been accepted by the United Nations and was referred to in that Organization's Headquarters Agreement.¹ It was a separate matter from that of the freedom of movement of members of the mission in the receiving State, which formed part of their privileges and immunities.

6. It was desirable that missions should have a residence where they could receive communications from the receiving State. For a long time it had been held that, if the special mission had no headquarters of its own, its residence should be deemed to be at the embassy of the sending State; but the modern view was that the mission should have its own headquarters, partly to avoid confusion between its business and that of the permanent mission and partly for reasons of a predominantly political nature.

7. Mr. CASTRÉN proposed that, in order to make paragraph 1 less rigid, the words "for the duration of

its function" — which seemed superfluous — should be replaced by some such words as "except as otherwise agreed"; secondly, the article could be simplified if the substance of paragraphs 2 and 3 were incorporated in paragraph 1, so that the article would read :

"Except as otherwise agreed, a special mission shall either have its seat at the place designated by the receiving State or shall be ambulatory, according to the nature of its assignment. Members of the special mission may reside elsewhere than at its seat, if the receiving State does not object."

8. Mr. TABIBI said that after studying the commentary and hearing the Special Rapporteur's introduction, he had come to the conclusion that article 12 should be based on the principle of mutual consent, as was article 12 in the Vienna Convention on Diplomatic Relations, and that it should be framed in flexible terms because practice varied and many different kinds of arrangement were possible. Special consideration should also be given to those cases where at certain seasons of the year the seat of Government was transferred to another place while Government offices might still remain in the capital.

9. Mr. BARTOS, Special Rapporteur, said that he had followed article 12 of the Vienna Convention on Diplomatic Relations, which made no reference to mutual consent.

10. Mr. de LUNA referred to article 9, considered at the previous meeting, and said that he would prefer a more detailed rule on which chanceries could rely without hesitation to the shortened formula suggested by the Special Rapporteur.

11. He, too, thought that article 12 should be simplified, though the Special Rapporteur's main ideas should be retained. He did not, however, support the new second sentence proposed by Mr. Castrén. Either the article dealt with the freedom of movement of the members of the special mission in the territory of the receiving State, in which case the rules concerning privileges and immunities applied; or else it was concerned with the accommodation of members of the mission, which was dealt with in article 17.

12. The CHAIRMAN, speaking as a member of the Commission, considered that the text should be simplified, although the substance was acceptable. Also the contradiction between paragraphs 1 and 2 should be removed, as the content of the latter could not apply to ambulatory special missions.

13. Mr. TUNKIN said that he did not entirely agree with the explanations given by the Special Rapporteur.

14. His view was that there was always an agreement between the two States and the existence of such an agreement was implicit in article 12 of the Vienna Convention. The sending State announced that it wished to open an office of the mission in a place in the territory of the receiving State, and that State either gave or withheld its consent. What surprised him in paragraph 1

¹ Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed at Lake Success on 26 June 1947, United Nations Treaty Series, Vol. II; also reproduced in United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations* (United Nations publication, Sales No. 60.V.2).

of the Special Rapporteur's draft was the word "designated" which seemed to him to lower the dignity of the sending State and to infringe the principle of the sovereign equality of States. He thought that the article should contain a reference to an agreement of some kind.

15. Mr. BARTOS, Special Rapporteur, said that the provision should not be understood as obliging the mission to establish itself at a particular place, but rather as making it possible to choose a place from which the special mission could carry on its activities. Embassies and legations had to be at the seat of Government, but offices could be opened elsewhere if the sending State so decided and the receiving State agreed. That was why he proposed the rule that the special mission's principal seat should be at the place "designated" by the receiving State. There were practical and political reasons for such a rule; in the first place, the receiving State should know to what address it could send communications for the mission, and, secondly, that State was responsible for facilitating accommodation and supplies for the special mission and for its protection. The phrase could perhaps be altered to read "... the place proposed by the receiving State and agreed to by the sending State", but the sending State could not be left free to make its own choice.

16. He had noticed that another tendency was to concentrate special missions at the seat of Government. There were advantages in such an arrangement, since it facilitated communications between the mission and the authorities; but there were also disadvantages, since it complicated travel in the territory of the receiving State. In most cases, the receiving State either set up a special department locally to keep in touch with the mission or it appointed a plenipotentiary or a liaison officer.

17. In reply to Mr. de Luna, he said that it might be possible to remove paragraph 2 from its present position and to insert it in article 17 or in article 20. The essential point was that the special mission should be able to carry on its work: if its members were scattered over the territory of the host State, it would be very difficult to reassemble them. Accordingly, the Commission would have to decide whether the question should be considered from the point of view of the independent functioning of the mission, in which case it should be dealt with in article 12, or from the point of view of its freedom of movement, which was a matter of privileges and immunities.

18. Referring to Mr. Tabibi's remarks, he said that the question of summer residences had been discussed at the Vienna Conference of 1961 and it had been made clear that it was the members of the staff that moved, not the offices. The embassies at New Delhi, for instance, were not closed during the summer, and communications were addressed to them in that city.

19. Mr. YASSEEN said that, in general, the question dealt with in article 12 did not raise many problems; nevertheless, it had to be considered and rules had to

be made to deal with it, for border line cases might occur and give rise to difficulties. The issue concerned the mission's office, since the place where members of the mission resided should be dealt with in the articles on privileges and immunities; and the question of the place where the mission's offices were to be established could be decided only by mutual consent. The host State could not oblige the sending State to establish its mission in a particular place. Basically, therefore there had to be tacit or express agreement. Which State would have the last word in case of dispute? Clearly, it was the host State, for it was sovereign in its own territory. Even so, it was undesirable that the articles should be too categorical; many difficulties would be overcome if "designated" were replaced by "proposed". In any case, the sending State was free to accept or not to accept the proposal, since it was open to it to decide not to send the special mission.

20. Mr. TABIBI said that, notwithstanding the view put forward by the Special Rapporteur, he still maintained that article 12 in the Vienna Convention on Diplomatic Relations implied that there had to be mutual consent between the two States, and all the difficulties that might arise over the seat of a special mission would be resolved if that principle were incorporated in the article. He did not share Mr. Yasseen's view that the final word lay with the receiving State, and considered that both sides had an equal say. He agreed with Mr. de Luna that the accommodation aspect should be dealt with under the section concerned with facilities, privileges and immunities.

21. The CHAIRMAN observed that the only issue that needed decision was whether or not the principle of mutual consent should be set forth in the article.

22. Mr. ROSENNE said that once agreement had been reached between two States to send and receive a special mission it was essential that the mission be allowed to establish its office where it could function effectively; at the same time, the last word must remain with the host State. In fact what was needed was a rule of the kind included in article 12, subparagraph (e), of the Agreement between Israel and the Federal Republic of Germany, of 10 September 1952, which read:

"The Israel Mission shall be entitled to establish offices in the Federal Republic of Germany as may appear necessary for the effective performance of its activities, provided, however, that the places where such offices shall be located shall be agreed between the Israel Mission and the appropriate authorities of the Government of the Federal Republic of Germany."²

23. Mr. YASSEEN said that though a firm believer in the equality of States, he still thought that the host State should have the last word. The host State had many obligations, especially of a political nature, and was internationally responsible for the safety of the

² United Nations *Treaty Series*, Vol. 162, 1953, page 224.

mission. A further reason why the receiving State should have the final say was that it was better acquainted with the territory and with the circumstances which had led to the arrival and presence of the special mission. Such a rule would not in any way infringe the sovereignty of the sending State, for it was free to decide not to send the mission.

24. Mr. PESSOU agreed with Mr. Yasseen's remarks. It was hardly necessary to press the matter further, for the essential criterion was that of international courtesy. If a State sent a special mission, it did so in a particular kind of atmosphere. The receiving State was, of course, responsible for the safety of the mission, but no case had ever arisen in which the special mission had refused to establish itself at the place of residence allotted to it, which was usually the seat of Government.

25. Mr. BARTOS, Special Rapporteur, said that perhaps the article could be redrafted in more flexible language. It would first lay down the rule of mutual agreement and then would go on to say that, in the absence of agreement, it was for the host State (which had not yet become the receiving State) to propose the place where the mission would have its seat.

26. The question of the headquarters of itinerant missions was a particularly difficult one. Unless some other mutual agreement had been made, its headquarters would be either at the place where the Ministry of Foreign Affairs had its seat or in some other place to which the receiving State did not object.

27. In reply to Mr. Pessou, he said that there had been cases in which hostilities had almost broken out because the sending State has considered itself slighted when the receiving State had not allowed a special mission to establish itself in a particular place. There had also been cases where, in connexion with a territorial dispute, the host State had regarded it as provocative behaviour on the part of the sending State to insist that the special mission establish itself in the disputed territory. The question of prohibited and security zones also had to be borne in mind.

28. With reference to Mr. Tabibi's remarks, he said that the United States did not have two embassies in Pakistan, but two embassy buildings.

29. Mr. ROSENNE said that presumably the actual place in which an ambulatory mission found itself would come within the general rule laid down in article 12. It would be difficult to assume, for example, that a frontier demarcation mission had a theoretical seat in a Government office situated in the capital of the country concerned.

30. The CHAIRMAN suggested that article 12 be referred to the Drafting Committee with the request that the article should be redrafted in more concise and more flexible language.

It was so agreed.

ARTICLE 13 (Nationality of the head and members of the special mission)

31. Mr. BARTOS, Special Rapporteur, said that article 13 was based on article 8 of the Vienna Con-

vention on Diplomatic Relations, 1961. The reference to stateless persons in paragraph 3 was taken from an amendment that had been submitted to the Conference on Consular Relations of 1963, but had not been adopted. The question was whether the head of a special mission, its members and staff should in all cases or should in principle possess the nationality of the sending State. In that respect, paragraph 1 of his article 13 was based on the terms of article 8 of the 1961 Vienna Convention.

32. In the case of paragraph 2 he had followed article 8, paragraph 2, of the Vienna Convention, subject to the omission of the words "which may be withdrawn at any time".

33. As explained in paragraph (5) of his commentary, he had intentionally refrained from drafting a provision concerning the double nationality of the chief, members of staff of a special mission. Whereas sending States might like to appoint to special missions persons who, though nationals of the sending State, had been born in the receiving State and still possessed that State's nationality, the authorities of the host State were generally unwilling to accept persons with double nationality. The problem did not arise in countries which recognized dual nationality, but other States were very sensitive on that point.

34. Mr. CASTRÉN said that paragraph 2, and especially paragraph 3, of article 13 diverged a great deal from the corresponding provisions of the Vienna Convention on Diplomatic Relations (article 8) and the Vienna Convention on Consular Relations (article 22). The Special Rapporteur, though aware of the differences, had not explained clearly why he had chosen a different system. In his own opinion, the changes were not justified, and he accordingly proposed that those paragraphs should be redrafted more nearly in line with the corresponding rules in the Vienna Conventions.

35. Mr. ROSENNE associated himself with the views expressed by Mr. Castrén. He was uncertain whether there was any need for paragraph 3, which added nothing to the rules laid down earlier in the draft concerning the composition of special missions. Moreover, it diverged considerably from the relevant provisions of the two Vienna Conventions, and he was particularly perturbed at the introduction into diplomatic law at such a juncture of the reference to stateless persons in the manner proposed by the Special Rapporteur.

36. Mr. VERDROSS said that paragraph 3 diverged a great deal from the formula accepted at Vienna. He did not think it would be justifiable, in the case of special missions, to draft provisions going further than the provisions of the Vienna Conventions, the more so since it was stated in another article that the receiving State could always declare a person not acceptable even before he arrived.

37. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Castrén and considered

that article 13 should be brought more closely into line with article 8 of the Vienna Convention on Diplomatic Relations.

Mr. Ago resumed the Chair.

38. Mr. YASSEEN, referring to the proviso in article 8, paragraph 2, of the Convention on Diplomatic Relations, which the Special Rapporteur had not reproduced, said that one possible reason for the omission might have been the temporary nature of special missions, though that did not prevent the receiving State from declaring some particular person *persona non grata* at any time.

39. On the other hand, he did not understand why the Special Rapporteur had not followed, in paragraph 3 of his own draft, paragraph 3 of article 8 of the Convention on Diplomatic Relations, which contained a reservation concerning nationals of a third State who were not also nationals of the sending State. The inference was that the Special Rapporteur had wished to leave the receiving State more freedom to decline to accept certain persons in the case of special missions than in that of permanent diplomatic missions, whereas logic required the converse.

40. Mr. BARTOŚ, Special Rapporteur, observed that his draft of paragraph 2 used the words "with the prior consent", and the expression used in the Vienna Convention was "with the consent"; consequently there was no difference in substance.

41. With regard to the omission of the words "which may be withdrawn at any time", he said that in the case of a special mission, which might perhaps last only a few days, it would be hard and unreasonable if the receiving State gave the consent and then withdrew it.

42. As far as paragraph 3 was concerned, he thought his draft was less strict than the Vienna Convention. Whereas article 8, paragraph 3, of the Convention contained the words "the receiving State may reserve the same right...", his text used the words "a State may refuse to recognize...", which meant that prior consent did not need to be obtained. The case of stateless persons had to be covered, for it often gave rise to difficulties; such persons would have to be classified with nationals of third States, for otherwise they would be accorded a privileged status.

43. Mr. VERDROSS said that he had not been convinced by the Special Rapporteur's interpretation of paragraph 3. He still thought that the case was already covered by the general rule under which a person could be declared not acceptable or *non grata* and that the paragraph was not necessary.

44. Mr. CASTRÉN thought that the system adopted at Vienna was less strict than the one that the Special Rapporteur had stated in paragraph 3. He personally preferred the former.

45. Mr. YASSEEN asked the Special Rapporteur whether, in his view, if a member of a special mission had dual nationality, the nationality of the sending State and that of a third State, the receiving State could refuse to recognize him as a member of the special mission. There might be some doubt about that under article 13, paragraph 3, of the draft, whereas under article 8, paragraph 3 of the Convention on Diplomatic Relations, a State could not, on the sole ground of his nationality, decline to accept such a person as a member of the permanent mission.

46. Mr. BARTOŚ, Special Rapporteur, replied in the affirmative. In the case described by Mr. Yasseen, the person was regarded, under the characterization theory which was still in force in nationality matters, as a national of the country to which he belonged by reason of the territorial conception of the receiving State. As was stated in paragraph (5) of the commentary, the receiving State had the right to decide what nationality was to be attributed to such persons.

47. Mr. YASSEEN said that the inference then was that paragraph 3 of draft article 13 was stricter than paragraph 3 of article 8 of the Vienna Convention.

48. Mr. BARTOŚ, Special Rapporteur, said that that was so with regard to stateless persons, who posed more difficulties than was justified by the services they rendered through their knowledge of languages and conditions in the receiving State.

49. Mr. CASTRÉN said that when a provision of an international convention laid down an express rule, no theory could change the substance of such a rule.

50. The CHAIRMAN said that the Commission should try not to stray from the subject. After all, there was an article enabling the receiving State to decline to accept any person on the ground that he was not acceptable or *persona non grata*.

51. He suggested that article 13 be referred to the Drafting Committee, which would examine it in connexion with article 8 of the Convention on Diplomatic Relations.

It was so agreed.

ARTICLE 14 (Intercourse and activities of special missions in the territory of a third State)

52. Mr. BARTOŚ, Special Rapporteur, said that article 14 dealt with the case, peculiar to special missions, where they met and carried on their activities in the territory of a third State. He had taken the view that the prior consent of the third State would be required for any such meeting and that such consent should be requested through the diplomatic channel.

53. The second question was whether the State giving hospitality to special missions could lay down certain

conditions for their activities. In his opinion sending States were sovereign, but they had a duty to respect the sovereignty of the State in whose territory the missions met.

54. The third question was whether the host State which had given its consent could subsequently withdraw it and so terminate the activities of the special missions which had come to its territory. He had not dealt with the very different case in which the third State acted as mediator or lent its good offices. Nor had he dealt with the case in which several regular missions accredited to the same State entered into contact to perform some special assignment, in which case they would be acting as true special missions. Those in favour of the principle of revocability set out in paragraph 3 would consider *a fortiori* that the third State could require regular missions to cease acting in that way.

55. Mr. ROSENNE said that article 14 was a valuable one and it was important to regularize the status of special missions which carried out their functions in a third State. Indeed, he would have thought that the content of paragraph 1 should be transferred to the beginning of the draft or at least that some adequate cross-reference should be made to article 14 earlier in the draft.

56. The general rules on the composition and reception of special missions would apply to the category under discussion, at least in principle. The detailed provision contained in the second sentence of paragraph 1 could be omitted, particularly as it might complicate matters where a joint request was made by two States to the third State.

57. The rule stated in paragraph 2 was correct, but he thought that the word "strictly" should be omitted, such a qualification being unnecessary in the context.

58. It seemed to him that paragraph 3 went too far in allowing the third State to withdraw its hospitality at any time and without any limitation.

59. Mr. de LUNA said that he approved of the three principles in article 14: the requirement of the third State's consent, that State's power to impose conditions and the revocability of the consent. He supported Mr. Rosenne's suggestion, however, that the requirement to request consent through the diplomatic channel be dropped. He was not opposed to that provision, but he did not think it was wholly necessary.

60. Mr. LACHS said that the Special Rapporteur had been wise in proposing article 14, which dealt with a matter of growing importance. Referring to the second sentence in paragraph 1, he said that there could be other ways than that referred to for obtaining the consent of the receiving State, and he would therefore favour a more flexible formula.

61. The words "but does not itself take any part in such activities" should be omitted from paragraph 2 because such a statement was either self-evident or might be inconsistent with practice if the third State

were asked to act in some capacity, for example if its good offices were required or if it was asked to act as conciliator.

62. He shared the doubts expressed by Mr. Rosenne about paragraph 3, for although the parties were in fact at the mercy of the host State the possibility of its withdrawing hospitality should not be sanctioned *de jure*. At the same time, however, the sovereign rights of that State should not be infringed: some more cautious provision was needed.

63. Mr. TUNKIN said that the Special Rapporteur had singled out the most important aspects of a very complex question and had drafted a text which was on the whole satisfactory.

64. The first sentence in paragraph 1 was correct; there might, however, be cases in which to require prior consent would be hard or even impossible. For example, a Foreign Minister returning from an official journey might happen to be in Switzerland and might wish to discuss certain matters with the permanent diplomatic missions of certain States there; that would be in some sort a special mission. The rule stated in paragraph 1 was probably not flexible enough to cover such cases, which were very frequent in practice.

65. The substance of paragraph 2 was acceptable, but the terms in which it was couched were rather too strong.

66. The rule stated in paragraph 3 gave too much power to the State in whose territory special missions met. The situation was rather different from that involving the activities of permanent diplomatic missions, in which the State of residence could declare a member of such a mission *persona non grata*. Several heads of State, for instance, might have met on Swiss territory, naturally with Switzerland's prior consent. But could the Swiss Government put an end to such a meeting without even giving a reason? If the Commission considered that the host State should have the right to withdraw its hospitality, it should at least draft a provision requiring that good reason be given for the exercise of that right.

67. Article 14 should be drafted in simpler and more realistic terms.

68. The CHAIRMAN, speaking as a member of the Commission, suggested that the whole article should be simplified by omitting whatever provision was too rigid. Paragraph 1 might consist of the first sentence only, with the word "prior" deleted. In that form the sentence would indicate clearly enough that the consent would normally continue for the duration of the mission, but might in certain cases be withdrawn. As a consequence, paragraph 3 might be deleted.

69. Paragraph 2 was not entirely essential. If the Commission wished to keep the idea that the third State could impose conditions it would perhaps be enough to add a phrase to that effect to paragraph 1. But even that was not really necessary since, if the third State's consent was required, obviously it could attach certain conditions to it.

70. From the point of view of drafting it might be useful to make clear what was meant by "third State", for the purposes of the article; the wording of paragraph 2 might be employed to explain that the third State in that case was a State which did not itself take any part in the activities of special missions meeting in its territory.

71. Mr. BARTOŠ, Special Rapporteur, referring to Mr. Tunkin's remarks, said that the article was not intended to deal with contact by an official personality when visiting or passing through a country; that point might be explained in the commentary.

72. He could accept the Chairman's suggestion that the word "prior" be deleted in paragraph 1.

73. The phrase "but does not itself take any part in such activities" might be omitted from paragraph 2 if the commentary explained that the third State in question was not a State acting as an intermediary or lending its good offices. He agreed with Mr. Rosenne that the word "strictly" was not essential in paragraph 2.

74. On the question whether, in the circumstances contemplated by article 14, the host State could impose conditions he did not think that the right to do so was implied in the concept of consent.

75. The principle of revocability set out in paragraph 3 was something very different from the power to declare a person *non grata*; no fault might be imputable to any person, and yet the mission as such might be regarded as undesirable because its activities harmed or might jeopardize the interests of the host State, especially in case of armed conflict or international tension.

76. With regard to the case mentioned by Mr. Tunkin of a conference held on the territory of a third State, he said he had not in his draft dealt with matters pertaining to conferences. If he had done so, he would have stipulated that in such cases the host State could not withdraw its consent once it had been given.

77. The Commission should take a decision on the principle embodied in paragraph 3; the choice lay between two different concepts, one placing the accent on the sovereignty of the host State, the other on the sovereignty of the negotiating States.

78. Mr. BRIGGS noted with satisfaction that the Special Rapporteur had agreed to the deletion from paragraph 1 of the word "prior" and also did not oppose the deletion of paragraph 3. In that manner, the provision would simply state the requirement of consent, with the implication that it would be a continuing consent unless withdrawn.

79. He had no objection to the use of the term "third State".

80. The CHAIRMAN said that there would be no objection to the use of that term provided that its meaning was clear.

81. Mr. CASTRÉN said that he supported the Chairman's suggestion; the essence lay in the first sentence.

If it was understood that the third State could impose certain conditions when giving its consent, paragraph 2 was not necessary. Paragraph 3 might be dropped if the word "prior" was deleted in paragraph 1. If the intention was to indicate that the third State might withdraw its consent, a provision to that effect might be — but did not need to be — added in paragraph 1.

82. The CHAIRMAN noted that the members agreed that the word "prior" should be deleted in paragraph 1 and that paragraph 3 should be dropped, on the understanding that the requisite explanations would be given in the commentary. He suggested that article 14 be referred to the Drafting Committee.

It was so agreed.

ARTICLE 15 (Right of special missions to use the flag and armorial bearings of the sending State).

83. Mr. BARTOŠ, Special Rapporteur, explained that paragraph 1 of his draft article 15 reproduced the rule contained in article 20 of the Vienna Convention on Diplomatic Relations.

84. However, experience had shown that that rule, as applied to special missions, should be broader. For that reason, in paragraph 2, he proposed that the national emblem might be used on all the buildings in which the different sections of the mission were accommodated and on all the vehicles which the mission used. He believed that the Commission should propose a rule to that effect.

85. In paragraph 3, he had gone still further. He had observed that often the host State considered that the presence of the national emblem of the sending State made it easier to protect the special mission and to avoid errors due to ignorance. The rule proposed in paragraph 3 was especially to be recommended for frontier areas.

86. The CHAIRMAN said that, in preparing the draft convention on diplomatic relations, the Commission had considered that the national flag could be flown not only at the seat of the embassy but also at all other premises used by embassy services. For that reason, the expression used in article 20 of the Vienna Convention of 1961 "the premises of the mission", was broader than that proposed by the Special Rapporteur in article 15, paragraph 1: "the building in which its seat is situated". He suggested that paragraph 1 should use the expression "the premises of the mission". He also suggested that in paragraph 1 the words "the means of transport used by the head of the mission" should be replaced by the words "the means of transport of the mission". If those two changes were made in paragraph 1, paragraph 2 could be deleted.

87. Mr. BARTOŠ, Special Rapporteur, accepted the suggestion, provided that the words "the premises of the mission and its sections" were used, since it was important to emphasize that the mission might comprise a number of sections or teams.

88. Mr. AMADO said he had some doubt regarding the expression "the means of transport"; the rule was perfectly applicable in the case of automobiles, but how would it be applied if the members of the special mission travelled by rail?
89. Mr. ROSENNE noted that paragraph 3 appeared to represent an innovation in so far as it would permit the receiving State actually to require that the national flag of the sending State be flown on the means of transport in question. The explanations and examples given by the Special Rapporteur in connexion with that paragraph prompted him to ask whether the responsibility of the receiving State would be affected in any way by the fact that it made use of its right under paragraph 3 or had failed to do so. In particular, if the receiving State were to abstain from requiring the national flag of the sending State to be flown, would the responsibility of the receiving State be in any way aggravated in case of mishap?
90. Mr. BARTOŠ, Special Rapporteur, replying to Mr. Amado's question, explained that he had had in mind all the means of transport used exclusively by the mission, but not public means of transport. Accordingly, the national emblem would be displayed on a special train but not on an ordinary train used by a member of the mission; the same would apply to a boat or any other means of transport. It should be specified, however, that the means of transport in question were not as a rule owned by the special mission; on the contrary, the most common practice was for the host State to undertake to place means of transport at the disposal of the mission. The situation was therefore quite different from that of a permanent mission, which had its own vehicles.
91. Replying to Mr. Rosenne's question he said that in his view the responsibility of the sending State would be engaged if it refused to comply with the request of the receiving State but that the responsibility of the receiving State could not be aggravated by its failure to make such a request.
92. Mr. de LUNA considered that paragraph 1 should be modelled closely on article 20 of the Vienna Convention of 1961. He even doubted whether the Commission should make any reference to the different sections of the special mission. In any case, there was no reason to grant to special missions any greater latitude than was granted to permanent missions in respect of the use of the national flag. Consequently paragraph 2 could be deleted.
93. Paragraph 3 expressed a logical thought, and he believed that the Commission could go even further. For the safety of the special mission the host State should be able to require that the national emblem be displayed not only on the mission's vehicles but also on all the premises occupied by the mission.
94. Mr. CASTRÉN approved the substance of article 15. With regard to its wording, it would be preferable to use the term "receiving State" throughout, as had been done in the English text, rather than "host State" ("*Etat hôte*") in paragraph 2 and "*Etat territorial*" in paragraph 3.
95. Mr. LACHS said that he agreed in principle with the ideas contained in article 15 but, like Mr. de Luna, he thought it would be desirable to follow the pattern of article 20 of the 1961 Vienna Convention on Diplomatic Relations.
96. In connexion with the means of transport and the point raised by Mr. Amado, he recalled a case where a diplomatic agent had used a "CD" plate on his bicycle and had been informed by the authorities of the receiving State that they objected to such a plate being used on that type of vehicle.
97. Turning to the more serious problem of paragraph 3, he said that it had raised doubts in his mind. It would in any case be necessary to explain in the commentary the reasons on which its provision was based.
98. Mr. AMADO hoped that article 15 would be modelled closely on article 20 of the Vienna Convention of 1961 and would not further extend the use of the national flag. Local usage could always be followed. He added that he would accept the majority view.
99. Mr. RUDA suggested that the provisions in article 15 should follow rather than precede those in article 16 (General facilities). In the Vienna Convention on Consular Relations, 1963, the article on facilities for the works of the consular post (article 28) preceded the article on the use of the national flag and coat-of-arms (article 29). Those two articles were the first articles of chapter II dealing with "Facilities, privileges and immunities relating to consular posts, career consular officers and other members of a consular post". Chapter I of the same Convention dealt with "Consular relations in general". Perhaps the Commission might wish to adopt for special missions a similar division into chapters.
100. He agreed with Mr. de Luna and the Chairman that the terminology of article 20 of the Vienna Convention of 1961 should be employed in the provision under discussion, which should, however, cover all the vehicles used by the mission and not only the means of transport of the head of the mission.
101. He had had considerable doubts with regard to paragraph 3 but had arrived at the conclusion that it should be deleted. There was no corresponding provision in the 1961 Vienna Convention and he saw no valid reason to establish for special missions a rule which did not exist in respect of permanent missions.
102. The CHAIRMAN said that the members of the Commission appeared to agree that paragraphs 1 and 2 should be combined in a text which would be closer to article 20 of the Vienna Convention.
103. Speaking as a member of the Commission, he agreed with the Special Rapporteur that it would be a mistake to limit the use of the flag strictly to the means of transport of the head of the special mission alone. A special mission often consisted of a number of persons of very high rank, such as the head of a Government and the Foreign Minister; it would be odd if in such a case the Foreign Minister should not have the right to display his country's flag.

104. The expression "the means of transport of the mission" would certainly not imply that the vehicles had to be owned by the mission; it would refer to means of transport used by the mission alone, to the exclusion of means of transport used in common with others. That might be explained in the commentary.

105. With regard to paragraph 3, he believe that it should be possible for the receiving State to advise the special mission to display its flag on all its vehicles but that it would be somewhat excessive to empower the receiving State to require the special mission to do so; the mission might prefer at times not to display its flag; if it failed to do so, despite the advice of the receiving State, it would be acting at its own risk.

106. The question of the place of the article would be settled later; the corresponding article was a part of the section on facilities, privileges and immunities in the Vienna Convention on Consular Relations, but not in the Vienna Convention on Diplomatic Relations.

107. Mr. BARTOŠ, Special Rapporteur, accepted the Chairman's suggestions. The rules which he had included in paragraph 2 and 3 were based on practice. The rule contained in paragraph 3 in particular, was not an innovation; all that could be said was that what it described was not the universal practice.

108. The argument advanced by Mr. Ruda was not valid, for although the members of a diplomatic mission other than the head of the mission were not entitled to display the flag, they were entitled to use the "CD" plate on their vehicles.

109. If the Commission decided to delete paragraph 3 it could recommend in a commentary that the receiving State should express the wish that members of the special mission should display their State's flag on their vehicles. Practical considerations, rather than prestige, were involved; he had in mind particularly the case of technical missions working in the field. It was unlikely that difficulties would arise in practice in the case of a head of Government or a minister.

110. Mr. de LUNA pointed out that the "CD" plate did not identify the specific State and therefore did not have the same value as the flag. From the point of view of safety, it could on occasions — though no doubt they were rare — be more dangerous to display the flag than not to display it.

111. The CHAIRMAN suggested that article 15 should be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 1.5 p.m.

764th MEETING

Monday, 13 July 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(resumed from the 760th meeting)

[Item 3 of the agenda]

ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 67 (General provision) [concerning the modification of treaties]

1. The CHAIRMAN invited the Commission to consider the following text proposed by the Drafting Committee for article 67:

"A treaty may be amended by agreement between the parties. The rules laid down in part I apply to such agreement except in so far as the treaty or the established rules of an international organization may otherwise provide."

2. Mr. PAREDES thought that in the Spanish text the word *no* was unnecessary as the negative was already implied in the word *salvo*.

3. Mr. de LUNA said that usage differed in the various parts of the Spanish-speaking world. The word *salvo* denoted an exception rather than a negative. As had been agreed, the Spanish-speaking members of the Commission would confer about the Spanish text of the articles.

4. The CHAIRMAN, speaking as a member of the Commission, said that the phrase "the rules laid down in part I apply to such agreement" seemed to imply that the agreement would have to be in written form.

5. Sir Humphrey WALDOCK, Special Rapporteur, observed that the Chairman was largely right: the principal sections of part I dealt with the more formal types of treaty.

6. Mr. TUNKIN considered that the second sentence could be deleted without loss, for it added nothing.

7. Sir Humphrey WALDOCK, Special Rapporteur, said that the provision contained in the second sentence was intended to safeguard special clauses concerning revision.

8. Mr. BRIGGS considered that the second sentence of article 67 should be retained, and if the words "as referred to or defined in part I" were inserted before the word "except" it would be clear that the article did not cover oral or informal agreements.

9. Mr. de LUNA considered that safeguards were needed to ensure that the modification of treaties was carried out according to established rules and that States were not being given complete freedom to alter treaties at will.
10. Mr. ROSENNE proposed the deletion of the full stop after the word "parties" as well as the deletion of the words "the rules laid down in part I apply to such agreement". The article would then be strictly parallel to article 40, paragraph 1, and the word "agreement" would have the same meaning in both. Express provisions regarding modification in a treaty or in rules of an international organization would also be preserved.
11. Mr. TUNKIN said that the change proposed by Mr. Rosenne would completely alter the purport of the article; he preferred Mr. Brigg's suggestion.
12. Mr. BARTOŠ considered that both of the two sentences constituting article 67 should be retained. The first sentence stated the rule; the second referred to the growing practice in international conferences and even between States proposing to conclude a multilateral treaty.
13. Mr. YASSEEN considered that there was only one doubtful point regarding the interpretation of article 67 — the use of the word "agreement". The Commission should decide, by unambiguous language, whether the amending agreement had to be in writing. He asked whether the Drafting Committee had intended the provision to mean that the agreement would have to be in writing.
14. Mr. BRIGGS, Chairman of the Drafting Committee, said that the question mentioned by Mr. Yasseen had not been discussed in the Drafting Committee. The Special Rapporteur's earlier text (A/CN.4/167/Add.1) had referred to amendment by another instrument, but in fact amendments could take other forms.
15. Mr. YASSEEN said that, like the Chairman, he had construed the second sentence to mean that the amending agreement would be subject to the rules laid down in part I. Accordingly, it seemed, by virtue of the theory of the contrary act, that the provision required an agreement amending a treaty to be likewise in written form.
16. The CHAIRMAN, speaking as a member of the Commission, said he believed that the real problem lay in article 2 as approved by the Commission in 1962 at its 14th session.¹ Under the existing text, an unwritten agreement was incapable of amending a treaty. Was that what the Commission wanted?
17. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission could not exclude the possibility of informal amendment, for example by means of a verbal declaration, even though it was likely to be uncommon.
18. The CHAIRMAN, speaking as a member of the Commission, considered that no State should be given the possibility of invoking the absence of a written agreement in a case when there had been a perfect and complete oral agreement.
19. Mr. VERDROSS proposed that, in order to reflect the idea expressed by the Chairman, the first sentence should be retained and in the second sentence the words "to such agreement" should be replaced by "to any instrument". In that way it would be clear that the second sentence applied only to written agreements.
20. Mr. YASSEEN considered that the article was concerned with only one amendment procedure, viz. amendment by means of an agreement, and that it did not exclude others.
21. The CHAIRMAN, speaking as a member of the Commission, pointed out that the need for agreement between the parties was mentioned in the first sentence, and then the second sentence went on to say, in effect, that the agreement could only be in written form.
22. Mr. VERDROSS said that the words "the rules laid down in part I apply to such agreement" would, as the provision stood, mean that those rules applied also to unwritten agreements, and that was a contradiction. That was why he had proposed that the words "to such agreement" should be replaced by "to any instrument".
23. Mr. AMADO proposed that the words "irrespective of the form of the agreement" should be added at the end of the first sentence.
24. The CHAIRMAN considered that Mr. Amado's amendment would not solve the problem arising from the second sentence.
25. Sir Humphrey WALDOCK, Special Rapporteur, proposed that at the beginning of the second sentence the words "if such agreement is in writing" should be inserted.
26. Mr. BARTOŠ said he was not concerned with the question of the form; he had wished to draw attention to the existence of a practical rule.

The Drafting Committee's redraft of article 67, amended as proposed by the Special Rapporteur, was adopted unanimously.

ARTICLE 68 (Amendment of multilateral treaties)

27. The CHAIRMAN invited the Commission to consider the Drafting Committee's text for article 68:

"1. Whenever it is proposed that a multilateral treaty should be amended in relation to all the parties, every party has the right, subject to the provisions of the treaty or the established rules of an international organization,

"(a) to be notified of the proposal and to take part in the decision as to the action, if any, to be taken in regard to it;

¹ *Yearbook of the International Law Commission, 1962, Vol. II, p. 163.*

“(b) to take part in the conclusion of any agreement for the amendment of the treaty.

“2. Unless otherwise provided by the treaty or by the established rules of an international organization —

“(a) an agreement amending a treaty does bind any party to the treaty which does not become a party to such agreement ;

“(b) the effect of the amending agreement is governed by article 65.

“3. The application of an amending agreement as between the States which become parties thereto may not be invoked by any other party to the treaty as a breach of the treaty if such party signed the text of the amending agreement or clearly indicated that it did not oppose the amendment.”

28. Sir Humphrey WALDOCK, Special Rapporteur, said that in accordance with the Commission's request the Drafting Committee had in its redrafts of articles 68 and 69 drawn a more clear cut distinction between amendments originally designed to apply to all the parties and those intended to apply to a restricted group only. The requirement of notification, except in the case falling under paragraph 1 (a) of article 69, had been preserved in paragraph 2 of the redraft of that article.²

29. The CHAIRMAN, speaking as a member of the Commission, said that his only criticism of the drafting of paragraph 1 of the redraft of article 68 concerned the words “in relation to all the parties” ; he suggested that the formula “as between all the parties” might be better.

30. Sir Humphrey WALDOCK, Special Rapporteur, said that the Chairman's wording would be acceptable.

31. Mr. LACHS said that the Chairman's wording seemed hardly necessary in view of the existence of a separate provision on *inter se* amendments.

32. Sir Humphrey WALDOCK, Special Rapporteur, said that his original text had indeed been based on that assumption but had met with objection.

33. Mr. CASTRÉN said that the question had already been discussed at length and that the Drafting Committee had been given precise instructions. The two different situations should be reflected in distinct provisions.

It was agreed that the words “as between” should be substituted for the words “in relation to”.

34. Mr. PAL said that any proposal to amend a multilateral treaty should be notified to all the parties thereto, even if the proposed amendment was only intended to apply *inter se*. As it stood, article 68 was not adequate but he would not press his objection as the text was to be submitted to Governments for comment.

35. Sir Humphrey WALDOCK, Special Rapporteur, observed that Mr. Pal's preoccupation was met by the provision contained in article 69, paragraph 2.

36. Mr. BARTOŠ said that he did not understand the point of the proviso “subject to . . .” in article 68, paragraph 1. Surely, the established rules of an international organization could not deprive certain States of the right to be notified of a proposal to amend the treaty. If that wording was retained he would vote against paragraph 1 and, if the provision in question was adopted by the majority of the Commission, he would abstain from the vote on article 68 as a whole. That formula would divide States into two categories — States which had the right to take part in the decision concerning any measures to be adopted and States which did not have that right. To adopt it would be to sanction the inequality of States.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that the equality of States was not at issue, but there were cases when under the rules of an international organization a proposal to amend had to be submitted for decision by an organ of the organization. However, he did not know of any rule circumscribing the right to be notified of such a proposal.

38. The CHAIRMAN, speaking as a member of the Commission, said that when it was proposed, for example, to amend an international labour convention, notice of the proposal was not necessarily sent to all the Members of the ILO.

39. Moreover, in the case of WHO the organs of that organization were empowered within certain limits to amend treaties without any notification or negotiation, and that authority was accepted in advance by the members.

40. Mr. BARTOŠ pointed out that even in WHO the States had to be duly informed and could raise objections.

41. The Commission should not approve a provision under which an international organization could deprive certain States of the right to be advised of proposals.

42. Mr. YASSEEN said he gathered that for Mr. Bartoš the rules guaranteeing the rights of States in that respect were rules of *jus cogens* ; accordingly, there was no problem so long as what was involved were “treaties”, for the proviso in paragraph 1, referring to treaties, could only mean treaties that were valid, including treaties which did not conflict with the rules of *jus cogens*.

43. Mr. TUNKIN said that in principle he agreed with Mr. Bartoš, who had raised an important point which had provoked doubts in his own mind about the second part of paragraph 1. All parties to a treaty had the right to be notified of a proposed amendment and to take part in the decision on the proposal.

44. Mr. PAREDES agreed with Mr. Bartoš ; it was important to ensure that all parties to a treaty were

² *Vide infra*, para. 73.

notified of proposals to amend it, so that they could express their views and take part in the relevant discussions and decision. The modification of treaties should not take place in secrecy. In the case of multilateral treaties concluded under the auspices of an international organization, the views of all member States should be taken into account.

45. Mr. de LUNA said that the point raised by Mr. Bartos might perhaps be mentioned in the commentary. He did not believe that notification could be made the subject of a rule of *jus cogens*.

46. The CHAIRMAN, speaking as a member of the Commission, said he did not believe the problem was a very serious one. The treaties in question were essentially technical instruments concluded within international organizations, which had to be adapted to changing conditions.

47. Mr. BRIGGS considered that in general all parties to a multilateral treaty should be notified of proposals to amend it, but it had to be recognized that some treaties and the rules of some international organizations limited the right to be notified, and States, in becoming parties to such a treaty or members of such an organization, were presumed to have voluntarily accepted that limitation.

48. Mr. ROSENNE said that there could also be cases where the right was extended; for example, under the 1958 Geneva Conventions on the Law of the Sea proposals for amending those Conventions were to be considered in the first place by the General Assembly, with the consequence that non-parties would have a say in the decision on such proposals. For the time being it would be wiser to maintain the text as proposed by the Drafting Committee; the whole problem would be reviewed in conjunction with the provisions contained in part I and article 48 concerning the constituent instruments of international organizations of treaties drawn up within them.

49. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion the passage in question did no harm. Either the treaty in question had been concluded within an international organization or, if not, it was hardly conceivable that States would include in a treaty a provision denying to any party the right to be notified.

50. Mr. BARTOŠ said that it was not the case of a treaty but that of the rules of an international organization which caused his concern. He proposed as a compromise that the words "to be notified of the proposal" should be placed after the words "every party has the right". Sub-paragraph (a) would then begin with the words "to take part in the decision".

51. Mr. CASTRÉN supported the proposal, which made the text acceptable by means of a slight change.

52. The CHAIRMAN, speaking as a member of the Commission, proposed that the word "notified", which

was much too formal, should be replaced by "informed". What mattered was that the States should be informed.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that he could accept the insertion of the words "to have the proposal communicated to it and" after the words "every party has the right".

Paragraph 1, as so amended, was adopted unanimously.

Paragraph 2 was adopted unanimously.

54. Mr. TSURUOKA, referring to paragraph 3, asked whether the words "that it did not oppose the amendment" were intended to cover, for example, the case where a State participating in a conference had voted in favour of a proposed amendment. In his opinion, that case should be excluded, for that State's favourable vote was not a promise of ratification. The rule in paragraph 3 could be applied if there was no opposition after ratification of the text.

55. Mr. BARTOŠ said that he was less exacting in that respect than Mr. Tsuruoka, who considered ratification indispensable. In his view it would be sufficient if the State in question had, over a long period of time, adopted an attitude towards the agreement which was not negative. The text of paragraph 3 under discussion was half-way between those two extremes, and he would vote for that text, even though it went too far.

56. The CHAIRMAN, speaking as a member of the Commission, thought that Mr. Bartos's point of view might be taken into account if the words "clearly indicated" were replaced by "allowed it to be clearly understood".

57. He doubted whether it was advisable to mention the signature. There were cases where signature was not enough and where ratification as well was necessary for the State to become a party to the agreement; on the other hand there were many instances of agreements where signature was sufficient for that purpose. Accordingly, it might be better to delete the reference to signature.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that if the provision were amended in the manner suggested by the Chairman it might be regarded as too general by some members of the Commission. The Drafting Committee had sought to find some formula that would impose a strict requirement upon the State to give a clear indication that it did not oppose the amendment, and his original reference to adoption of the text had been dropped because certain members had argued that there was no means of ascertaining which way States had voted.

59. The CHAIRMAN, speaking as a member of the Commission, maintained that the reference to what might be only an intermediate stage, namely signature of the text, should be omitted.

60. Mr. TSURUOKA pointed out that if the reference to signature was deleted it would be difficult to determine whether there had or had not been opposition. A distinction had to be made between signature and a vote, for signature was a solemn act, even if only for the purpose of the authentication of the text, whereas a vote was often the result of a move made by a delegation which did not have enough time to consult its Government.

61. The CHAIRMAN asked whether, in Mr. Tsuruoka's opinion, a favourable vote was not a clear indication that the State in question did not oppose the amendment.

62. Mr. TSURUOKA replied that in his opinion the vote was not a sufficient criterion. He proposed that the words, "after the drafting of the text of the agreement in question," should be added between the words "clearly indicated" and "that it did not oppose the amendment".

63. Sir Humphrey WALDOCK, Special Rapporteur, said that a change of the kind proposed by Mr. Tsuruoka, would go too far because there could be cases where States signified through the diplomatic channel that they were not interested in the modification of the treaty and would not attend the discussions.

64. Mr. de LUNA endorsed the Chairman's point of view.

65. Mr. TUNKIN said that from the beginning he had had doubts about the wisdom of including such a provision, because neither a vote on nor the signature of the text could be regarded as a definitive indication of a State's attitude. It might subsequently be realized that the amendment was inconsistent with its rights.

66. Mr. YASSEEN considered that paragraph 3 should be approved as it stood, for it was both necessary and adequate. The rule stated in the paragraph apparently referred on the one hand to States which had taken part in the amendment process and, on the other, States which had not taken part in that process. For the first category of States, the question was how far a State could go without waiving its right to claim that the amending agreement constituted a breach of the treaty; paragraph 3, as drafted, proceeded on the assumption that, by signing the text of the agreement, the State which had taken part in the amendment process waived the right to claim a breach of the treaty. With regard to States which had not participated in the amendment process, the rule proposed was that the State waived the right in question if it clearly indicated that it did not oppose the amendment. That indication could be given orally or through certain channels.

67. Mr. AMADO asked what exactly the verb "to indicate" was intended to mean. If it meant that there should be a formal indication, he agreed. The signature was an indication but in some cases it was only an intermediate act. Accordingly, it should be made a specific condition that the State must have signed the text of the agreement or given an indication analogous to signature.

68. Mr. ROSENNE said that the trend of the discussion had raised doubts in his mind as to the necessity of paragraph 3. Article 68 was already linked to article 65 with its general reservation concerning the responsibility a State might incur by concluding or applying a treaty the provisions of which were incompatible with its obligations towards another State under another treaty. In addition, article 47 contained both general rules regarding the application of the concept of estoppel in the law of treaties and a special reference to the connexion between estoppel and the material breach of a treaty.

69. Sir Humphrey WALDOCK, Special Rapporteur, considered that paragraph 3 embodied an important point of substance. It would be extraordinary if a State that had signed the text of an amending instrument, thereby helping to put into motion the machinery for entry into force, could subsequently claim that it was a breach of the original treaty. The provision had a limited object but did relate to an essential element in the process of amending multilateral treaties in modern practice, and he did not think that the point was covered in the other articles mentioned by the preceding speaker, at any rate in the form in which they were at present drafted.

70. The CHAIRMAN, speaking as a member of the Commission, said that he found the wording of paragraph 3 ambiguous. The words "if such party signed the text of the amending agreement" covered situations where a State had taken part in the process of amending the treaty, but only in cases where its signature was not a final binding act. The words "or clearly indicated that it did not oppose the amendment" covered a whole series of different situations, including the case where a State had taken part in the conference held to amend the treaty and, without having signed the agreement, signified that it had no objection to the amendment.

71. He suggested that the word "otherwise" should be inserted before the words "clearly indicated".

72. Mr. TUNKIN said he continued to question the wisdom of including such a provision.

Paragraph 3 with the insertion of the word "otherwise" before the words "clearly indicated" was adopted by 13 votes to none with 5 abstentions.

Article 68, as a whole, as amended, was adopted unanimously.

ARTICLE 69 (Agreements to modify the application of treaties between certain of the parties only)

73. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following title and text for article 69:

"Agreements to modify the application of treaties between certain of the parties only"

"1. Two or more of the parties to a multilateral treaty may enter into a collateral agreement to modify the application of the treaty as between themselves alone if—

“(a) the possibility of such agreements is provided for by the treaty; or

“(b) the modification in question —

“(i) does not affect the enjoyment by the other parties of their rights under the treaty;

“(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole; and

“(iii) is not expressly or impliedly prohibited by the treaty.

“2. Except in a case falling under paragraph 1 (a), the conclusion of any such collateral agreement shall be notified to the other parties to the treaty.”

74. The provisions of the article had been left practically unchanged, except for some drafting improvements. The main controversy that had arisen related to paragraph 2, which was now preceded by the opening proviso “Except in a case falling under paragraph 1 (a)”. It had seemed to the Drafting Committee unnecessary to maintain the requirement of notification in a case where the treaty itself made provision for the possibility of an *inter se* agreement.

75. Mr. CASTRÉN said that, at the 754th meeting, he had proposed the deletion of paragraph 1 (a) and 1 (b) (ii); but those provisions had been retained in the new text. He would not press for their deletion since only a question of form was involved.

76. Fortunately, the Drafting Committee had not taken up the suggestion made by some members of the Commission that paragraph 2 should be deleted. Nevertheless, it had followed Mr. Reuter's suggestion and greatly weakened the provision. Although he did not deny that that change was justifiable in theory, he doubted whether the solution now adopted would be a sound one in practice. Under the new text, parties to an *inter se* agreement were not bound to give prior notification of their intention to the other parties to the original treaty: notification became obligatory only after the conclusion of the collateral agreement. The result would be that parties which had not been consulted about that agreement would be confronted with a *fait accompli* and any disputes concerning the legality of the *inter se* agreement would be more difficult to settle than they would have been if the parties had been able to state their objections at the stage when the collateral agreement was being prepared. In any case, the new draft of paragraph 2 should be supplemented by some such phrase as “as promptly as possible”; unless that addition were made, he would be unable to vote for the paragraph.

77. Mr. TSURUOKA proposed that the word “collateral” should be deleted in paragraphs 1 and 2. The deletion would not alter the sense of the article, whereas if that word were retained, the question of its precise meaning would arise.

78. Mr. PAREDES noted that paragraph 1 contemplated two completely different cases. One case was that where a treaty provided for the possibility of an *inter se* agreement. The second case was that envisaged in sub-paragraph (b), for which case the requirements specified in (i) and (ii) were laid down. The fact that those conditions were not specified for the case envisaged in sub-paragraph (a) seemed to imply that, where the treaty itself provided for the possibility of an *inter se* agreement, such an agreement could affect the enjoyment by the other parties of their rights under the treaty; also, that such an *inter se* agreement could relate to a provision derogation from which was incompatible with the effective execution of the objects and purposes of the treaty as a whole.

79. In connexion with paragraph 1 (b) (i), he wished to revert to a point which he had raised during the Commission's previous discussion of the subject. The provision in question specified that the *inter se* modification must not affect the enjoyment by the other parties of their rights under the treaty. It was essential, in that regard, to cover not only the case where the enjoyment of rights was affected but also that where greater obligations, duties or burdens were imposed. If, for example, an *inter se* agreement relating to navigation in a river or canal made provision for navigation by vessels of deeper draught or for navigation at other periods of the year than those specified in the original treaty, greater obligations or burdens might thereby be imposed upon other parties to the original treaty which were not parties to the *inter se* agreement.

80. Mr. VERDROSS thought that the expression “as between themselves alone” was not very felicitous; it would be better to say “so far as their mutual relations are concerned”.

81. The words “expressly or impliedly” in paragraph 1 (b) (iii) should be deleted, for a prohibition could hardly be implied.

82. Mr. ROSENNE said that he wished to express his reservations regarding paragraph 2; he was not fully convinced of the necessity of its provisions and would therefore abstain from voting upon that paragraph.

83. With regard to paragraph 1, he supported the proposal by Mr. Verdross that in sub-paragraph (b) (iii) the words “expressly or impliedly” should be deleted.

84. Mr. BARTOS said that he did not regard the conditions laid down in paragraph 1 (b) as sufficient; as Mr. Paredes had said, the *inter se* agreement might also have an indirect effect on the interests of the parties to the original treaty; or again, it might alter the climate or balance of interests which the original treaty had created. He would therefore be obliged to abstain in the vote on paragraph 1.

85. He was also opposed to the rule appearing in paragraph 2. Even in the case of an *inter se* amendment made in conformity with the provisions of the treaty, it was necessary that the other parties should be acquainted with the purport of the amendment. Although, by

the terms of the Charter, publication of treaties was compulsory, there was often a delay before publication took place. Furthermore, since the authors of the Charter had held that every treaty should be brought to the notice even of the States not directly concerned, therefore *a fortiori* an *inter se* agreement amending a treaty for some of the parties should be communicated to all the parties to the original treaty. If the phrase "Except in a case falling under paragraph 1 (a)" were maintained, he would vote against paragraph 2 and would abstain in the vote on the article as a whole.

86. Mr. YASSEEN said that in his view the condition laid down in paragraph 1 (b) (ii) was contained in that laid down in (iii), for any modification that did not comply with condition (ii) would, at least implicitly, be prohibited by the treaty.

87. In paragraph 1 (b) (iii) the words "expressly or impliedly" were superfluous. The sentence would have exactly the same meaning without them, since a treaty always had to be construed by reference to what it said expressly and also in the light of what it implied.

88. He held the same views as Mr. Bartoš on paragraph 2 and considered that the proviso "Except in a case falling under paragraph 1 (a)" was undesirable.

89. The addition proposed by Mr. Castrén at the end of paragraph 2 was right in principle, but would have little effect in practice. It was impossible to stipulate a fixed time limit; and if the provision said simply that notification should be given within a reasonable time, it would be stating something that was already implicit in the obligation to act in good faith.

90. He considered that the word "collateral" should be retained, for it described correctly the relationship between the *inter se* agreement and the original treaty.

91. Mr. LACHS suggested that in the opening sentence of paragraph 1, the words "to modify the application of the treaty" should be amended to read "to modify the treaty" or "to amend the treaty" since what was at issue was the subsistence of the treaty, not the scope of its application. Another reason for the change was that it would bring the wording into line with that of paragraph 1 of article 68.

92. He supported the proposal by Mr. Tsuruoka for the deletion of the word "collateral". In some cases, the agreement might well have an independent existence.

93. He supported the proposal by Mr. Verdross that in paragraph 1 (b) (iii) the words "expressly or impliedly" should be omitted. The provision of paragraphs 1 (b) (i) and 1 (b) (ii) already covered the cases of implied prohibition arising from the substance or object of the treaty or of the rights set forth therein.

94. He agreed with the suggestion by Mr. Bartoš for the deletion of the opening proviso of paragraph 2 and supported Mr. Castrén's proposal for an addition at the end of the paragraph.

95. The CHAIRMAN suggested that the Commission should deal with paragraph 2 first, since its approach to paragraph 1 would be affected by the action taken on paragraph 2.

96. Sir Humphrey WALDOCK, Special Rapporteur, said that for his part he did not feel strongly about the opening proviso of paragraph 2. He stressed, however, that it had been introduced in deference to the wishes of certain members who had thought that, where the possibility of an *inter se* agreement was already provided for in the treaty, it would be excessive to suggest that sovereign States had a duty to notify all the parties to the original treaty when they concluded such an agreement.

97. Mr. TUNKIN said that he understood the pre-occupation of Mr. Bartoš. In reality, the problem differed according to the type of treaty involved. In the case of a multilateral treaty concluded between a small group of States, it would be appropriate to require the notification envisaged in paragraph 2. The position would, however, be different in the case of a general multilateral treaty. For example, the Soviet Union and the United States had recently concluded a bilateral consular convention. If the Vienna Convention on Consular Relations, 1963, had been in force, it would surely be excessive to suggest that the conclusion of such a bilateral convention should be notified to all the parties to the Vienna Convention, which permitted the conclusion of such bilateral agreements. It was difficult to see what purpose would be served by such a notification, particularly as the fact of the conclusion of a treaty was always made public and most treaties were registered with the United Nations Secretariat and published.

98. Mr. BARTOS observed that the Convention mentioned by Mr. Tunkin was an instance of the supplementary agreements referred to in article 73, paragraph 2, of the Vienna Convention on Consular Relations. He (Mr. Bartoš) had been referring to the very different case where the regime set up under the original treaty was altered by a subsequent *inter se* agreement.

99. His view on paragraph 1 (b) (iii) was the same as Mr. Yasseen's: with or without the words "expressly or impliedly" the provision would have to be interpreted in the same way.

100. Mr. ROSENNE said that if the opening proviso were deleted from paragraph 2, he would be obliged to vote against that paragraph. If the proviso were retained, he would abstain.

101. Mr. VERDROSS said that, if the notification referred to in paragraph 2 concerned only the conclusion of an *inter se* agreement, it was unnecessary, since publication of all treaties was required under the Charter.

102. Sir Humphrey WALDOCK, Special Rapporteur, said that the question of the notification of the conclusion of the agreement involved a matter of real substance. The registration and publication of treaties took a long time. Although it had been felt that in many cases it would be excessive to require the notification of a mere proposal for amendment, it had been considered desirable to require the notification of the conclusion of the amending instrument. However, it was advisable to maintain the opening proviso of paragraph 2 so as not to render the rule too rigid, for otherwise, the whole section might not be acceptable

to States. It should be remembered that, particularly in article 68, a certain measure of progressive development had been introduced on the subject of notification on points which were not as yet governed by settled principles; in order to obtain acceptance for the fairly strict rule laid down in article 68, the provisions of article 69 should be less strict.

103. Mr. de LUNA expressed support for the retention of the opening proviso in paragraph 2.

104. The case mentioned by Mr. Tunkin of the bilateral consular convention between the Soviet Union and the United States appeared to be covered by paragraph 1 (a) because the 1963 Vienna Convention on Consular Relations expressly provided for the possibility of the conclusion of such a bilateral convention. He added that a modification was not always necessarily the reversal of a rule in the amended instrument (amendment *contra legem*); the effect of the modification might be to add something that was consistent with that instrument (amendment *secundum legem*) or to remove doubts which had arisen (amendment *praeter legem*).

105. The CHAIRMAN noted that the Commission apparently wished to retain paragraph 2, including the "except" clause. The retention of that paragraph would necessitate certain consequential changes in the drafting of paragraph 1.

106. Speaking as a member of the Commission, he said that the words *Deux ou* should be added at the beginning of paragraph 1 of the French text. The word "collateral" was not very apt and might be dropped, for the opening passage of paragraph 1 made it sufficiently clear what agreement was involved. Furthermore, the purpose of such an agreement was to modify, not the "application" of the treaty, but the treaty itself, or the rules which it contained.

107. Paragraph 1 (b) (i) should read "does not affect the rights of the other parties under the treaty"; the word "enjoyment" distorted the meaning of the provision. In deference to the remarks of Mr. Paredes the words "or the performance of their obligations" might be added at the end of paragraph 1 (b) (i).

108. With regard to the proposal to delete paragraph 1 (ii), he considered that the Commission could either delete (ii) and retain the words "expressly or impliedly" in (iii), or else retain (ii) and delete the words "expressly or impliedly" in (iii).

109. Sir Humphrey WALDOCK, Special Rapporteur, said that he would have no objection to the deletion of the word "collateral" which had been introduced solely to satisfy those members who wanted to underline the distinction between the case envisaged in article 69 and that in article 68.

110. He had no objection to the change proposed by Mr. Lachs in the opening sentence of paragraph 1, but wished to explain that the words "to modify the application of the treaty" were intended to stress that the *inter se* agreement could not modify the treaty itself; its effect was merely to modify, as between the parties to the *inter se* agreement, the rules embodied in the treaty. The condition in paragraph 1 (b) (i) that the

modification must not affect "the enjoyment . . . of . . . rights under the treaty" was intended to cover changes which, without directly affecting the rights themselves, nevertheless had an indirect impact on the enjoyment of these rights.

111. In the same sub-paragraph, the valid point raised by Mr. Paredes of the possibility of increased burdens or obligations being imposed could be covered by adding a reference to the performance of obligations to that of the enjoyment of rights.

112. Paragraph 1 (b) (ii) embodied a useful provision derived from the important question, raised by the previous Special Rapporteur, of interdependent obligations. Although the point could be said to be covered by the notion of implied prohibition referred to in paragraph 1 (b) (iii), he thought that there was value in retaining the provisions of paragraph 1 (b) (ii), since there had been some discussion in the Commission on the particular subject.

113. Mr. TUNKIN favoured the retention of paragraph 1 (b) (ii), the provisions of which were stronger and possibly broader than those of paragraph 1 (b) (iii) on implied prohibition.

114. Mr. de LUNA strongly supported the retention of paragraph 1 (b) (ii) with its reference to the effective execution of the objects and purposes of the treaty, a notion which appeared in other articles of the draft.

115. Mr. LACHS said that the Commission was in fact faced with the choice of retaining either paragraph 1 (b) (ii) or the word "impliedly" in paragraph 1 (b) (iii). For his part, he supported the retention of paragraph 1 (b) (ii) with its explicit provisions, and the deletion of the nebulous terms "impliedly".

116. The CHAIRMAN put to the vote paragraph 1 as amended by the addition of the words *Deux ou* in the French text; the deletion of the word "collateral"; the deletion of the words "the application of"; the addition of the words "or the performance of their obligations" at the end of (b) (i); and the deletion of the words "expressly or impliedly" in (b) (iii).

Paragraph 1, as so amended, was adopted unanimously.

Paragraph 2, with the consequential deletion of the word "collateral", was adopted by 13 votes to 1, with 4 abstentions.

117. Mr. VERDROSS said that in the title of the article the words "the application of" should be omitted.

It was so agreed.

Article 69, as a whole, as amended, was adopted by 16 votes to 1, with 1 abstention.

118. Mr. ROSENNE proposed that the word "Revision" in the title of part III of the draft, "Application, Effects, Revision and Interpretation of Treaties" should be replaced by "Modification".

It was so agreed.

The meeting rose at 6.15 p.m.

765th MEETING

Tuesday, 14 July 1964, at 10 a.m.

Chairman : Mr. Roberto AGO

Law of Treaties

(A/CN.4/167/Add.3)

(continued)

[Item 3 of the agenda]

ARTICLE 70 (General rules) [concerning the interpretation of treaties],

ARTICLE 71 (Application of the general rules),

ARTICLE 72 (Effective interpretation of the terms : *ut res magis valeat quam pereat*) and

ARTICLE 73 (Effect of a later customary rule or of a later agreement on the interpretation of a treaty)

1. Sir Humphrey WALDOCK, Special Rapporteur, introducing part III, section III, of his report (A/CN.4/167/Add.3), said that the commentary to section III set out as briefly as possible the considerations which had led him to formulate the four articles on the general interpretation of treaties and two further ones on the interpretation of plurilingual treaties.

2. The first question to be decided by the Commission was whether its draft should contain articles on interpretation at all, and naturally that question could hardly be answered without some idea of the form which such articles might take. In preparing a few possible fundamental provisions on the subject he had in some measure been inspired by the work of the Institute of International Law and of Sir Gerald Fitzmaurice in his private capacity in connexion with his studies of the jurisprudence of the International Court of Justice. He (the Special Rapporteur) had tried to take into account State practice, though evidence of it was difficult to obtain as not much was to be found in publications of State practice which for the most part were content to reproduce the decisions of international tribunals and were not concerned with the interpretation of treaties by States themselves.

3. Mr. TUNKIN said that as the time left for the discussion of the articles was very limited it was to be hoped that members would not touch upon doctrinal controversies and would restrict themselves as far possible to comments of a practical character.

4. Mr. BARTOŠ supported Mr. Tunkin's suggestion that members should make their statements brief. At the same time, however, he considered that the Commission

should have a little more time at its disposal to discuss the important articles concerning the interpretation of treaties.

5. Mr. PAREDES said that the Special Rapporteur with his customary scruple had pointed out the many difficulties which could arise in the interpretation of treaties. Rules on the subject were indispensable for purposes of application. The requirement of good faith in article 70, paragraph 1, was acceptable and in conformity with certain other provisions already adopted.

6. The reference to "context" in paragraph 1(a) should be dropped, for it was appropriate only when the inter-relationship of the different articles in a treaty was under consideration.

7. He added that in the Spanish text of the provision the word *ordinario* should be replaced by *corriente*.

8. Mr. BRIGGS said that, as between the alternatives which the Special Rapporteur mentioned in paragraph (8) of his commentary, viz. that the Commission could either omit the topic of interpretation from the draft or else seek to isolate and codify the comparatively few rules which appeared to constitute the strictly legal basis of the interpretation of treaties, he would choose the second course. In attempting such a task the Commission would be fulfilling the function laid upon it in article 15 of its Statute.

9. He strongly supported the approach adopted by the Special Rapporteur in articles 70 to 73 and thought it not inconsistent with the wise caution displayed in the Harvard Research Draft.¹ The canons of interpretation were not always rules of international law but, as Judge de Visscher had said, they were working hypotheses, and the Special Rapporteur's decision to distil the essence of such fundamental principles as could properly be treated as rules of international law was sound. Extensive State practice, precedent and doctrine permitted of the precise formulation and systematization of rules of the kind he had set out.

10. The Special Rapporteur had rightly emphasized the primacy of the text of the treaty as an expression of the intentions of the parties.

11. While generally in agreement with both the substance and the wording of article 70 — though he was somewhat bothered by the use of the word "natural" — he thought that there was not a sufficiently clear distinction between paragraphs 1 and 2 : the former was not exclusively concerned with the situation where the text of the treaty gave rise to no ambiguity or doubt as to its meaning.

12. Possibly the substance of paragraph 2 (a), referring to the objects and purposes of the treaty, might be transferred to the end of paragraph 1 (a) and the words "in addition to the means referred to in paragraph 1" might be inserted after the word "interpreted" in paragraph 2.

¹ See passage cited in footnote to paragraph (1) of the Special Rapporteur's commentary

13. He welcomed the provision contained in article 71, paragraph 2, to the effect that reference might be made to the subsequent practice of the parties for the purpose of confirming the meaning of a term in the treaty and believed that a cross-reference to that possibility should be included in article 70, paragraph 1.

14. In conclusion, he said that the Special Rapporteur with his moderate approach had given the Commission a challenging opportunity to reach agreement on some fundamental rules.

15. Mr. de LUNA said that, having been sceptical about the possibility of framing rules for the interpretation of treaties, he particularly admired the Special Rapporteur for having devised articles and written a commentary that were in general satisfactory.

16. There had been much discussion, notably in the Institute of International Law, on the interpretation of treaties, on the difference between the Anglo-Saxon and continental conceptions, on whether any rules existed, whether interpretation should be by reference to the text itself or to the intention of the parties, and on whether interpretation was governed by subjective or by objective criteria.

17. Article 70 of the Special Rapporteur's draft laid down the fundamental rule and the succeeding articles enumerated what might be regarded as the techniques to be applied. In articles 70, 71 and 72 the subjective and objective elements should be clearly separated. The confusion in article 71, paragraph 2, between authentic interpretation and interpretation reflected in State practice and the *travaux préparatoires* should be eliminated. In article 71, paragraph 1, the Special Rapporteur had possibly arrived at the opposite effect to that intended. There were two decisions of the International Court relevant to the use of the preamble for the interpretation of a treaty, namely that in *the United States Nationals in Morocco*² case and that in the *Asylum*³ case.

18. It was difficult to distinguish between treaties laying down rules of conduct for States and those of a contractual type involving an exchange of benefits. The rules being drafted should not become a strait-jacket capable of frustrating, for example, the institutional development of international organizations. Obviously, there was a difference between an extensive and a restrictive interpretation of treaties of a contractual type and that of constituent instruments of international organizations.

19. He was least satisfied with article 72. The choice was not between giving effect to a treaty and allowing it to lapse, but between different degrees of effectiveness. According to one principle of international law an obligation did not exist unless it was proved, and in the present context that principle was more important perhaps than the rule that limitations on sovereignty could not be assumed to exist. There was an old maxim saying *in dubio pro libertate*.

20. Mr. CASTRÉN, after congratulating the Special Rapporteur on his draft, said he had at first been somewhat sceptical as to the possibility of drafting rules of interpretation acceptable to Governments but, after studying the draft articles and the commentary, he had been led to adopt a more positive attitude. The Commission might submit a preliminary draft on the question and await the response of Governments.

21. The Special Rapporteur appeared to have succeeded in finding a very satisfactory solution to the complex problems of the interpretation of treaties and to have accurately defined the boundaries of the subject. The Special Rapporteur had rightly refrained from going into detail and had not committed himself on the subject of restrictive and extensive interpretations, except in article 72, in which he had dealt with interpretation from the point of view of its effectiveness, an approach which he (Mr. Castrén) did not consider advisable. As a whole, the rules had been drafted in terms which were both general and concise; but there was a certain amount of repetition and some of the provisions might well be shortened.

22. In article 70, paragraph 1(a), it was perhaps unnecessary to repeat the words "in the context"; the whole passage following "in its context in the treaty" might perhaps be omitted. In paragraph 2(a), there was a reference to the "objects and purposes" of the treaty, which seemed again to indicate that the treaty should be interpreted as a whole. In any case, the words "in the context of the treaty as a whole" in paragraph 1(a) should be replaced by the words "in the light of the treaty as a whole", if only to avoid unnecessary repetition.

23. He proposed that the words "in the context of the treaty as a whole" in paragraph 2 should be deleted, for it was already stated in the preceding provision that a treaty had to be interpreted as a whole. For the same reason, the words "its context and" might be omitted from paragraph 2(a).

24. Mr. TABIBI paid a tribute to the Special Rapporteur's attempt to formulate articles on a controversial subject and to his scholarly commentary. The difficulty of the subject and the scepticism of some eminent jurists as to the value of rules on interpretation, which some claimed might create more problems than they solved, should not deter the Commission from trying to codify the rules. Furthermore it would be of great value to frame draft articles in order to elicit comments from Governments.

25. Personally, for the purpose of the interpretation of treaties, he would give greater weight to the intention of the parties — as had been the opinion of Sir Hersch Lauterpacht⁴ — and he believed that that aspect should be dealt with in article 70 since it constituted the most important element of any general rule. To give effect to that idea he suggested that articles 70 and 71 should be combined.

² *Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports, 1952.

³ I.C.J. Reports, 1950.

⁴ Cited in paragraph (4) of the Special Rapporteur's commentary.

26. Mr. AMADO said it was perhaps fortunate that the subject of the interpretation of treaties — which, as Lord McNair had said,⁵ was one that could not be approached without trepidation — was being considered at the end of the session. He had been pleasantly surprised at the manner in which the Special Rapporteur had succeeded in picking his way through the jungle of notions on the subject and in drafting rules to deal with it.

27. Nevertheless, speaking from what he hoped would be regarded as a purely objective point of view, he wished to draw attention to certain aspects of the subject which were causing him some difficulty.

28. The resolution of the Institute of International Law, cited in paragraph (11) of the Special Rapporteur's commentary, stated "The agreement of the parties having been reached on the text of the treaty...". But Sir Gerald Fitzmaurice, quoted in paragraph (12) of the commentary, had written "Treaties are to be interpreted primarily as they stand" and had gone on to say at another point, in connexion with integration, "treaties are to be interpreted as a whole...". The opening passage of article 70 read "The terms of a treaty...". But, in fact, a treaty consisted of a number of texts, contexts and terms; what had to be interpreted was the treaty itself, not its terms. In any case, it was impossible to begin with the "terms".

29. He associated himself with Mr. de Luna's remarks on article 71, paragraph 2, in which too much emphasis was placed on "preparatory work".

30. He added that the Commission should not hesitate to mention the teleological aspects of treaties.

31. Mr. RUDA associated himself with the congratulations addressed by other speakers to the Special Rapporteur on his excellent report on a very difficult subject. The subject raised two general problems: the first, which was in fact a preliminary question, was whether any rules on interpretation should be included in the draft articles. If the answer to the first question was "yes", then the next problem was which of the two existing methods of interpretation should be given greater weight.

32. With respect to the first, and more interesting problem, the Special Rapporteur had made, in paragraphs (6) and (7) of the commentary, a distinction between principles or maxims of interpretation, which were apparently non-obligatory in character, and "methods of interpretation", where the position was different. Although he (the speaker) was not quite clear as to the exact scope and significance of the distinction between principles and maxims on the one hand and methods of interpretation on the other, he noted that, in paragraph (8) of the commentary, the Special Rapporteur went on to deal with both of them along the same lines. That paragraph opened with the statement that "Any attempt to codify the conditions for the application of principles whose appropriateness in any given case depends so much on the particular context

and on a subjective appreciation of varying circumstances would clearly be inadvisable" and that it was not possible to go any further than to formulate "a permissive provision simply stating that recourse may be had to the principles in question for the purpose of interpreting a treaty". The Special Rapporteur, however, then proceeded to reject that argument and to say that the Commission had the choice of either omitting the topic of interpretation of treaties altogether from the draft articles or else seeking "to isolate and to codify the comparatively few rules which appear to constitute the strictly legal basis of the interpretation of treaty". In conclusion, the Special Rapporteur had inclined towards the second of those two alternatives.

33. He agreed with the Special Rapporteur that, for the time being, the subject of the interpretation of treaties should find its place in the draft, but his opinion was based on different reasons. He considered that, at the present stage of development of international law, there did not as yet exist for States any obligatory rules on the subject of interpretation; he stressed that he was referring to rules binding upon States. At least, if any rules existed, they were subject to considerable doubt, except for the rule *in claris non fit interpretatio*, which had been first formulated by Vattel and which meant that there could be no question of interpretation where the sense was clear and there was nothing to interpret.

34. Interpretation occurred at two different levels. First, as between States, the only legally valid interpretation of a treaty was the authentic interpretation by the parties to the treaty. The other level was that of interpretation by arbitration, for which there were fundamental principles; that form of interpretation, however, fell outside the discussion because the Commission was engaged in drafting a convention between States.

35. Although he did not wish to imply that the Commission could not formulate rules in the matter, he stressed that those rules would not constitute a codification of existing law; they would represent proposals for the progressive development of international law. With a view to progressive development, rules could thus be submitted to States for their guidance in the interpretation of treaties. Such rules would have the advantage, from the theoretical point of view, of being conducive to the certainty of international transactions. From the practical point of view, as had been indicated by other speakers, it would be useful to submit to States draft articles on interpretation, so as to elicit from them specific comments.

36. On the second problem, the choice of method, he agreed with the approach adopted by the Special Rapporteur, who had taken the text of the treaty as the authentic expression of the intention of the parties.

37. He had reservations regarding article 72 and agreed with Mr. Amado's remarks concerning the reference to "the preparatory work of the treaty" in paragraph 2 of article 71.

38. Mr. ROSENNE said that he had had serious misgivings about the possible effect of including rules

⁵ *Law of Treaties*, 1961, p. 364.

on interpretation in the draft on the exercise of powers of interpretation by third parties when that was permitted, particularly if they were international organizations and to some extent if they were international arbitral tribunals. He was less disturbed by the possible effect on the decisions by the International Court of Justice because under its Statute they would be final. His concern was that such rules might not contribute to the settlement of international disputes which so often appeared at first sight to be disputes concerning the interpretation of treaties, in that they might make it easier for a dissatisfied party to put forward arguments based on a claim that the decision by the third party had been *ultra vires* or was otherwise vitiated by a failure by the third party to follow the rules prescribed.

39. However, the generally permissive form of the rules proposed by the Special Rapporteur and the argument he had put forward in paragraph (8) of his commentary had gone far towards allaying these doubts and he had reached a conclusion similar to Mr. Ruda's that the Commission should include such articles in its draft. As the matter was a delicate one, not only its decision on the text, but also its decision on whether to include the section in the draft should, however, be provisional pending the receipt of observations from Governments, whose task would be facilitated if the Commission could provisionally formulate some rules on the topic.

40. He agreed with the Special Rapporteur's view concerning the importance of stressing the text of a treaty as the expression of the parties' intention and therefore as the point of departure for the whole process of interpretation, but also found merit in Mr. Tabibi's suggestion that an attempt should be made to amalgamate articles 70 and 71.

41. It should be appreciated that rules of the kind under consideration were valid only for treaties in the normally accepted sense of the term, and a general reservation should therefore be included in the text itself concerning the special problems created by the constituent instruments of international organizations referred to at the end of paragraph (24) of the commentary. He had been greatly impressed by the views put forward by Sir Percy Spender and Judge Koretsky⁶ concerning the effects of practice and voting in international organizations and the inadvisability of equating that with subsequent practice of the parties to other kinds of treaties.

42. On a matter of drafting he suggested that the expression "World Court" should be avoided in the commentary as, in view of the decisions of the San Francisco Conference, it could be misleading to speak in the same breath of the International Court of Justice and the Permanent Court of International Justice.

43. In conclusion he expressed agreement with many of the drafting changes proposed concerning article 70.

44. Mr. PESSOU said that, as usual, the Special Rapporteur had succeeded in gathering most diverse and

interesting material. But it was precisely because the material was so abundant that it was difficult to formulate an exact and concise set of rules embodying all the rules and methods used in interpreting treaties.

45. Articles 70, 71 and 72 undoubtedly mentioned all the known methods of interpretation — *ratio legis*, the principle of the general context and the principle of effective interpretation.

46. He thought that the text would be clearer if the three articles were combined. He therefore proposed that they should be replaced by the following text :

"In the light of the context and of the general rules of application, the provisions of a treaty shall be interpreted in good faith in conformity with the objects and purposes of the treaty and with the intention of the parties at the time of the conclusion of the treaty."

47. Mr. TUNKIN said that he favoured the codification of the rules on the interpretation of treaties, particularly since there existed already a substantial body of precedents and State practice on the subject. The Commission should therefore endeavour to formulate, perhaps tentatively, a few rules on the subject in order to see what the reactions of Governments to those rules would be.

48. He found himself in general agreement with the Special Rapporteur's approach to the subject, but thought that article 70 should be shortened so as to state concisely the general rule in the matter, which was referred to in the commentary. He therefore suggested that article 70 should be reworded along the following lines :

"The provisions of a treaty shall be interpreted in good faith and in the context of the treaty as a whole and in the light of the basic principles of international law".

49. Such a provision would make it clear that, whenever interpretation was necessary because of some ambiguity in the provisions of the treaty, that interpretation should be made in the context of the treaty itself. If necessary, the general principles of international law would then be resorted to. As indicated by his suggested text, he preferred the formulation put forward by the Institute of International Law, which referred to "the principles of international law" and not to the rules of international law in force at the time of the conclusion of the treaty. The rules of international law which should be applied were those in force at the time of interpretation, particularly since there existed certain rules in respect of which States were not permitted to contract out.

50. Turning to the expression "the treaty as a whole", which he suggested should be retained in article 70, he stressed that he attached to it a somewhat different meaning from that given to the expression by the Special Rapporteur in his article 71. In article 1 of part I of the draft, the Commission had already defined a treaty as capable of consisting either of a single instrument or of two or more inter-related instruments.⁷ Accord-

⁶ Case of *Certain Expenses of the United Nations*, I.C.J. Reports, 1962.

⁷ Yearbook of the International Law Commission, 1962, Vol. II, p. 161.

dingly, the expression "treaty as a whole" meant all the instruments that together formed the treaty and could include such instruments as additional protocols.

51. He suggested that article 73 should follow immediately after article 70, because article 73 indicated what might be termed second degree sources of interpretation. As far as the items to be included in article 73 were concerned, he suggested that first place might be given to the contents of sub-paragraph (b), although perhaps they raised more a question of conflicting treaties than one of interpretation. The provisions of sub-paragraph (c) would come next, followed by a sub-paragraph covering subsequent agreements on interpretation.

52. He suggested that the provisions at present in article 73 should be followed by those in article 72 which dealt with subsidiary sources of interpretation. The reference to "the preparatory work of the treaty" (*travaux préparatoires*) would find its place in that article.

53. Paragraph 2 of article 70 could be omitted, since its contents should be covered by the subsequent articles. In particular, the reference in sub-paragraph (a) to the objects and purposes of the treaty should be moved to article 72; the contents of paragraph 2 (b) should be covered by article 71.

54. He considered that paragraph 3 should be omitted from article 70, but did not have strong feelings on the subject.

55. Mr. YASSEEN said that in his view it was necessary and indeed essential that the draft should contain some articles on interpretation, which made it possible to determine the exact meaning of a treaty. But excessive detail should be avoided; the Commission should confine itself to the leading principles governing interpretation and especially to the rules reflecting the special nature of a treaty as the expression of the will of several different parties. In general, the Special Rapporteur's draft articles satisfied that requirement.

56. He approved the Special Rapporteur's approach to the subject matter of article 70. The text of the treaty should form the basis of any inquiry into the scope and meaning of its provisions; but interpretation could not be confined to the context of the treaty, for a treaty also had to be regarded as an expression of will in the light of the legal order in force at the time of its conclusion.

57. He disagreed with Mr. Tunkin, but only with respect to the form. His (Mr. Yasseen's) view was that interpretation was a method of ascertaining the exact meaning of a text or of a rule of law. In principle, the parties, in preparing the text of the treaty, took into account the legal order prevailing at the time when it was concluded. Like Mr. Tunkin, he considered that, at the time of its application, a treaty could not be incompatible with the fundamental rules of the legal order then in force; but what was really involved was not interpretation but modification, the limitation of the scope of a particular rule in the light of new rules.

Interpretation in the true sense should be based on the legal order in force at the time of the conclusion of the treaty.

58. He therefore regarded the draft rules as accurate; but he wished to emphasize that it was not the "terms" but the "provisions" of the treaty which had to be considered, for literal interpretation, covered by the rule in article 70, paragraph 2, was only one aspect of interpretation in the legal sense.

59. Paragraph 3 also referred to the literal meaning; the provision which it contained was useful, but it was necessary to go further and to determine how one could ascertain that the parties had wished to attach a special meaning to the terms used.

60. Mr. VERDROSS congratulated the Special Rapporteur on his draft and said that he supported Mr. Tunkin's proposal for simplifying the text.

61. Who would be bound by the rules? In the first place, it would be the judicial or arbitral body to which a matter was referred by the parties for decision; secondly, a State wishing to interpret a treaty which it had concluded would take the rules as a guide. But, in a case where two States had concluded a treaty, they would not be bound by the rules in question because they could agree to use other means of interpretation. That was a fact that should at least be mentioned in the commentary. Furthermore, when a quasi-legislative body like the General Assembly interpreted the Charter of the United Nations by a document like the Declaration on the granting of independence to colonial countries and peoples, it would not be bound by the rules of the articles of the draft.

62. He agreed with Mr. Tunkin that article 70, paragraph 1, should be based on the text of the resolution of the Institute of International Law.

63. Mr. BARTOS expressed his appreciation of the Special Rapporteur's draft which he found acceptable, though he had a few remarks to make on points of principle.

64. The draft articles were based on the general concept, so dear to the English school of legal thought, that interpretation meant interpretation of the text rather than of the spirit of a treaty. Like Mr. Tunkin, he thought it would be better to take as a basis the general principles of international law than to concentrate on the "terms" of the treaty. He did not greatly favour the exegetical method in international law. Where interpretation was concerned, the autonomy of the will of the parties was paramount. What the parties had intended was more important than what they had actually said in the treaty.

65. The Special Rapporteur proposed in article 71, paragraph 2, that for the purpose of determining the parties' intention recourse should be had to what were in fact secondary elements, such as the preparatory work and the circumstances surrounding the conclusion of the treaty. It was preferable to use objective criteria, even for determining the meaning of treaties.

66. He shared Mr. de Luna's view that the question of authentic general interpretation should be dealt with first and arbitral interpretation afterwards. The articles made no reference to arbitral interpretation, which was binding on the parties irrespective of their intentions and which was a source of subsequent interpretation.

67. Mr. Verdross had rightly pointed out that it was judicial or arbitral bodies which would have to apply the rules formulated by the Commission; in that case, he considered that not only would those rules be general but the convention on the law of treaties would be binding on States parties to it and would form a part of the body of rules which a tribunal would take into account.

68. In his view the interpretation of a treaty should be based on the general spirit of the treaty. The two concepts—his own and the Special Rapporteur's—were difficult to reconcile, since there was a question of primacy. He might offer further comments at the second reading of that part of the draft.

69. With regard to the drafting of the articles, he drew attention to a minor point in article 71, paragraph 2 (b), in the French text: was it certain that the words *cet article* referred to article 70? In sub-paragraph (c) the expression *dudit article* was used.

70. Article 73 laid down, not rules of interpretation but the rules to be followed to bring the text of the treaty into line with certain juridical practices emerging later. The matter lay mid-way between the institution of interpretation and that of the modification of the treaty by *jus superveniens*.

71. Mr. AMADO said that the word "provisions" suggested by Mr. Yasseen and Mr. Tunkin was hardly more satisfactory than the word "terms". According to article 71 the treaty as a whole included the preamble; though the preamble was in fact part of the treaty it contained no "provisions".

72. Mr. TSURUOKA, after associating himself with the speakers who had congratulated the Special Rapporteur, pointed out that the group of articles under consideration indicated how treaties should be interpreted but did not specify who was to interpret them. In international practice many disputes arose from the fact that a third Power sought to interpret a treaty concluded between other parties. It would be desirable to mention that question either in the articles or in the commentary.

73. Mr. PAL commended the Special Rapporteur for his enlightening commentary which set out most clearly the grounds on which the articles on interpretation were based.

74. The discussion of the articles on interpretation one by one was based on the assumption that the Commission accepted the idea of including articles on interpretation in the draft articles on the law of treaties. For his part, he would make some brief comments on that assumption.

75. With regard to the formulation of article 70, the Commission had before it the proposal by the Special

Rapporteur and the alternative put forward by Mr. Tunkin. He personally inclined in substance in favour of the formulation submitted by the Special Rapporteur. Mr. Tunkin's formulation seemed too general for the Commission's purpose; he agreed, however, with his remarks on article 73.

76. Subject to those observations, he expressed himself in general agreement with the Special Rapporteur's articles 70 to 73.

77. The CHAIRMAN said that no decision could be taken on the question whether the Commission's draft should include rules concerning the interpretation of treaties. No member had proposed that such rules should not be included in the draft. At most, the articles under consideration should be considered to be of an even more provisional nature than the rest of the draft.

78. Speaking as a member of the Commission, he said that he had found the Special Rapporteur's arguments convincing. Some members had asked who would observe the rules to be formulated by the Commission. His reply to that question was that the Commission was not creating *jus cogens*. If the parties agreed to interpret the treaty in another way, there was nothing to prevent them from doing so; but that would no doubt occur rarely, for those rules were eminently reasonable. They would be useful in a number of ways: in eliminating uncertainty in the law, which was the basic purpose of codification, and in facilitating the work of arbitral bodies, but particularly between the parties and even in the case cited by Mr. Tsuruoka, where a State sought to interpret a treaty to which it was not a party. Between the parties themselves, those rules could facilitate the settlement of disputes concerning the interpretation of treaties.

79. The principles embodied in the articles were, on the whole, sound. The Special Rapporteur proposed that the interpretation should be based first on the text of the treaty and secondly on the context; where the text was obscure, he proposed that recourse should be had to subsidiary methods. That was what happened in practice. Vattel's rule, cited by Mr. Ruda, was in fact implicit in the proposed articles. For his part, he would prefer not to lay too much stress on that rule, which was also a trap, used by those who refused to interpret the treaty according to common sense. There were cases where two States both found a treaty perfectly clear but interpreted it in two different ways.

80. On the question of the form to be given to the articles, he was inclined to share Mr. Tunkin's view, and he would even go a little further. Article 70, paragraph 1, could be redrafted to read:

"Treaties shall be interpreted in good faith in accordance with the ordinary meaning of each term in the context of the treaty and in the light of the principles of international law."

That wording would permit the elimination of the word "terms", which had a broader meaning than the corresponding word in French. It would also permit the elimination of the word "natural", which he would find

it difficult to accept, since the meaning of a term was a convention created by the human mind. The last phrase, "and in the light of the principles of international law", was in line with Mr. Tunkin's suggestion. The Commission should stop there, without specifying whether the principles in question were those in force at the time of the conclusion of the treaty. He was inclined to share Mr. Yasseen's view on the subject; in the case envisaged by Mr. Tunkin, where a new rule of *Jus cogens* appeared, it was not a matter of changing the interpretation of the treaty but of the treaty's becoming partly or wholly void.

81. After that paragraph, the Commission might add as paragraph 2 what was at present article 71, paragraph 1, the definition of "context". The first phrase of that paragraph would be worded: "The context of the treaty shall be understood as comprising in addition to the entire text of the treaty". Next would come sub-paragraphs (a), (b) and (c) as they appeared at present in article 71, paragraph 1.

82. As paragraph 3, the Commission could use the existing paragraph 2 of the article 70, amended to read:

"If in the context the meaning of a term seems to be obscure or ambiguous, its meaning shall be determined by means of the rules of interpretation set out in the following articles."

The present paragraph 3 of article 70 was not indispensable; the new paragraph 3 which he proposed would be more suitable for concluding the first article of section III.

83. While he made that proposal in his personal capacity, he had taken into account the remarks made by the members of the Commission.

84. Mr. PESSOU suggested that the word "ordinary" before the word "meaning" should be replaced by the word "usual".

85. Mr. de LUNA found the Chairman's proposal sound. However, as he shared Mr. Bartoš's concern, he regretted that it deferred mention of the objects and purposes of the treaty to the following articles. In his view, the objects and purposes were an integral part of the treaty, and all the intrinsic methods or interpretation should be exhausted before recourse was had to extrinsic methods. For that reason he suggested that the objects and purposes of the treaty should be mentioned in the definition of the context of the treaty proposed by the Chairman.

86. The CHAIRMAN pointed out that according to article 70, paragraph 2, as proposed by the Special Rapporteur, the objects and purposes of the treaty were taken into consideration only if the ordinary meaning would lead to an absurd or ambiguous interpretation. In the wording which he had proposed, he would prefer that the objects and purposes of the treaty should be mentioned in the first paragraph.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that, when he had drafted paragraph 1 of article 70 and in particular the passage referring to "the context

of the treaty as a whole", he had had very much in mind the objects and purposes of the treaty. It was, however, in paragraph 2 that he had found it necessary to spell out that point because it would be difficult to formulate any basic rule for the cases envisaged in paragraph 2 where the meaning was in doubt without a statement that the interpretation should be dominated by the objects and purposes of the treaty. He realized, however, that some discrepancy in the drafting became apparent when a comparison was made between paragraphs 1 and 2.

88. If the Commission were to consider the adoption of the text suggested by him, it would be necessary to add, after the words "in the context of the treaty as a whole" a passage along the following lines: "and taking into account its objects and purposes".

89. The CHAIRMAN accepted the Special Rapporteur's suggestion: the words "and with due regard to the objects and purposes of the treaty" should be added to the paragraph 1 which he had proposed.

90. Mr. TUNKIN said that the fate of article 70, and in particular whether its paragraph 2 should be retained or not, would depend very largely on the formulation of a subsequent article. For his part, he considered that paragraph 2 was unnecessary because its contents should be covered by the following articles.

91. Mr. BARTOŠ said that he had not proposed any amendments to the articles because he considered that his view and that of the Special Rapporteur could hardly be reconciled. The Special Rapporteur had not taken the objects and purposes of the treaty as the starting point for the purposes of its interpretation; instead of going from the general to the particular he went from the particular to the general, in proposing in article 70, paragraph 2, that in the event of ambiguity or obscurity the objects and purposes of the treaty should be considered. He suggested that perhaps at the second reading an introductory article might be proposed in which the treaty as a whole, including its objects and purposes, would be the basis of any interpretation.

92. The CHAIRMAN pointed out that his proposal, as revised, should to some extent allay Mr. Bartoš's concern for it referred to the objects and purposes of the treaty, not in the rule concerning the special case of an absurd or ambiguous interpretation but in the general rule to be stated in paragraph 1.

93. Mr. YASSEEN considered that the wording proposed by the Chairman improved the text of article 70. However, it would be regrettable if the Commission neglected a very important point, namely that the principles of the international order which should be taken into consideration were those prevailing at the time of the conclusion of the treaty. It should not be difficult to reach a compromise by modifying article 73. If article 70 expressly stated that the rules of law in force at the time of the conclusion of the treaty should be taken into consideration, then it would be possible, in reliance on such a provision, to give the treaty a definite meaning. It would suffice subsequently to modify ar-

title 73 to state that where that meaning was incompatible with rules of *jus cogens* emerging after the conclusion of the treaty, the meaning should be altered in conformity with those rules.

94. Sir Humphrey WALDOCK, Special Rapporteur, said that he agreed with Mr. Yasseen but thought that the point was a formal one; there was not much difference in substance between himself and Mr. Tunkin. The reference in paragraph 1 of article 70 should be to the interpretation of a treaty in the context of the rules of international law contemporary to its conclusion. The question of substance raised by Mr. Tunkin was covered by article 73, sub-paragraph (a), which dealt with the emergence of any later rule of customary international law affecting the subject-matter of the treaty; that provision would cover also the emergence of a rule of *jus cogens*.

95. The purpose of paragraph 1 (b) of article 70 was to cover such matters as the need to interpret a treaty in the light of the linguistic usages of the law at the time of the conclusion of the treaty. Clearly, only the contemporary law would be relevant from that point of view.

96. Lastly, in view of the inter-relation of the articles on interpretation, it was not possible to appreciate the Chairman's proposed article 70 unless his views were known on what should be the contents of the following articles.

97. The CHAIRMAN said that, to his mind, the following articles should be along the lines of those proposed by the Special Rapporteur.

The meeting rose at 1 p.m.

766th MEETING

Wednesday, 15 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties (A/CN.4/167/Add.3)

(continued)

[Item 3 of the agenda]

ARTICLE 71 (Application of the general rules) [concerning the interpretation of treaties]

1. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 71 of his draft (A/CN.4/167/Add.3),

said that he had little to add to his commentary; in particular, the controversy regarding the value, for purposes of interpretation, of the preparatory work of a treaty was well known.

2. Difficulties of interpretation arose in the cases, envisaged in paragraph 2 of article 70, where the text of the treaty itself was not sufficient to elucidate its meaning and it became necessary to have recourse to other means of interpretation.

3. There existed general agreement on the importance of the subsequent practice of the parties in relation to a treaty. However, it was only when that practice was concordant that it could be regarded as having the value of an authentic interpretation. In the case of multilateral treaties, the subsequent practice of only some of the parties was not automatically excluded as a means of interpretation; if it did not cover a broad group of parties it would, of course, only serve as an indication, and more evidence would be required in support of the alleged interpretation. It was for that reason that he had dealt with the matter of subsequent practice in two different provisions, in paragraph 2 of article 71 and in article 73. In article 73, the subsequent practice mentioned was the concordant practice of all the parties to the treaty, which gave a clear indication of their authentic interpretation of the treaty.

4. The CHAIRMAN, speaking as a member of the Commission, said that he entirely agreed with the principles stated in paragraph 2 of article 71, even though not everything set out in sub-paragraphs (a), (b) and (c) was entirely necessary and the paragraph might accordingly be drafted more concisely.

5. Experience had convinced him of the importance of the three elements referred to in the paragraph, and not least of the preparatory work. It would be hard to understand exactly what the intentions of the parties had been without reference to the *travaux préparatoires*, the term being taken in its broadest sense, akin to the English "legislative history". Secondly, it could happen that some of the intentions of the parties were not reflected in the preparatory work but might be inferred from the circumstances surrounding the treaty's conclusion. Thirdly, the subsequent practice of parties in relation to the treaty was a reliable guide for the purpose of its interpretation, but that was true only of the concordant practice of the parties, for any unilateral practice which was disputed by the other parties was not an element of interpretation. Accordingly, it would have to be specified that the subsequent practice to be taken into account in the interpretation of the treaty had to be concordant.

6. Mr. BRIGGS said that he supported the contents of both paragraphs of article 71.

7. In paragraph 1, as a matter of drafting, he considered that sub-paragraph (a) was unnecessary. In addition, sub-paragraphs (b) and (c) could be incorporated into the opening sentence. He therefore suggested that paragraph 1 should be reworded along the following lines:

"The context of the treaty shall be understood as comprising, in addition to the treaty, any instrument annexed to the treaty and any other instrument related to it at the time of its conclusion."

8. Paragraph 2 should be maintained as it stood, mainly for the reasons given by the Chairman. The means of interpretation therein mentioned were intended to serve in the situations envisaged in paragraph 2 of article 70. If, after an attempt had been made at a textual interpretation based on the ordinary meaning of the words used in the treaty, the resulting interpretation was manifestly absurd or unreasonable, or in the event of ambiguity or obscurity, the means mentioned in paragraph 2 of article 71 could be resorted to. In that same paragraph, he agreed that sub-paragraphs (a), (b) and (c) should be retained as they stood.

9. Mr. RUDA said that if the reference to the preamble were omitted from paragraph 1 of article 71, it would be necessary to introduce into the commentary some explanation on the use of the preamble of a treaty for the purpose of its interpretation. It should be explained that the preamble of a treaty was both a legitimate and a valuable guide in interpretation.

10. He agreed with Mr. Tunkin¹ that the definition of "treaty" in article 1 of the Commission's draft covered much, if not all, of the substance of article 71, paragraph 1, which could therefore perhaps be deleted altogether.

11. Referring to paragraph 2, which dealt with auxiliary means of interpretation, he said he found himself in full agreement with the permissive form in which its provisions were drafted. However, he had some doubts regarding sub-paragraph (a). If the meaning of a term was clear, with the consequence that paragraph 1 of article 70 applied, there would surely be no need to resort to auxiliary means of interpretation for the purpose of confirming that meaning, which was already clear. He also had doubts regarding sub-paragraph (c), which dealt with the exceptional case covered by paragraph 3 of article 70. If, as stated in that latter provision, the special or extraordinary meaning of a term had been "established conclusively", then the meaning in question was perfectly clear and there should be no need to resort to auxiliary means of interpretation in order to establish that special meaning.

12. He added that, paragraph 2 of article 71 actually applied exclusively to the cases mentioned in paragraph 2 of article 70, for the whole system of auxiliary means of interpretation entered into play only where a textual interpretation led to a manifestly absurd or unreasonable meaning, or in the event of ambiguity or obscurity. That being so he thought that paragraph 2 of article 71 should be merged with paragraph 2 of article 70. With regard to the order in which the various auxiliary means were listed, he considered that the subsequent practice of the parties should be mentioned first, the circumstances surrounding the conclusion of the treaty second and the preparatory work last of all.

13. The CHAIRMAN observed that normally those auxiliary means were enumerated in chronological order.

14. Mr. ROSENNE said that he was in general agreement with the basis of article 71 and most of his observations would relate to matters of drafting.

15. He suggested that the opening words of paragraph 1 should be amended to read "For the purposes of article 70" instead of "In the application of article 70". The term "application" was used much too frequently in the draft and it could be a source of confusion.

16. He would prefer the words "including its preamble" to remain but if they were dropped, the commentary should explain clearly that the preamble constituted an integral part of an international treaty.

17. In paragraph 2, he suggested that the opening words should be amended to read "Reference may also be made, where necessary, to...". In addition, he suggested the deletion of the last words of the opening sentence "for the purpose of" and also of sub-paragraphs (a), (b) and (c). In the codification of the law of treaties, he did not believe that the Commission should touch upon problems of evidence and proof in international law. In any case, if those problems were to be dealt with, he did not believe that the sub-paragraphs in question would necessarily cover all that was relevant. In particular, sub-paragraph (a) introduced an unnecessary element of doctrinal controversy. It was true that there existed a number of apparently consistent pronouncements by the International Court of Justice and arbitral tribunals to the effect that *travaux préparatoires* had only been used to confirm what had been found to be the clear meaning of the text of a treaty. However, that case-law would be much more convincing if from the outset the Court or tribunal had refused to admit consideration of *travaux préparatoires* until it had first established whether or not the text was clear, but in fact, what had happened was that on all those occasions the *travaux préparatoires* had been fully and extensively placed before the Court or arbitral tribunal by one or other of the parties, if not by both. In the circumstances, to state that the *travaux préparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction. It was impossible to know by what processes judges reached their decisions and it was particularly difficult to accept the proposition that the *travaux préparatoires* had not actually contributed to form their opinion as to the meaning of a treaty which, nevertheless, they stated to be clear from its text, but which, as the pleadings in fact showed, was not so. At all events, it could be supposed that all practitioners of international law were free in their use of *travaux préparatoires*.

18. With regard to the order in which the sources should be mentioned in paragraph 2, he suggested that first place should be given to the circumstances surrounding the conclusion of the treaty, second place to the *travaux préparatoires* and last place to subsequent practice.

¹ See para. 50 of the summary record of the 765th meeting.

19. Mr. TUNKIN said that he was in general agreement with the basic ideas embodied in article 71 but thought that it overlapped to a considerable extent with article 73 ; hence the need for the rearrangement of the articles on interpretation which he had suggested at the previous meeting.²

20. In particular, the contents of paragraph 1 (a) of article 71 duplicated to some extent those of paragraph (b) of article 73. It was true that the latter provision referred to "any later agreement" and not specifically to an agreement on interpretation, but it was nevertheless true that an agreement which did not deal with interpretation could sometimes be relevant to the interpretation of an earlier treaty.

21. The subsequent practice of the parties in relation to the treaty was also mentioned both in article 71 and in article 73.

22. He therefore urged that some rearrangement of articles 70 to 73 should be undertaken in order to bring out more clearly the basic ideas put forward by the Special Rapporteur. In that rearrangement, article 70 would set forth the fundamental rule that the text of the treaty constituted the basic source of interpretation. Article 71 would then deal with what might be called sources of interpretation of the second degree ; it would be followed in turn by another article dealing with subsidiary sources of interpretation.

23. Within that framework, article 71 would cover the following : first, subsequent agreements on the same subject-matter, so far as they were relevant to the interpretation of the original treaty ; second, any later agreement on its interpretation ; third, subsequent practice, provided that it was the concurrent practice of all the parties to the treaty. In connexion with the third source, some doubts had arisen whether it should be considered as a secondary source or merely as a subsidiary source. He personally regarded it as having the character of a secondary source ; if the subsequent practice of all the parties concurred, it could be said that there existed between the parties a tacit agreement, at least on interpretation. The source was thus of the same order as the agreements he had just indicated as first and second sources.

24. The article which would follow article 71 and which would deal with subsidiary sources would cover preparatory work. He was not absolutely certain that the circumstances surrounding the conclusion of the treaty should be included under that same heading.

25. Turning to the wording of article 71, he expressed doubts regarding the need to retain paragraph 1, since in article 1 of part I of the draft the Commission had already indicated what it meant by "treaty" for the purposes of its draft articles. Perhaps the Drafting Committee should be invited to consider whether it was necessary to retain paragraph 1, inasmuch as some of the instruments therein mentioned were already covered by the definition of "treaty". Sub-paragraph (c) was

not quite clear to him ; he asked whether the instruments therein mentioned might not in some cases be *travaux préparatoires*.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that the instruments mentioned in paragraph 1 (c) of article 71 were not *travaux préparatoires*. One example of the type of instruments he had in mind was that of instruments of ratification.

27. Mr. TUNKIN, while accepting that explanation, pointed out that an instrument of that type would perhaps constitute a subsidiary source of interpretation.

28. The provisions of paragraph 2 of article 71 should, be thought, be divorced from those dealing with the secondary sources of interpretation. The contents of paragraph 2 should form a separate article, drafted on the following lines :

"If the interpretation in accordance with the two previous articles does not bring about a sufficient clarification, reference may be made to other evidence or indications of the intentions of the parties..."

29. A formulation of that type would make it perfectly clear that subsidiary sources would be used only if primary and secondary sources proved of no avail.

30. The CHAIRMAN, speaking as a member of the Commission, said that according to the proposal he had made at the previous meeting,³ paragraph 1 of article 71, which was intended to define the meaning of the expression "the context of the treaty" would be transferred to the first article of section III and would be drafted on the following lines :

"The context of the treaty shall be understood as comprising, in addition to the entire text of the treaty, any instrument annexed to or related to it".

That wording would cover all kinds of instruments — instruments of ratification, exchanges of letters, annexes, collateral agreements and so on — in short, all documents to be taken into consideration, other than subsequent agreements establishing an interpretation.

31. Sir Humphrey WALDOCK, Special Rapporteur, said that the formulation suggested by the Chairman did not take into account the important question of agreements made by the parties before the conclusion of the treaty and related to it.

32. The CHAIRMAN, speaking as a member of the Commission, said that some such words as "and drawn up before or in connexion with its conclusion" might be added to the text he had proposed.

33. Sir Humphrey WALDOCK, Special Rapporteur, thought that the language proposed by the Chairman was much too broad. It could be construed as covering also future agreements. He suggested that the passage should commence with language along the following lines :

"For purposes of interpretation, the context of the treaty shall be understood..."

² *Ibid.*, para. 51.

³ *Ibid.*, para. 81.

34. Mr. CASTRÉN said that he could accept article 71 as submitted by the Special Rapporteur, although he recognized that probably most of the proposals by previous speakers were defensible. He had two remarks to make concerning paragraph 2. In order that it should not give too much weight to the subjective element, the provision might mention in addition to the intention of the parties, the interpretation of the treaty in general. So far as preparatory work was concerned, he agreed with the remark in paragraph (21) of the commentary that unpublished documents could also be taken into consideration, provided that they were accessible to the parties; that condition might perhaps be included in the body of the article.

35. M. de LUNA said he was in agreement with the Chairman's formulation for paragraph 1, which embodied ideas expressed by Mr. Tunkin, Mr. Briggs and Mr. Ruda.

36. So far as paragraph 2 was concerned, he agreed with Mr. Tunkin that a sort of order of importance among sources of interpretation should be established. In his opinion, subsequent practice should precede preparatory work in that enumeration. Unlike the Chairman, he did not attach much importance to the chronological order; the main difference between those two sources was that subsequent practice had a more objective character and also a greater measure of certainty than *travaux préparatoires*. All those who had participated in diplomatic negotiations were aware of the decisive part which informal discussions often played in the most delicate phase of the negotiations. As a result, the reasons which had impelled the parties to accept a certain formula of agreement frequently did not appear at all in the records of the meeting, so that those records did not provide a full guide to the will of the parties. All too often, the parties placed on record as little as possible, and certainly what committed them least.

37. There was also a very great difference between an announced intention and the carrying out of a certain programme. He suggested that a distinction should be made between intentions that were actually carried out and intentions that were merely announced.

38. Nor was the subsequent practice of the parties always a reliable guide for the purpose of interpretation; it might also have the effect of modifying the treaty, for the parties were free at any time to amend a treaty by means of their concurrent practice.

39. Another important problem, which could hardly be dealt with in the article itself but which should be mentioned in the commentary, concerned the constituent instruments of international organizations. The subsequent practice of the parties had in many cases led to interpretations which in effect amended the instruments concerned. Nothing said in the draft articles on interpretation should be capable in any way of preventing that progressive development within international organizations.

40. He agreed with Mr. Rosenne that it would be advisable to delete sub-paragraphs (a), (b) and (c) of

article 71, paragraph 2. In particular, he entirely agreed with Mr. Rosenne's remarks on the use made by judges of *travaux préparatoires*. Having served in a judicial capacity for four years, he could safely assert that no one could claim to know how a judge actually arrived at his conclusions; that question was a completely different one from that of the statement of reasons which normally prefaced the operative part of any judicial decision. The situation was not without some similarity to that which he had described in his earlier remarks concerning the *travaux préparatoires* of a treaty.

41. Mr. LACHS said that in general the provisions of article 71 contained a sound and clear formulation of the rules of interpretation covered by that article.

42. Commenting on paragraph 1, he agreed with those speakers who had stressed the importance of the preamble of a treaty and suggested that the words "including its preamble" should be retained without the brackets. The preamble of a treaty was extremely important for the interpretation of a treaty as a whole. In a great many treaties, the object and purpose were indicated solely in the preamble, and the preamble was consequently essential for the purpose of a wider interpretation of the treaty. He had some doubts regarding paragraph 1 (a), which spoke of an agreement concluded by the parties as a basis for the interpretation of the treaty. He believed cases of such agreements were extremely rare but had no objection to such agreements, if any, being used as a source of interpretation.

43. He had, however, much greater difficulty in accepting the reference in paragraph 1 (b) to the annexes to a treaty. In many treaties, the annexes had a completely different standing from the international instrument itself; in particular, provision was often made for the amendment of an annex without the consent of all the parties to the treaty. An example of that situation was provided by the air navigation conventions concluded at Paris (1919)⁴ and Chicago (1944).⁵ The annexes to those conventions contained certain definitions, and in particular the definition of "aircraft". In both cases, the procedure for amending the annexes was much easier than that for amending the conventions. It was questionable whether annexes of that subsidiary character, with the flexible arrangements for their amendment for practical purposes, could be relied upon for purposes of interpretation, particularly since they were not agreed to by all the parties of the treaty. He thought that some qualifying phrase covering that type of annex was necessary.

44. In paragraph 1 (c), it should be made clear that the instruments mentioned should have been subscribed to by all the parties to the treaty. It was possible for some of the parties to a treaty to conclude an instrument related to the treaty that would constitute a sort of *inter se* agreement.

⁴ Convention for the Regulation of Aerial Navigation of 13 October 1919, *United Kingdom Treaty Series* No. 2 (1922).

⁵ Convention on International Civil Aviation of 7 December 1944, *United Nations Treaty Series*, Vol. 15.

45. In paragraph 2, the most important issue was that of the relationship between preparatory work and subsequent practice; it was therefore not a matter for surprise that all speakers should have referred to that issue. In that connexion, he pointed out that, occasionally, the subsequent practice of the parties transformed a treaty so profoundly that it was made to serve a purpose diametrically opposed to the one for which it had been concluded. As an example, he mentioned the Treaty for collaboration in economic, social and cultural matters and for collective self-defence, signed at Brussels on 17 March 1948 by Belgium, France, Luxembourg, Netherlands and the United Kingdom⁶ as a protection against Germany, to which the Federal Republic of Germany had, however, later been admitted as a party, with the consequence that the Brussels treaty had become a treaty of alliance with that country. The fact of the matter was that the intentions of the parties could change and be expressed in their subsequent practice.

46. He fully agreed with Mr. de Luna that, in international organizations, changes could be brought about by way of practice and interpretation in such a manner as to give to certain provisions of the constituent instrument a meaning which was very remote from that envisaged by the parties at the time of signature. The Charter of the United Nations provided a good example; nineteen years had elapsed since it had been signed, and many of its provisions were now construed in a manner completely different from that contemplated in 1945. It was also worth remembering that the original parties to the Charter were now outnumbered by the States that had acceded to the Charter since 1945; it would be going too far to claim that the original signatories had a greater say in the interpretation of the Charter than the majority. The burden of the operation of a treaty, in the light of the realities of international relations, fell upon all its signatories; there was therefore no reason for giving a higher standing to the intentions of the original parties in the matter of interpretation.

47. Paragraph 2 should strike a balance between subsequent practice and *travaux préparatoires*, for even those who had participated in the *travaux préparatoires* might well change their minds later and express that change of views in their subsequent practice.

48. Mr. YASSEEN said that article 71, paragraph 1, was intended to define what was meant by "the context of the treaty" for a specific purpose, and, accordingly, that definition did not necessarily have to be identical with the definition of "treaty". For the purposes of the interpretation of a treaty one had to determine the entire "context", and hence the provision should mention whatever might be helpful in the interpretation. The agreements arrived at between the parties as a condition of the conclusion of the treaty or as a basis for its interpretation (referred to in sub-paragraph (a)) might be agreements separate from the treaty, but they had a direct link with the treaty so far as the interpretation

was concerned and hence should be enumerated among the elements comprising the context. The elements listed in sub-paragraphs (b) and (c) were also useful. Without going into questions of drafting, he therefore thought that the ideas stated in paragraph 1 were correct.

49. As to paragraph 2, he thought it was self-evident that interpretation was almost impossible on the basis of the text of the treaty alone. The text was the expression of the intentions of the parties, but a knowledge of the events during the drafting of the text was necessary for an understanding of those intentions. Extrinsic means of verifying the exact scope of the rule of law embodied in the treaty had to be resorted to. It was not always possible to adhere to the *prima facie* meaning of the text, even though that meaning might apparently be clear and reasonable. Clarity was relative and might be apparent only; in order to prove that the meaning was ambiguous or unreasonable, reference must be made to extrinsic factors, such as the circumstances surrounding the conclusion of a treaty and the preparatory work. He was not sure, however, that it was desirable to refer in that paragraph to the stage subsequent to the treaty's conclusion.

50. Mr. PAL said that, with regard to subsequent practice, whatever was mentioned in article 71 should be regarded as in aid of interpretation; the provision could not go beyond that.

51. The fundamental rule was laid down in article 70; in order to find out the real meaning of a treaty, it was necessary to consider the intention of the parties in so far as those parties had succeeded in expressing it in the language used by them in the treaty. Article 71 mentioned certain means which could be used in aid to finding out that intention; that article was based on the assumption that there was ambiguity in the text itself.

52. As he understood it, the reference in article 71 to subsequent practice meant that reference could be made to subsequent practice in so far as it helped to ascertain the intention of the parties. Accordingly, the subsequent practice that was material was that which emanated from the parties that were the authors of the treaty. Also, it should not have the effect of modifying the treaty; subsequent practice which amended a treaty raised a different issue.

53. He believed that those were the ideas underlying the Special Rapporteur's draft articles on interpretation. It was possible, however, that some drafting changes might be necessary in order that those ideas should be more adequately expressed.

54. He stressed the value of subsequent practice as an expression of the intention of the parties, when that subsequent practice took place before any dispute arose. In such an event, there could be no doubt that the practice in question would be of assistance in ascertaining the meaning of the treaty as understood in good faith by the parties themselves.

55. Mr. AMADO urged the Commission to cease delving into such fertile soil: every facet of the subject

⁶ United Nations Treaty Series, Vol. 19.

could well lead to a battle of legal wits. Because he wanted the Commission to perform useful work he had, in the discussion on article 70, spoken in favour of the reference to the preamble and had opposed the use of the expression "the terms of the treaty". As to article 71, he was disturbed to note that some members wished to give so much weight to the *travaux préparatoires*. He did not dispute their value in the interpretation of a treaty, but, after all, words were often used to hide thoughts, and in negotiating a treaty States were concerned mainly to advance their interests. The *travaux préparatoires* should not therefore be placed on the same footing as such a traditional practice as authentic interpretation by States, even if that interpretation modified the meaning of a treaty. The Commission should have the courage not to seek perfection and should adopt article 71 as it stood, save perhaps the sub-paragraphs, which seemed to be designed for casuistry.

56. Mr. BARTOŠ said he wished to make some technical observations, although he remained faithful to the general conception he had propounded at the previous meeting. He agreed with other members that paragraph 1 (b) of article 71 to some extent conflicted with the definition of "treaty" embodied in article 1 of the Commission's draft. He was doubtful whether the expression "drawn up in connexion with the conclusion of" could be kept in sub-paragraph (c), even if the requisite explanations were given in the commentary; for if the Commission accepted the Special Rapporteur's idea that one had to inquire into the intentions of the parties, then it followed that the interpretation would be subjective. If the interpretation was to be based on instruments, it would be objective.

57. The reference to preparatory work would be of dubious value if the parties had made conflicting declarations or if a term had been used which could be construed in several ways and it was impossible to determine which of those constructions had prevailed. Besides, were States which subsequently acceded to a multilateral treaty bound to know everything that had preceded the treaty's conclusion? Experience with the drafting of multilateral treaties showed that a compromise was very often reached at the last minute which conflicted with the positions previously assumed and of which no explanation was found in the records of the discussion. Accordingly, he thought that too much should not be made of subjective expressions of the will of the parties as a clue to their intentions. He personally preferred objective interpretation, because the will of the parties as objectively expressed in the text of a treaty (unless there was very clear evidence of an error in wording) was the best guarantee of respect for the treaty and the best safeguard of treaty relations between States. The circumstances surrounding a treaty's conclusion were of more value for understanding the meaning of the treaty as a whole or of one of its clauses. He hoped therefore that the trend in the commentary would be less definitely towards the subjective conception of interpretation. Interpretation was sometimes a confirmation of a treaty's meaning, but far more often a modification of that meaning.

58. He had criticized the Special Rapporteur's approach, but his own was perhaps more dangerous, since it gave a freer hand, opened many avenues of escape from the clauses of a treaty and gave a great deal of opportunity for arbitrary conduct.

59. Mr. PESSOU remarked that the Commission should not overlook another aspect, which was a frequent source of difficulties, the matter of language and the impossibility, in some cases, of finding equivalent words in different languages. A illustration had been cited at the previous session⁷ of the outbreak of a war between Italy and Abyssinia owing to a difference in the meaning of one word used in a treaty between the two countries concerned.

60. The CHAIRMAN said that, admittedly, the linguistic problem was important, but it would be dealt with in another article, concerning the interpretation of conflicting texts of treaties drawn up in more than one language.

61. Mr. VERDROSS said he shared Mr. Bartoš's misgivings. They might perhaps be allayed by slightly amending the wording of article 71, paragraph 2. Under article 70 auxiliary means could be used only in cases of doubt or if the ordinary meaning of a term did not lead to a reasonable interpretation, and article 71, paragraph 2, suggested other means of determining the intentions of the parties. The intention alone was not, however, a conclusive guide; it had to be expressed in the text of the treaty, however imperfect. Paragraph 2 might be amended to refer to "the intentions of the parties as expressed in the text of the treaty".

62. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the whole of article 71 was governed by the words "in the application of article 70", and article 70 dealt with the whole question of the text. The point could undoubtedly be clarified when the articles were redrafted.

63. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Lachs's point with regard to annexes was perhaps not so important as it appeared. If an annex constituted an *inter se* instrument among some of the parties, it would clearly not form part of the context that was relied upon to solve problems of interpretation that had arisen among the other parties or among all the parties. But if the annex was an instrument applicable to all the parties, it formed part of the context. In the case of a treaty on aerial navigation, for instance, if the air routes in question were specified in an annex to the treaty, it was obviously impossible to interpret the treaty without reference to the annex. If necessary, he was prepared to agree that no attempt should be made to define "context"; but if the Commission decided that such a definition was necessary, it would have to be very broad, for it would be very dangerous to omit any factor of importance. The question arose in a different way on each occasion.

64. The basic problem lay in article 71, paragraph 2,

⁷ See *Yearbook of the International Law Commission, 1963*, Vol. I, para. 42 of the summary record of the 678th meeting.

which dealt with subsidiary means of interpretation. It had been claimed that, if the text was clear, there was no need to employ those means; but in many of the International Court's decisions, there was first a brief interpretation of a text that was regarded as clear and then a thorough analysis of the preparatory work to confirm that interpretation. Accordingly, even where a literal interpretation was obvious from the start, it was always desirable to confirm it if possible by reference to the *travaux préparatoires*.

65. The order of priority of the various subsidiary means of interpretation also varied from case to case. To give the same example again, a treaty on aerial navigation might use a rather vague geographic term. It might be that reference to subsequent practice would not provide a conclusive answer if it was evident from that practice that for some years the term had been interpreted narrowly — though without necessarily excluding a broader sense — and that the fact that it was open to different interpretations had only come to light later. In such a case, on the contrary, a study of the preparatory work might show that the negotiations had been spread over several years and that not until the State proposing the conclusion of the treaty had given a very narrow definition of the term in question had its proposal been accepted by the other States. In such a situation, it was clear that the treaty had eventually been concluded because the States which had at first been hesitant had been reassured by the knowledge that the term in question was to be taken in a narrow sense. Without reference to the preparatory work, it would be impossible to know on what basis the consent of the parties had been obtained.

66. The Commission should be very cautious and adopt a very flexible text which would offer several means of interpretation but would not impose any one of them; it should also be careful not to suggest that there was any order of preference among those means.

67. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion on articles 70 and 71 had been instructive particularly on those points about which members claimed to differ from him but concerning which they had in fact said what he had intended to express. He therefore believed it should be possible to formulate acceptable texts.

68. If the "context of a treaty" was understood in a fairly liberal sense and defined on the lines suggested by the Chairman, some measure of hierarchical order would be given to the different elements of interpretation without going too far in that direction.

It was agreed that the Special Rapporteur should be requested to redraft articles 70 and 71 in the light of the discussion.

ARTICLE 72 (Effective interpretation of the terms: *ut res magis valeat quam pereat*)

69. The CHAIRMAN asked the Special Rapporteur whether he still thought that article 72 should be a separate article, or whether he proposed to incorporate its contents either in article 70 or in article 71.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that he had submitted article 72 as a separate provision in order to ascertain the views of the Commission. He did not particularly favour retaining the maxim *ut res magis valeat quam pereat* because what the article really was concerned with was the effective interpretation of the terms of the treaty. He agreed with de Visscher⁸ that it depended on the terms of the treaty itself whether the application of the principle led to a restrictive or to an extensive interpretation. The principle appeared in the jurisprudence of the International Court and was inherent in the notion of good faith. As he had indicated in the commentary, there was perhaps one reason for including such an article, for without it the somewhat strict rules laid down in the earlier articles concerning the text and context of a treaty might appear to exclude the notion that terms could be implied in a treaty (see paragraph (29) of the commentary).

71. Mr. VERDROSS doubted whether it was necessary to retain the article; for in his view it merely repeated what was already stated in article 70. Article 72 said in effect that, if the interpretation was in conformity with the rules set out earlier, the treaty would produce all the effects it was capable of producing.

72. Mr. CASTRÉN referred to the reservations he had expressed concerning article 72 earlier in the debate.⁹

73. The Special Rapporteur himself had hesitated (paragraph (27) of the commentary) to propose the inclusion of the principle of "effective" interpretation and had also pointed out (paragraph (16) of the commentary) that the International Court of Justice had refused to admit that principle. The Commission should follow the same course, especially since a number of other principles could be invoked against that of "effective interpretation", the bounds of which were hard to define. It would be enough to state, as did paragraph (29) of the commentary, that the principle of effective interpretation might be said to be implicit in the requirement of good faith. Besides, the rule of article 70 that a treaty should be interpreted by reference to its objects and purposes might in a way be said to constitute an affirmation of the principle of effective interpretation.

74. He therefore shared Mr. Verdross's view that article 72 should be dropped.

75. Mr. BARTOŠ said that, like Mr. Verdross and Mr. Castrén, he doubted whether the provisions of article 72 should be retained in the form of a separate article.

76. On the other hand, he attached particular importance to sub-paragraph (b) of article 72 which should be transferred bodily to article 70. Sub-paragraph (a), however, might be said to be implicit in the opening words of article 70, paragraph 2.

⁸ Cited in para. (27) of the Special Rapporteur's commentary.

⁹ See summary record of the 765th meeting, para. 21.

77. In the debate on article 70, Mr. Tunkin had said that the basis of the interpretation of a treaty should be the principles of international law.¹⁰ His (Mr. Bartoš's) view was that the general rule should also make reference to the objects and purposes of the treaty. The rule should not refer solely to cases where the natural and ordinary meaning of a term led to an interpretation which was manifestly absurd; the objects and purposes of the treaty should be regarded as paramount.

78. Accordingly, although he considered that article 72 should not form a separate article, he hoped that its substance would, as one of the leading rules for the interpretation of treaties, form part of article 70, paragraph 1.

79. Mr. YASSEEN considered that the rule stated in article 72 should not appear in the draft. The purpose of interpreting a treaty was to ascertain the true sense and exact scope of the text; it followed that the fullest weight and effect should be given to the stipulations entered into by the parties. That was not merely a rule imposed by the principle of good faith; it was the basis of all interpretation.

80. Like Mr. Verdross, he thought that the article should be omitted.

81. Mr. de LUNA agreed with Mr. Bartoš that it would be desirable to delete that article while preserving some of its features.

82. If the article was deleted, the question would be whether to make the provisions of a treaty as effective as possible by means of a so-called extensive interpretation or, on the contrary, to limit their effect so far as possible, by means of a restrictive interpretation.

83. The choice was not between legal effects and the total absence of such effects — or, in the terms of the maxim, between *valeat* and *pereat* — but rather between legal effects which were more or less far-reaching.

84. For many reasons States preferred in practice deliberately to rely on political expediency rather than on sound legal logic to determine certain consequences of treaty provisions. The Commission was as powerless as judges and States to change the tendency deliberately to limit the consequences of a treaty provision, since that limitation was desired by the parties. Actually, the Latin maxim was at variance with principles to which he attached greater importance; for example, the principle that a State was subject to an obligation only if the obligation was proved to exist. In case of doubt, the lack of proof of an obligation was a stronger argument than the principle of State sovereignty.

85. As he shared Mr. Verdross's opinion on the subject, he proposed that the entire article should be deleted, although the commentary should mention the case where a treaty provision produced no legal effects.

86. If, on the contrary, the Commission decided to retain the article he thought the text should be re-drafted in such a way as to lessen the inclination towards an extensive interpretation which the present

wording seemed to indicate. He proposed that the phrase "to give it the fullest weight and effect consistent" should be replaced by the words "to give it effect", which would preserve the only important feature; in other words, it would cover the situation where a treaty provision had no legal effect. The interpretation could be extensive or restrictive, as required, but it always had to be adequate.

87. Mr. LACHS said that the underlying idea of article 72 should be reflected in article 70 and he would have liked to preserve the Latin maxim which expressed it concisely. However, sub-paragraph (b) should precede sub-paragraph (a) because in any case of conflict it was the objects and purposes of the treaty which should prevail.

88. Mr. TABIBI considered that the substance of article 72 should be transferred to the fundamental rule to be stated in article 70.

89. The CHAIRMAN, speaking as a member of the Commission, warned against over-simplification of the problem. The Commission had decided to refer to the objects and purposes of the treaty in article 70, paragraph 1, as a basic criterion for interpretation. Article 72 had a different objective.

90. The deletion of paragraphs (a) and (b) would not mean ignoring the intention underlying that text, as reflected in the Latin maxim; interpretation should seek to save clauses of a treaty which were threatened with loss of effect through interpretation.

91. In addition, the article as drafted was definitely weighted in favour of extensive interpretation. That was his real reason for thinking that the article should be omitted, for he considered that the Commission should not express a preference either for extensive or for restrictive interpretation.

92. Mr. ROSENNE considered that the idea underlying article 72 that a treaty should be given an interpretation which would make it effective, should be retained; whether it should be embodied in a separate article or in article 70 was essentially a drafting question. The word "fullest" seemed to him excessive and should be replaced at the most by the word "full".

93. The discussion on articles 70 and 71 had perhaps been rather too theoretical: interpretation should not be viewed as an academic intellectual exercise performed in the abstract but as a practical process undertaken in concrete political circumstances. In that connexion he drew attention to the following passage in the comments by Sir Eric Beckett on Sir Hersch Lauterpacht's report to the Institute of International Law on the interpretation of treaties:

"There is a complete unreality in the references to the supposed intention of the legislature in the interpretation of the statute when in fact it is almost certain that the point which has arisen is one which the legislature never thought of at all. This is even more so in the case of the interpretation of treaties. As a matter of experience it often occurs that the difference between the parties to the treaties arises out of

¹⁰ *Ibid.*, para. 49.

- something which the parties never thought of when the treaty was concluded and that, therefore, they had absolutely on common intention with regard to it. In other cases the parties may all along have had divergent intentions with regard to the actual question which is in dispute. Each party deliberately refrained from raising the matter, possibly hoping that this point would not arise in practice, or possibly expecting that if it did the text which was agreed would produce the result which it desired.”¹¹
94. The last few words in the passage he had quoted confirmed the importance of stressing the idea underlying article 72 as a primary element of what constituted interpretation, which it would be the purpose of article 70 to describe.
9. Mr. RUDA said he opposed the text of article 72 for reasons of form, similar to those mentioned by Mr. Verdross, and also for reasons of substance. He considered that the Special Rapporteur's text did not actually reflect the sense of the Latin maxim, the terms of which he endorsed. He believed that the maxim should be understood to mean that the interpretation should seek to give a treaty provision a positive legal effect and avoid its losing its effect. In applying the Latin maxim to the interpretation of the treaty the object should be to save the clauses of the treaty.
96. That point of view was very different from that reflected in the text proposed by Sir Humphrey Waldock, especially the expression, “the fullest weight and effect consistent”. There was a considerable difference between giving a provision its full effect — arriving at an extensive interpretation — and saving a clause of a treaty.
97. If the text with the vague formula “the fullest weight” was maintained, he would be unable to support it. Latin America had recently had experiences of the extensive interpretation of clauses which were important to its security. For that reason, and in the light of his personal experience, he would be unable to accept the text unless it was modified along the lines indicated by the Chairman.
98. Sir Humphrey WALDOCK, Special Rapporteur, said that the words “as to give it the fullest weight and effect consistent” were taken from principle IV in Sir Gerald Fitzmaurice's formulation (cited in paragraph (12) of the commentary), which also contained the qualifying phrase “and in such a way that a reason and a meaning can be attributed to every part of the text”. Perhaps the latter wording could be used when redrafting the text, as he imagined that the Chairman and Mr. Ruda had something of that kind in mind. The text could also be modified in such a way as not to favour extensive interpretation.
99. The CHAIRMAN, speaking as a member of the Commission, suggested that another solution would be to draft another separate article to express the basic idea that, when two interpretations were possible, preference should be given to the one which gave meaning to the treaty provision in question.
100. Mr. TUNKIN said that in the measure in which it might be acceptable the notion of effective interpretation could be incorporated in article 70, but caution was needed. An extensive interpretation sometimes went too far. Only sub-paragraph (b) of article 72 should be retained for inclusion in article 70.
101. Sir Humphrey WALDOCK, Special Rapporteur, said that in essence the content of article 72 would be retained if sub-paragraph (b) were included in article 70.
102. The CHAIRMAN, speaking as a member of the Commission, said that he would not be sorry to see the Latin maxim deleted. The requirement of good faith and the reference to the objects and purposes of the treaty were already contained in article 70. Whether one liked it or not, the rule formulated in article 72 would lead to an extensive interpretation.
103. In any case, the article related to rather hypothetical situations. The interpretations of a text, however divergent they might be, always gave it a meaning. It was hardly conceivable that a party would propose an interpretation which deprived the text of all meaning. On the other hand, it was inevitable that a provision like that in article 72, even if drafted in prudent terms, would ultimately tend to endorse an extensive interpretation.
104. He did not wish to suggest that the Commission should endorse the principle of restrictive interpretation, which was in any case applicable in situation where, out of respect for State sovereignty commitments had to be narrowly construed. Yet, it would be unwise even to suggest an extensive interpretation, in however prudent language, and for that reason he also favoured deletion of the text.
105. Mr. ROSENNE questioned whether article 72 was concerned with the alternatives of a restrictive or an extensive interpretation. Surely it dealt with a commonplace aspect of interpretation in general, namely, that it was always to be assumed that parties intended to give a meaning to the terms of the treaty.
106. The CHAIRMAN, speaking as a member of the Commission, considered that it was only logical to give preference to the interpretation which gave a meaning to the text. An interpretation given in good faith and taking account of the objects and purposes of a treaty would always necessarily seek to give a meaning to the text.
107. Mr. ROSENNE said that in the case contemplated by article 72 the choice was not between an interpretation which produced nonsense and one which produced sense but between two which made sense.
108. The CHAIRMAN said that in that case the question of an extensive interpretation would arise.
109. Mr. VERDROSS considered that, if article 72 was merely intended to cover cases where a provision

¹¹ *Annuaire de l'Institut de Droit International*, Vol. 43, tome 1, (1950), p. 438.

would or would not have a meaning, everything that needed to be said on the subject was already said in article 70, paragraph 2.

110. Mr. LACHS agreed with the preceding speaker and considered that the substance of article 72 could be incorporated in article 70, paragraph 2, subject to the omission of the words "as to give it the fullest weight and effect consistent with" for they might give the impression that the aim was to save the treaty at all costs regardless of whether it fulfilled the requirements of the time.

111. Mr. AMADO supported the suggestion made at the preceding meeting by Mr. de Luna and Mr. Tunkin that the reference to the objects and purposes of the treaty should appear in the fundamental rules of interpretation. He also agreed with Mr. Ruda's remarks.

112. However, in following the debate, he had been struck by the repeated references to the idea of extensive interpretation, whereas no one attached any importance to the word "weight", which some members seemed to associate with the idea of extensive interpretation. But surely, the idea of "weight" in that connexion was a very concrete one and one of particular importance in a text intended fully to elucidate the substance and effects of a term.

113. He believed that the Latin maxim, highly respectable though it was, was out of date.

114. He paid a tribute to Mr. Bartoš, who, although opposed to any subjective interpretation, had agreed to the use of the expression "objects and purposes of the treaty".

115. Mr. BRIGGS agreed with the majority that article 72 should not be maintained as a separate article, for if it were allowed to stand it would single out for special treatment one of the many canons of interpretation.

116. Perhaps the words "and so as to give it effect" might be inserted after the word "term" at the end of the opening phrase in article 70, paragraph 1.

117. Mr. RUDA considered the formula suggested by Mr. Briggs to be extremely dangerous. To give effect to a treaty, within a political conference at which there was a certain degree of tension, was particularly risky because the small States were under the sway of the large ones. Furthermore, with respect to whom could the provisions of a treaty be given effect?

118. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had been valuable in making it clear that the Commission attached great importance to the primacy of the text. He did not favour Mr. Briggs's amendment, for it might diminish the force of the fundamental rule.

119. The CHAIRMAN said that the majority of the Commission seemed to hold the view that the maxim *ut res magis valeat quam pereat* should not form the

subject of a separate rule. In so far as it stated a logical rule, it was in any case implicit in the earlier provisions of sections III of the draft and there was perhaps no need to state it explicitly.

120. Accordingly, he suggested that for the time being article 72 should not appear in the section on the interpretation of treaties.

It was so agreed.

ARTICLE 73 (Effect of a later customary rule or of a later agreement on interpretation of a treaty)

121. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 73, said that if earlier in section III the "context of a treaty" was defined as comprising the rules of international law, then it might perhaps be argued that the evolution of those rules would be automatically taken into account at any point in time. In the first instance, in the interpretation of a treaty it was necessary to establish what the treaty was intended to mean, and it was questionable whether the effect on it of the emergence of later rules of law raised problems of interpretation. Rather he thought that it raised problems of the application of those rules to the treaty. As the emergence of later rules affected both the interpretation and the application of a treaty, it seemed preferable to deal with the question separately as one of inter-temporal law; he looked to the Commission for guidance.

122. Article 73 also dealt with subsequent treaties touching on or overlapping with the same subject matter and intended to modify the earlier treaty.

The meeting rose at 1 p.m.

767th MEETING

Thursday, 16 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Tributes to Mr. Liang

1. The CHAIRMAN said that the session was the last one that Mr. Liang would be attending in his present capacity. Mr. Liang was an old friend of many members of the Commission, and no doubt they would wish to associate themselves with the tribute to be paid by Mr. Amado, the senior member.

2. Mr. AMADO thanked the Chairman for having given him the opportunity of expressing publicly his feeling of friendship for Mr. Liang, which dated back to the earliest days of the United Nations.
3. Mr. Liang was a man of learning whose intellectual curiosity he admired, a person without political bias who had the gift of making friends; above all he had always and with evident zest devoted himself unsparingly to his duties.
4. Mr. Liang was deeply versed in the law and a learned author of note; he was warm-hearted and a man of integrity, and as head of his Division he had succeeded in winning the friendship of his assistants. Although he was leaving the Commission, he would always be present in the hearts of its members with whom he had worked for so long.
5. Mr. BRIGGS paid a tribute to the scholarly contribution made by Mr. Liang to the development of international law and to his work as Secretary of the Commission. For many years he had contributed articles to the *American Journal of International Law*, mostly on United Nations activities in the field, and his writings were indeed indispensable for anyone wishing to know about the Commission's formative years. He had also played an important part in the framing of the Commission's Statute and as Secretary of the Committee on the Progressive Development of International Law and its Codification.
6. Mr. TABIBI said that members would regret Mr. Liang's retirement. As the Commission's records showed, he had greatly contributed to its discussions out of his long experience and wide knowledge. He had always displayed modesty, wisdom and scholarship, both within the United Nations and in his academic work.
7. Mr. PAL said that the foregoing tributes were entirely deserved as he knew from personal experience, for he had had the benefit of Mr. Liang's encyclopaedic knowledge as Chairman of the Drafting Committee and twice as Chairman of the Commission. It seemed difficult to imagine the Commission without Mr. Liang's presence. He wished him and his family all the best in his future activities.
8. Mr. VERDROSS said that, although he had first met Mr. Liang at the Aix-en-Provence session of the Institute of International Law, he had known of him long before through his scientific work. He wished to express his admiration for the active share which Mr. Liang had taken in the work of the Commission, for his learning, and for the care with which he had prepared its work. Mr. Liang was on terms of cordial personal friendship with all the members of the Commission. He wished to take the opportunity of expressing his warmest good wishes both to Mr. Liang and to Mrs. Liang.
9. Mr. ROSENNE, associating himself with Mr. Amado's remarks, first paid a tribute to the kindness with which Mr. Liang had assisted him when in the early stages of his career he had been sent for the first time to participate in the work of the Sixth Committee; and he had since on many occasions had cause to be grateful to Mr. Liang. He also recalled that Mr. Liang's association with the codification of international law antedated his appointment as head of the Codification Division in the Secretariat. In his capacity as a member of the delegation of China at the Dumbarton Oaks and San Francisco Conferences, Mr. Liang had played an important part in the discussion leading to the inclusion of the reference to codification and progressive development of international law in Article 13 of the Charter; and in that endeavour Mr. Liang was continuing along a path which had commenced when he had been a member of the Chinese delegation at the League of Nations Codification Conference of 1930.
10. Mr. BARTOŠ said that he had first worked with Mr. Liang during the London meetings of the Preparatory Commission of the United Nations late in 1945 and early in 1946. Mr. Liang's gifts had been of great value on that occasion, for he had acted as adviser and guide to delegates who in those days had often been inexperienced.
11. In the Sixth Committee of the General Assembly, it had in the early days been customary to ask the Secretariat for notes for the information of representatives on all the questions to be discussed; there, too, Mr. Liang had made an important contribution.
12. During the meetings at Lake Success of the committee which had prepared the Statute of the International Law Commission, Mr. Liang had played an important part. The report of the Sixth Committee, as a result of which the International Law Commission had been brought into existence, had been largely due him.
13. He had learned much from Mr. Liang, to whom the Commission would forever be in debt for all that he had done ever since its establishment. It would be hard to visualize the meetings of the Commission without Mr. Liang.
14. Mr. de LUNA said that Mr. Liang was a jurist of distinction, a linguist, an outstanding civil servant and above all a man for whom he had the highest esteem and to whom he wished to express his deep and lasting gratitude. He hoped that Mr. Liang, wherever he might be, would regard him as a grateful friend who would always be at his disposal and who would ever be glad of an opportunity to prove his friendship.
15. Mr. YASSEEN said that he had first heard Mr. Liang speak at the Hague in 1948, at the opening meeting of the conference on the legal profession, when he had described the role of the United Nations in the codification of international law. He wished to pay a tribute to Mr. Liang as a great expert in international law, as a distinguished international civil servant and as true friend.
16. Sir Humphrey WALDOCK joined in the tributes paid to the Secretary, from whom he had received a great deal of assistance in his work on the law of treaties. The Commission had already given proof of

its value in the work accomplished on the law of the sea and the law on diplomatic and consular relations, and Mr. Liang could in his retirement have the satisfaction of knowing that he was passing on to his successor a worthy inheritance.

17. Mr. RUDA said that he particularly wished to mention Mr. Liang's attitude towards the younger generation of jurists who had had the privilege of making his acquaintance. He had worked under Mr. Liang in the Codification Division in New York, and at the same time had been one of his students at New York University Law School. Mr. Liang's influence on him had been very great, and he looked forward with pleasure to meeting him again in the future.

18. Mr. PAREDES said that since 1962, when he had become a member of the Commission, he had had an opportunity of appreciating Mr. Liang's work, his intellectual capacity and also his kindness. He was indeed sorry to hear that he was leaving and wished to take the opportunity of expressing his admiration for his scientific work and his best wishes for the future.

19. Mr. CASTRÉN said that he wished to associate himself with the tributes so eloquently paid by Mr. Amado, the Commission's senior member. Mr. Liang fully deserved all that the members of the Commission has said of him. He was a man of learning, and an international civil servant of the highest class who had carried out his work with devotion and skill. He wished to thank Mr. Liang for his help in the three years of his membership of the Commission and to offer him his most sincere good wishes for the future.

20. Mr. TSURUOKA said that he wished, like the previous speakers, to express his sincere admiration for Mr. Liang and his appreciation of all that he had done for the Commission and for the progressive development of international law and its codification. He had been proud to find in the Commission a man with such outstanding attainments who came from the same part of the world as his own. There was one thing that he wished to add, which was implicit in the tributes already paid, namely that Mr. Liang combined in his person East and West, ancient culture and modern culture; that was a feature characteristic both of China and Japan, the peoples of which, despite occasional differences, were bound to one another by a centuries-old friendship.

21. There was a Far Eastern proverb that every meeting was the beginning of a parting. In the case of Mr. Liang, however, it might be said that parting was in a way the beginning of a meeting, for all the members of the Commission were sure that they would meet Mr. Liang again on many occasions, both in person and through his work. He hoped that Mr. Liang would have a very brilliant career in the service of the great causes of the peace and prosperity of the international community to which he had always devoted himself.

22. Mr. TUNKIN expressed appreciation for the services rendered by Mr. Liang to the Commission and

for the devotion with which he had discharged his responsibilities. He had taken the keenest interest in the problems discussed by the Commission and had often proffered helpful advice.

23. Mr. PESSOU associated himself with the preceding speakers, who had known the Commission's Secretary longer and more intimately than he. He would continue to follow Mr. Liang's work through his writing, since he was above all an eminent internationalist and his presence would therefore continue to be felt in the Commission.

24. The CHAIRMAN said that Mr. Liang, who was no doubt moved by the tribute and the friendship expressed by all the members of the Commission, and in particular by its veteran member, Mr. Amado, could not fail to realize that all held him in high esteem and were grateful for the outstanding services which he had rendered to the Commission and to the cause of the codification of international law. In paying a tribute to Mr. Liang, who was devoted to scholarship and the pursuit of knowledge, and who had been able to enlist the goodwill, affection and attachment of all, the members were saddened at the prospect of losing his valuable collaboration, his presence and his friendship, which they had known for so many years.

25. One should not give way to sadness, however, since to look to the future rather than to the past was to remain young. One should therefore think of Mr. Liang's future career and of the many services which, owing to his cultivated mind, his knowledge and his intelligence, he would continue to render to the cause of international law. It was therefore with confidence in the future that he concluded his tribute to Mr. Liang, who had been the Commission's Secretary for so many years.

26. Mr. LIANG, Secretary to the Commission, warmly thanked members of the Commission for their kind words. He had no regrets at having dedicated 20 years of his life to the cause of codification. He had had the privilege of being the spokesman of his delegation during the conversations at Dumbarton Oaks in 1944 when China had proposed that a provision be inserted in the Charter of the United Nations, then being prepared, concerning the codification of international law, and both during the preparatory stages of the San Francisco Conference and at the Conference itself he had pressed for the adoption of the formula now to be found in Article 13. His country had thus been a leading proponent of codification during the post-war period.

27. He had learned much from his long period of association with the luminaries of learning in the Commission. He had learned, for example, that labels used to indicate the school of philosophy of international law to which a jurist belonged were deceptive in the extreme. In the past, some members had been apt to label others as romanticists. But they themselves were far from adopting a positivist approach to the practical problems which had to be dealt with by the Commission. They constructed theoretical edifices with all romantic flourishes, and their thinking demonstrated a

high degree of unreality. Those were true romanticists in international law as distinguished from jurists, like Mr. Amado, who, while always insisting on adherence to the canons of *elgantia juris*, never departed from the strict path of positivism.

28. He had also learned that it was necessary to follow the teaching of Confucius who had said that the trouble with humanity was the anxiety to teach others. He had consistently refused to yield to the pressure from uninformed circles, which tried to ask the Secretariat of the Commission to give "guidance" to the Commission by putting forward studies proposing solutions to the most controversial problems of international law such as State responsibility, etc.

29. He was grateful that his duties had kept him in close touch with international law, which would not have been the case had he been engaged in diplomatic activities. He felt bound to apologize for the fact that he had found himself occasionally unable to help the members to adjust certain administrative problems arising from their service with the Commission.

30. Referring to his relations with individual members, he recalled that in the early nineteen-thirties he had considered himself already a disciple of Mr. Verdross. His works and particularly a treatise entitled "Völkerrechtsgemeinschaft" had fascinated him. In the years immediately before and after the founding of the United Nations he had worked together with Mr. Bartoš and Mr. Lachs. His acquaintance with the first vice-Chairman, Mr. Briggs, dated back to 1930 when he had been pursuing advanced studies in the United States. He admired Mr. Rosenne's prolific writings and appreciated particularly his assistance and criticism in connexion with the publications of the Codification Division. Mr. Tabibi's close knowledge of the United Nations administrative law and its operation was bound to be of great help to the Commission.

31. He had been elected to the Institute of International Law in the same year (1950) as Sir Humphrey Waldock, Mr. Castrén and Mr. de Luna, and it was a special pleasure to work the them closely in the Commission. He had known Mr. Tsuruoka in 1955 in the United Nations Conference on the Conservation of the Resources of the Sea. In the course of the subsequent years he had been privileged to co-operate with him on many occasions and to get acquainted with his juridical acumen and diplomatic skill. He had learned to appreciate the qualities of the comparatively new members, Mr. Paredes and Mr. Pessou, and was certain that they would contribute more and more to its work. He had a high admiration for Mr. Ruda, who as his former student in the New York University Law School and his colleague in the United Nations Secretariat, had exhibited qualities of a brilliant international lawyer. He expressed deep gratitude to Mr. Pal, senior next only to the Mr. Amado in the Commission, for his inspiration and guidance during his two terms as Chairman of the Commission. As to the present Chairman, Mr. Ago, he held him in the greatest respect not only for his penetrating insight into the theories of international law but also for his rigorous precision in the formulation of juridical rules. He was tempted

to compare him to the Chairman of the first session (in 1949) of the Commission, the late Judge Manley O. Hudson, of the United States, a tower of strength in the formative days of the Commission. He would like to thank Mr. Tunkin and Mr. Yasseen, who were also officers of the Commission, for their constant encouragement. Last but not least, he wished to state how gratified he was to have had also the opportunity of working with those members who were not present at the meeting, Mr. Cadieux, Mr. Elias, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Kanga, Mr. Liu and Mr. Reuter.

Visit by the Secretary-General

32. The CHAIRMAN made the following statement :

" Mr. Secretary-General,

" The International Law Commission of the United Nations feels highly honoured by your visit and is impressed by the consideration that you have shown to the importance of its work and to its position in the framework of the United Nations.

" When the Charter was drafted in 1945, no provision was made for a permanent organ entrusted with the task of preparing the codification and the progressive development of international law, and the only legal organ of the United Nations provided for in Chapter XIV was a judicial organ: the International Court of Justice, charged with applying that law to the settlement of international disputes.

" Thanks to the vision and action of a group of enlightened men, some of whom are in this very room, the idea of the progressive development of international law and its codification was embodied in the Charter as a matter for the General Assembly to initiate studies and make recommendations. But neither at that time, nor later, when, in execution of Article 13 the International Law Commission was established, could anyone have realized what, within just a few years, would be the extent and the urgency of the task of the newly created body.

" It is the great revolution which is now taking place in the world society under the auspices and with the encouragement of the United Nations, and which has given independence to a number of States which today is greater than the number of those who created the United Nations—it is that event which has thrust into the foreground the pressing need for codification and evolution of the law of the Community of States.

" In a human society which is going through such a radical change, the need for certainty in the law and the need to bring it into line with the new conditions is one of the utmost urgency. It is with full awareness of that need that the International Law Commission has now directed its attention to its work.

" Its first great achievements, such as the preparation of the codification of the law of the sea, of diplomatic and consular law, are well known. The Commission is now preparing to complete this work

by new drafts concerning special missions and the relations between States and international organizations.

“But the Commission has above all realized that the time has come for it to devote itself to the revision, clarification and codification of the main topics of international law, in the light of the characteristics of the renewed international society. It is chiefly in these fields that the main principles demand to be re-stated, that evolution must be provoked, and at the same time certainty re-established, on the basis of the widest possible agreement of the States and on a sound scientific foundation.

“For this reason the Commission boldly put on its agenda the principal chapters of contemporary international law, like the law of treaties, State succession and State responsibility. I do not hesitate to say, Mr. Secretary-General, that if the Commission, thanks to its work and with your help and that of your services, succeeds in completing such an ambitious programme, and if the States will then consummate this work in diplomatic conferences, progress absolutely without precedent since the time of Grotius will have been achieved in international law, and a contribution of inestimable value to the peaceful development of international relations will have been made.

“In order to speed up the attainment of this goal, the Commission has also decided to take some exceptional measures, like proposing for future years an extension of its sessions, and other steps for further intensifying its work. At the same time, it must never be forgotten that the codification of the law is a very heavy and difficult burden and cannot be achieved too rapidly.

“To be able to meet its present responsibilities, the International Law Commission greatly needs the full collaboration of the other organs and, above all a full understanding of the importance, of the delicacy and of the urgency of its task. For these reasons you may realize, Mr. Secretary-General, how deeply we appreciate your decision to visit us just in the moment of our most intensive work, how we greatly hope that your present visit will be the beginning of regular future contacts, and how warmly and sincerely we all welcome the presence among us of your person, Mr. Secretary-General: a person who, in the eyes of us all represents the first champion in the struggle for peace, for the achievement of greater justice and of a higher standard of living for all the human beings, and, last but not least, for the rule of law in international relations.”

33. The SECRETARY-GENERAL made the following statement :

“Mr. Chairman and members of the Commission : I am particularly grateful to you, Mr. Chairman, for your very clear exposé of the activities of the Commission as well as its aims and objectives and the measures of accomplishment so far and the prospective measures of achievement in the future.

And first of all let me say that I am almost completely unversed in this sphere of law — and for that matter international law — and I do not think I can express any opinion or make an assessment of the rate of progress of the functioning of your Commission ; but this much I can say — that from all available accounts, the work of the International Law Commission has been quite impressive in the face of very real and practical difficulties.

“Last year my good friend, Dr. Tabibi, suggested to me in Geneva that in the course of my next visit to Geneva it would be worthwhile to visit the International Law Commission. I readily accepted his very kind suggestion because I feel very strongly that the Secretary-General of the United Nations should be in as close a touch as possible with all Commissions and Committees — particularly the creations of the principal organs of the world organization. I am particularly gratified to be here and delighted to meet with you, and I thank you for your very gracious welcome.

“Just a few minutes I want to take of your time by making a brief observation on some of my thinking, which in my view may have some relevance to the work of the International Law Commission. So long as I am performing the functions of the Secretary-General of the United Nations, Mr. Chairman, it shall be my constant endeavour to try to carry out my responsibilities with as much objectivity and impartiality as possible. Of course, being human, I must admit that from time to time my judgment may be at fault. I may run into circumstances and conditions in which one party or other may have occasion to question my integrity, to question my impartiality or to question my honesty — I am prepared for that. But one thing I am convinced of ; that is about one of the principal functions of the United Nations, of which I have the privilege to be the Chief Executive.

“In the Charter of the United Nations there is a very important provision which to me is basic to the operation of all committees and commissions operating within the framework of the resources of the principal organs of the world organization. The provision of the Charter I am referring to urges all Member States to practice tolerance and live with one another as good neighbours and to unite their strength for the achievement of the common objectives. And at the same time the Charter explicitly mentions that one of the functions of the United Nations is to harmonize the actions of Member States. Although there is no specific mention of the area of harmonizing which the Charter of the United Nations envisages, I am confident that the founding fathers of the United Nations nineteen years ago had in mind all activities of human endeavour — political, economic and social, as well as legal. If my interpretation of human history is correct, I have a feeling that there are unmistakable trends towards a big synthesis in human history, not only in the political field, but also in the economic and social field and, I am sure, also in the legal field. From the basis of thesis and

antithesis we are now heading towards a big synthesis, the harmonizing of all different viewpoints, all different legal concepts too.

"In the political field particularly, I am confident that there have been obviously, liberalizing tendencies all over the world — progressive tendencies all over the world — and the future is bright with the prospects of a big synthesis which we all dream about and which we all hope for.

"Mr. Chairman, in the noble endeavours of your Commission, in your endeavours to codify and evolve a new system of international law, I am sure the members of the Commission have in mind this very pertinent chapter of the Charter, concerning the attempts to harmonize the actions of Member States, and I am sure you are all very conscious of the fact that this enjoining on Member States to harmonize their actions involves not only political, economic and social spheres, but also the legal field.

"Mr. Chairman, I wish to thank you once again, and the members of the Commission, for a very patient hearing and for the privilege I have today of meeting with you."

Law of Treaties

(A/CN.4/167/Add.3)

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 73 (Effect of a later customary rule or of a later agreement on interpretation of a treaty) (*continued*)

34. The CHAIRMAN invited the Commission to continue its consideration of article 73 of the Special Rapporteur's draft.

35. Mr. VERDROSS considered that only sub-paragraph (c) of article 73 was concerned with the interpretation of treaties, for (a) and (b) actually dealt with the modification of treaties. If a rule of customary law emerged, or an agreement containing a new rule was entered into between the same parties, after the conclusion of the treaty, then what would need interpretation was not so much the original treaty as the new rule. Sub-paragraph (c) was quite correct, but the idea which it contained was already implied in article 71, paragraph 2, under which interpretation could take account of the subsequent practice of parties in relation to the treaty. Consequently, article 73 did not belong in section III concerning the interpretation of treaties.

36. Mr. de LUNA, associating himself with the views expressed by Mr. Verdross, said that, according to the decision in the *Island of Palmas* arbitration,¹ a juridical fact must be appreciated in the light of the law con-

temporary with it and not of the law in force at the time when a dispute concerning it arose or was brought before a tribunal.

37. Accordingly, he thought that article 73 was not in its proper place in the section concerning the interpretation of treaties; its provisions should appear in the section dealing with the application of treaties. Moreover, with characteristic intellectual honesty, the Special Rapporteur had himself expressed doubt concerning the place of that article. Sub-paragraph (c) dealt with the modification of treaties and the extension of their application and therefore had nothing to do with interpretation. All that related to interpretation in the light of the subsequent practice of parties had already been stated in article 71 — a reference, of course, to interpretative practice and not to practice tending to modify the terms of the treaty. Both those possibilities could be considered, but in the particular instance only the first was involved.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not disagree with the two previous speakers, but pointed out that he had been asked by the Commission to re-examine the so-called inter-temporal rule in the context of interpretation. Even if, which he believed would be correct, it were regarded as relevant to application as to interpretation, it was not easy to draw the line between the two so far as the effect of subsequent practice was concerned.

39. He would feel the same uneasiness as Mr. Verdross and Mr. de Luna in dealing with the matter simply as one of interpretation, and it might be found necessary to transfer the whole or part of article 73 to another place. He was anxious to have guidance from the Commission on how to treat the question of subsequent practice, as the Commission's indications would affect the way in which he redrafted articles 70 and 71. As he saw it, the subsequent practice of some parties to a general multilateral treaty, if concordant, could be regarded as evidence of a proper interpretation. A concordant subsequent practice accepted by all the States concerned would come close to an authentic interpretation similar to a subsequent agreement on interpretation. But the case with which article 73 was concerned was one where subsequent practice could not be reconciled with the ordinary meaning of a treaty though purporting to be an application of it.

40. Mr. ROSENNE said that article 73 did not cause him any particular difficulty either as to substance or as to its place in the draft. He assumed that the phrase "at any time" would introduce the necessary element of flexibility in recognition of the fact that interpretation might change over a period of time. He had noted the difference between the wording of sub-paragraph (c) and that of article 71, paragraph 2, which presumably referred to the parties between which an issue of interpretation had arisen. If article 73 were omitted, the alternative would be to revert to article 56, paragraph 2, concerning which no decision had been taken.

41. Mr. PAL said he did not believe that article 73 was well placed, for it dealt with a matter not connected

¹ *Reports of International Arbitral Awards*, Vol. II (United Nations publication, Sales No. 1949, V.1).

with interpretation. He associated himself with the views expressed by Mr. Verdross and Mr. de Luna.

42. The CHAIRMAN said that it was his impression that the Commission considered that the article under consideration dealt with the modification and revision of treaties rather than with their interpretation.

43. Speaking as a member of the Commission, he said it was obvious that whenever a rule of customary law emerged or a new treaty relating to the subject matter of the first treaty was concluded, problems of interpretation would arise. The real problem, however, would be that of the subsequent conduct of the parties, and for the purpose of solving that problem one would either have to inquire into the evidence of the true intention of the parties at the time of the conclusion of the treaty or else determine whether the parties had subsequently shown an intention of modifying the treaty. In strict logic, however, in dealing with interpretation, the Commission should only be concerned with the first of the two alternatives, for the other came under the heading of the modification of treaties.

44. Mr. YASSEEN agreed with Mr. Verdross and Mr. de Luna that the article should be placed elsewhere. Subsequent agreements might affect the interpretation, but it was not clear that the provision was concerned with interpretative agreements. The parties could at any time have recourse to the method of the subsequent agreement, for the purpose not only of interpreting but also of modifying or abrogating a treaty.

45. With regard to sub-paragraph (c), he said that subsequent practice might certainly have a bearing on interpretation by indicating the intention of the parties. The sub-paragraph was, however, clear as it stood; it was not concerned with interpretation at all but with the modification or extension of the application of a treaty, for it spoke of the subsequent practice which was followed by the parties in respect of the treaty and which constituted evidence of the consent of all the parties to a modification of the treaty or to the extension of its application. Consequently, the article as drafted could not remain in a chapter dealing with interpretation; in essence, it dealt with the subsequent modification and extension, which was a itself a modification, of a treaty.

46. Mr. TUNKIN said that whether sub-paragraph (a) was retained in article 73 would of necessity depend on the wording ultimately adopted for paragraph 1 of article 70 and, in particular, on the drafting of the concluding words of that paragraph, which he had suggested² should be amended so as to refer simply to the principles of international law, and not to the rules of international law in force at the time of the conclusion of the treaty.

47. Turning to sub-paragraph (b), he said that a later agreement between the same parties could have a bearing on the interpretation of a treaty. However, there

were aspects other than interpretation: the two treaties could raise questions of conflicting treaty provisions or questions of amendment. It was essential to clarify the wording of sub-paragraph (b) so as to make it clear that it referred to interpretation and not to conflict or amendment.

48. On the subject of sub-paragraph (c), he completely agreed with Mr. Yasseen that, as drafted, it dealt with the modification of a treaty and had no place in the articles on interpretation. He agreed with Mr. de Luna that subsequent practice could have a twofold effect: first, it could have the effect of amending the provisions of a treaty and, second, it could supplement the interpretation of the treaty. Article 73 was concerned solely with the question of interpretation, and its sub-paragraph (c) should therefore be amended to make that fact clear and to exclude the question of modification by subsequent practice. He therefore suggested that the concluding words of the clause "...to an extension or modification of the treaty" should be amended along the following lines:

"...evidencing the consent of all the parties to a certain interpretation of the treaty".

49. Commenting on the opening sentence of article 73, he said that he had doubts regarding the necessity of the words "at any time" and also regarding the need to refer to articles 70 and 71.

50. He thought that sub-paragraphs (b) and (c) of article 73 did not properly belong to the subject-matter of article 73, which should be devoted to the matter of subsidiary sources of interpretation.

51. Sir Humphrey WALDOCK, Special Rapporteur, said that in his original draft of article 56 (A/CN.4/167) he had frankly recognized that the effect of subsequent practice was not really a matter of interpretation but rather a matter of modification of treaties. However, several members of the Commission, in particular Mr. Reuter, had claimed that the matter was one of interpretation and the Commission had instructed him to re-examine the question in that light. That was the sole reason why he had dealt with the subject in the articles on interpretation.

52. The problems which had arisen would, he thought, be minimized if the Commission ultimately altered the order in which the various sections of the draft articles on the law of treaties had been arranged. He believed that many of the problems which had arisen were due to the fact that the articles on interpretation had been placed after the articles on modification. He suggested that, when the Commission came to consider all the draft articles on the law of treaties in second reading in the light of Government comments, it should rearrange them on the following lines: first, the articles on the conclusion, entry into force and registration of treaties; second, the articles on validity; third, the articles on interpretation; fourth, the articles on the application and effects of treaties; fifth, the articles on the modification of treaties, and, last, the articles on the termination of treaties. With a rearrangement of that kind, there should be no difficulty in disposing of

² Summary record of the 765th meeting, para. 49.

the problem which had arisen regarding the placing of sub-paragraphs (b) and (c) of article 73.

53. If it were decided to limit article 73 to questions of interpretation, its provision should deal solely with the effects of subsequent practice on interpretation. It would, however, be difficult to draw the dividing line between interpretation proper and modification by way of purported interpretation.

54. He added that the Commission had entrusted him with the task of redrafting articles 70 and 71. Article 70 would include a first paragraph stating the general rule on interpretation; that provision would be followed by a paragraph stating what was meant by the "context of the treaty". He personally would be inclined to include in the context of the treaty any agreements for the interpretation of the treaty, but the subject-matter of sub-paragraph (c) of article 73 could not be so included. In connexion with that provision, he agreed on the need to amend its wording so as to make it clear that it was intended to deal only with interpretation by subsequent practice.

55. The question remaining to be decided by the Commission was whether subsequent practice should be regarded as a subsidiary source of interpretation or whether it should be treated as evidencing in some sort an authentic interpretation, when that subsequent practice was the concurrent practice of all the parties to the treaty.

56. The CHAIRMAN said that it would be preferable to resume the discussion later on the basis of a new text. The Commission seemed to have accorded special importance to the subsequent concordant practice of the parties, regarding it as more akin to true interpretative agreements than to an aid to interpretations. If the parties agreed to interpret a text in a certain way, that agreement prevailed; it was not merely a secondary means of clearing up an obscurity or resolving some other difficulty of interpretation. The new text might perhaps be drafted along those lines, for it would then be likely to meet with more general approval.

57. Sir Humphrey WALDOCK, Special Rapporteur, said that if it were accepted that concurrent subsequent practice was evidence of a sort of authentic interpretation, there remained the question of the subsequent practice of some of the parties to the treaty and not disputed by the others. The case he had in mind was not that of the concurrent practice by all the parties but that of a practice of some, the others remaining silent. In his view, that silence was not conclusive and the situation which he had just described could not be equated with the concurrent subsequent practice of all the parties to the treaty; instead, therefore, of constituting evidence of an authentic interpretation, it would merely provide an indication of the intention of the parties. Perhaps the best way to deal with the point was simply to leave it to be covered by some general reference to "other means of interpretation as secondary sources".

58. The CHAIRMAN said that the practice of parties might be classified into three categories: first, a prac-

tice which was not very definite but which was an auxiliary element in interpretation; second, a wholly concordant and definite practice, which was tantamount to a kind of interpretative agreement; and, third, practice which was equivalent to the amendment of the treaty. It was for the Special Rapporteur to determine in his final draft the value of practice for the purposes of interpretation; he would then be able to decide whether it should be mentioned only once or several times.

59. He suggested that the Special Rapporteur should be asked to redraft article 73 in the light of the debate.

It was so agreed.

ARTICLE 74 (Treaties drawn up in two or more languages) and

ARTICLE 75 (Interpretation of treaties having two or more texts or versions)

60. Sir Humphrey WALDOCK, Special Rapporteur, introducing his draft articles 74 and 75, referred to the commentary to those articles and said that, in article 74, the only point which had caused him some difficulty was that dealt with in paragraph 2 (b): that of a language version drawn up within an international organization. He understood that there existed some practice regarding treaties drawn up under United Nations auspices but that that practice was not altogether uniform. He was not sure whether the procedure followed in that respect could be said to be based on the established practice of organizations or on the implied agreement of the parties. It had become apparent to him that much more information was needed on the question of language versions drawn up within an international organization. Perhaps the Secretariat would be able to provide such information and facilitate further study of the question.

61. Mr. CASTRÉN said that he approved of article 74 in form and substance, though he considered that at the end of paragraph 1 there should be added the words "or in so far as the parties agree otherwise", which would balance the words appearing at the end of paragraph 2 (a).

62. Mr. ROSENNE said that, at that stage, he would confine his remarks on article 74 and 75 to the statement of his general agreement with their provisions.

63. He strongly supported the remarks of the Special Rapporteur regarding the need for further information as to the procedures followed in international organizations.

64. State practice on the subject under discussion had developed at a time when problems had arisen concerning the interpretation or bilingual bilateral treaties, and to a great extent international jurisprudence was similarly restricted. In modern times such problems frequently arose in connexion with multilateral treaties drawn up in as many as five different languages, and he was not sure that the earlier restricted practice and jurisprudence fully covered the matter. The Secretariat

should be able to provide information regarding the different techniques used in the preparation of multi-lingual versions. It sometimes occurred that the drafting committee of an international conference submitted to the conference a report stating that the various language versions were concordant. Where no such report existed, the situation would, of course, be completely different. Those cases indicated the importance of the *travaux préparatoires* for that aspect of the law of treaties.

65. It would therefore be extremely useful for the Commission if the Secretariat were to submit at the next session a document giving all useful factual information on conference procedures in respect of the versions of a treaty in different languages.

66. Mr. TUNKIN said that he found himself in general agreement with the provisions of article 74, but understood the hesitation of the Special Rapporteur regarding paragraph 2 (b). The provisions of that paragraph might well conflict with the constitutions of certain international organizations and with the practices adopted by them. He therefore urged that those provisions should be worded more cautiously, along the lines already adopted by the Commission when it had referred to international organizations in certain other articles of the draft on the law of treaties.

67. Mr. BRIGGS favoured the inclusion of draft articles on the question of treaties drawn up in two or more languages or having two or more texts or versions. Draft articles on those points would represent a valuable contribution by the Commission to the codification and development of the law of treaties.

68. As far as he had been able to assess, the rules set forth in articles 74 and 75 appeared satisfactory.

69. He had been struck by the statement in the second sentence of paragraph (5) of the commentary: "But it needs to be stressed that in law there is only one treaty . . . even when the two authentic texts appear to diverge". It was correct to state that there was only one text of any treaty, although there might be versions in several languages. For those reasons, he believed that Article 111 of the Charter was not correct when it referred to the Chinese, French, Russian, English and Spanish "texts" rather than to versions of the text.

70. Accordingly, he was not altogether satisfied with the drafting of article 74, in so far as it suggested that a treaty could have two or more authentic texts. The provisions of the article should be reworded in such a manner as to refer to two or more language versions of the same treaty.

71. Mr. BARTOŠ said that he had no objection to article 74 but he would like to draw attention to a practice which had become common in the past ten years. For reasons of prestige some States required a treaty to be drawn up in their national language. There thus existed a version in the language of each of the parties, but, because the languages of the parties were not widely known and were not recognized as diplomatic languages, to facilitate understanding and interpretation a translation in a third language was annexed

which was authoritative, the other two versions being also regarded as authentic. That was an innovation not considered in the draft. He would ask the Special Rapporteur at least to refer to the practice in his commentary, if he could not do so in the articles.

72. Mr. TUNKIN said that he could add other examples of a similar kind. The practice of States showed a considerable variety of approach to the languages question. For example, the Treaty of Friendship of 1928 between the Soviet Union and Yemen had been drawn up in Arabic and Russian but the treaty itself stated that only the Arabic text was authentic.

73. In his view, the provisions of paragraph 1 of article 74 covered cases like those mentioned by Mr. Bartoš and himself.

74. The CHAIRMAN said that he also thought that paragraph 1 of article 74 covered those cases.

75. He suggested that articles 74 and 75 should be referred to the Drafting Committee, with the comments made during the discussion.

It was so agreed.

The meeting rose at 1 p.m.

768th MEETING

Friday, 17 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Representation of the Commission at the nineteenth session of the General Assembly

1. Mr. LIANG, Secretary to the Commission, suggested that, as in former years, the Commission should appoint its Chairman to represent it at the next session of the General Assembly. He drew attention, in that respect, to the relevant passage in the Commission's report on its fifteenth session.¹

2. Mr. BRIGGS, supported by Mr. TUNKIN and Mr. AMADO, proposed that the Chairman should be asked to represent the Commission at the nineteenth session of the General Assembly. No one was better qualified to present to the Assembly the views of the Commission and to represent its interests.

The proposal was adopted by acclamation.

¹ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, para. 80.*

Date and Place of the Commission's seventeenth session

[Item 7 of the agenda]

3. The CHAIRMAN invited the Commission to discuss item 7 of its agenda: date and place of the seventeenth session.

4. Mr. LIANG, Secretary to the Commission, said that the place would no doubt be Geneva. As far as the date of the opening of the session was concerned, referred to the Commission's decision that it should be the first Monday of May, unless otherwise decided.

5. Mr. TABIBI said that the Commission should consider holding a meeting outside Geneva at some future date, particularly if it were to hold a winter session.

6. The CHAIRMAN said that if a winter session had been arranged for 1965, he would have liked to make arrangements for the Commission to meet at Rome. It was still too early to consider the position with regard to the proposed winter session in 1966.

7. Mr. ROSENNE suggested that in view of the late session of the General Assembly in 1964, it might be advisable for the Commission to commence its next session on 10 May 1965.

8. Mr. YASSEEN also favoured that date.

9. Mr. VERDROSS and Mr. CASTRÉN opposed the suggestion that the session should begin on 10 May 1965, because it would involve a one-week postponement of the end of the session.

10. The CHAIRMAN, after an informal consultation, noted that the Commission as a whole preferred to adhere to the usual practice of commencing the session on the first Monday of May. He therefore suggested that the seventeenth session should commence on 3 May 1965 and, as usual, last for ten weeks.

It was so agreed.

Co-operation with other bodies

(A/CN.4/171 and 172)

(resumed from the 745th meeting)

[Item 8 of the agenda]

11. The CHAIRMAN invited the Commission to resume its consideration of item 8 of its agenda.

12. Mr. LIANG, Secretary to the Commission, drew attention to a letter of 8 May 1964 from the President of the International Union of Judges, addressed to him as Secretary to the Commission, requesting that the Union be authorized to collaborate with the Commission in pursuance of article 26, paragraph 1, of its Statute. It was also requested in the same letter that the Union should be included in the list provided for in article 26, paragraph 2, of the Statute in order that it might receive the Commission's documents.

13. The request for inclusion of the Union in the list prepared for the distribution of the Commission's documents raised no problem, and arrangements were being made to place the International Union of Judges on that list.

14. On the question of co-operation in pursuance of article 26, paragraph 1, of the Commission's Statute, he stated that, after consultation with the Chairman, he would submit that it was necessary to bear in mind the precedents established by the Commission in the matter of co-operation with the legal bodies of the Organization of American States and with the Asian-African Legal Consultative Committee. Since the International Union of Judges did not have on its agenda any subject which corresponded to those studied by the Commission, the Secretariat should be authorized to reply that the Commission would be glad to establish co-operation with the Union if its programme were to include subjects identical with or intimately related to those discussed in the Commission. His letter would add a list of the subjects at present before the Commission and would end with an indication that it was open to any members of the International Union of Judges who wished to do so to attend the meetings of the Commission.

15. The CHAIRMAN suggested that the Secretary should be authorized to reply in that sense to the request by the International Union of Judges.

It was so agreed.

16. Mr. LIANG, Secretary to the Commission, said that the Commission had been invited to send an observer to the next session of the Asian-African Legal Consultative Committee to be held at Baghdad in January or February 1965. In that connexion, he drew attention to the Commission's decision at its fifteenth session to send its then Chairman as observer to the Consultative Committee's session at Cairo in February 1964.² By the same decision, the Chairman had been authorized, in the event of his being unable to attend, to appoint another member of the Commission or its Secretary to represent the Commission at the Committee's session.

17. He suggested that a similar formula might be adopted for the 1965 session of the Committee.

18. Mr. YASSEEN said that it would be particularly appropriate that the Chairman of the Commission's current session should attend the Baghdad meeting of the Asian-African Legal Consultative Committee; in the first place, it was desirable to follow precedent, for the Committee's previous session had been attended by the then Chairman as observer; in the second place, the Chairman at the current session was an eminent representative of European legal thinking and of the international spirit.

19. The CHAIRMAN said that he looked forward to attending the Baghdad meeting but thought it would be a useful precaution to include the customary provision

² *Ibid.*, para. 69.

about the possibility of appointing another member of the Commission or the Secretary to act as observer in his place.

20. If there was no objection, he would consider that the Commission agreed to that course.

It was so agreed.

21. Mr. BARTOS drew attention to the report on the sixth session of the Asian-African Legal Consultative Committee submitted by Mr. Jiménez de Aréchaga, who had attended that session as observer for the Commission (A/CN.4/172).

22. He proposed that the Commission should take note of that report.

The proposal was adopted.

23. Mr. LIANG, Secretary to the Commission, said that during the past year no communication had been received from the juridical bodies of the Organization of American States with regard to the next session of the Inter-American Council of Jurists. He recalled that it had been customary for the Commission to send an observer to meetings of that Council. However, it did not appear likely that any meeting of that Council would be held before the Commission's next session. A paragraph to cover the subject of co-operation with the Inter-American Juridical Committee would be included in the Commission's report for the current session.

24. The CHAIRMAN drew attention to the memorandum prepared by the Secretariat, in connexion with agenda item 8, on the subject of the distribution of the Commission's documents (A/CN.4/171).

25. Mr. LIANG, Secretary to the Commission, said that in its report on the fifteenth session³ the Commission had expressed the hope that the relevant regulations of the United Nations would be so adapted as to secure a better exchange of documentation between the Commission and the bodies with which it co-operated.

26. The Secretariat had considered it appropriate to submit to the Commission a memorandum on the factual situation (A/CN.4/171); it was for the Commission to decide what further action it might wish to take.

27. From the practical point of view, he suggested that it might be advisable for the Commission to designate a small group to study the whole subject at the beginning of the next session.

28. He stressed that any free distribution of documents on a very large scale could not be undertaken by the Secretariat without the authorization of the appropriate organs of the United Nations. It should be borne in mind that some interested non-governmental organizations had a very large membership. On that problem, he drew special attention to paragraph 24 of the Secre-

tariat memorandum and, in particular, to the last sentence: "Careful consideration would be required in order to establish criteria for the purpose of selecting organizations to which the documents of the Commission would be given".

29. Mr. ROSENNE said that the discussion at the fifteenth session, and indeed at the earlier sessions, from which paragraph 70 of the previous year's report had emerged, had been concerned not so much with the free distribution of documents as with the regular exchange of documents with the bodies with which the Commission maintained formal relations. He welcomed the suggestion by the Secretary for the convening of a small group of members early in the next session to consider the whole question. In the meantime, it would be useful if the Secretariat could prepare a document dealing with the organization of the exchange of documentation.

30. Sir Humphrey WALDOCK pointed out that some members of the Commission who did not hold government posts found it extremely difficult to obtain United Nations legal documents relevant to their work. He suggested that arrangements should be made for members to receive such documents. He believed that members of the Commission should have first priority with regard to the distribution of documents of that type.

31. Mr. PAREDES stressed that it was essential to distribute the Commission's documents to all those interested in the subjects discussed by the Commission. Only in that manner would it be possible to disseminate those documents in such a manner that they reached the right persons and that a favourable atmosphere was created to gain acceptance by Governments for the Commission's drafts.

32. In that connexion, he pointed out that there existed in Ecuador an Institute of International Law, to which the Commission's documents should be sent.

33. Mr. de LUNA said that he agreed with the suggestion by Mr. Paredes but he also agreed with the Secretary's remark that it was not possible to send the Commission's documents to individual members of scientific bodies. He expressed his strong support for the suggestion made by Sir Humphrey Waldock. As far as he was concerned, although he was in the service of his Government, he had only been able to assemble an incomplete set of useful United Nations legal documents by means of a great deal of time-consuming effort and only as a result of the kindness of individual members of the Secretariat.

34. It was particularly important that the legal documents of the United Nations should be sent to the individual members of the Commission directly at their home addresses.

35. The CHAIRMAN said that all the members of the Commission would no doubt agree with Mr. de Luna on that last point.

³ *Ibid.*, para. 70.

36. There could be no doubt that if it was desired that the work of the Commission should be known and studied, and that it should produce its full effects, the Commission's documents should reach all universities and scientific bodies. He hoped therefore that the United Nations would incur the comparatively small expenditure of printing the extra copies of documents necessary to ensure such a useful dissemination of the Commission's documents. The subject was one of vital importance to the United Nations as a whole.

37. The suggestion that a small committee should study the problem early in the next session would no doubt also meet with general approval.

38. Mr. LIANG, Secretary to the Commission, said that he had received a letter from Mr. Paredes on the subject of the Institute of International Law of Ecuador and he was glad to state that there should be no difficulty in arranging to send the Commission's documents to that academic body.

39. He urged all members of the Commission to give the names of any other institutes engaged in the special study of international law; an request that the Commission's documents be sent to bodies of that type would meet with a favourable response from the United Nations. What could not be done was to send the Commission's documents to individuals, because such a distribution would open the door to unduly numerous requests for the free distribution of the United Nations documents.

40. Turning to the suggestion by Sir Humphrey Waldock, he said that all members of the Commission were certainly entitled to receive United Nations legal documents. However, it would not be at all easy for the Secretariat to select what documents to send. He recalled that on one occasion a member of the Commission had complained that he had received so many documents that he was unable to classify them.

41. The Juridical Yearbook of the United Nations had now appeared in mimeographed form and would be sent to members of the Commission. In that publication members would find the documents they needed; in addition, they could make requests for any specific sets of documents of legal interest. It would, however, be difficult to arrange that all the documents of the General Assembly and the Security Council be sent automatically to members of the Commission.

42. The problem of the exchange of documents which had been raised by Mr. Rosenne was principally a question of distribution. As far as the Asian-African Legal Consultative Committee was concerned the position was that the individual members of that Committee did not receive the documents. The Committee was composed of government representatives who changed from one session to another and the Secretariat's view was that where a Government received the documents, no copies were sent to an individual representative.

43. Sir Humphrey WALDOCK said that his request had been a modest one. Surely, such documents as the

proceedings of the two Vienna Conferences of 1961 and 1963 should be sent to the members of the Commission as a matter of course.

44. Mr. CASTRÉN urged that members of the Commission should receive full sets of records of the discussions in the Sixth Committee of the General Assembly. He had had considerable difficulty in consulting the only set at the Ministry for Foreign Affairs at Helsinki.

45. Mr. TABIBI supported the request by Sir Humphrey Waldock. He pointed out, however, that the Secretariat was under strict instructions from the Fifth Committee to keep down the volume of free distribution of documents; in carrying out those instructions, the Secretariat was obliged to be restrictive, regardless of the merit of the request made.

46. He stressed that the only practical course would be for the Commission to include a paragraph in its report on the subject; the Sixth Committee of the General Assembly would then take a decision in the matter and there should be no difficulty in obtaining the action desired.

47. Mr. BARTOŠ said that it was not always possible to consult United Nations documents even in the appropriate ministries. Nor was it an ideal solution to obtain them through the United Nations Information Centres.

48. Many legal documents did not come before the Sixth Committee, but originated in the Third Committee (e.g. those concerning human rights) or in the Fourth Committee (e.g. those concerning decolonization). He suggested that the Secretariat should send to the members of the Commission at least the monthly list of the documents published by the United Nations, from which members would then be able to select and order those of interest to them.

49. The CHAIRMAN said that, when attending the General Assembly as the representative of the Commission, he would do his utmost to bring the views of the Commission to the attention of the Assembly.

50. Meanwhile, the various suggestions by members would be studied by the Secretariat for possible action.

The Commission took note of the Secretariat's memorandum (A/CN.4/171).

Special Missions

(resumed from the 763rd meeting)

[Item 4 of the agenda]

ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 1 (The sending of special missions)

51. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following text for article 1:

"1. For the performance of specific tasks, States may send temporary special missions with the consent of the State to which they are sent.

- "2. The existence of diplomatic or consular relations between the States concerned is not necessary for the sending and reception of special missions."
52. Mr. RUDA said he found the text acceptable but suggested that the end of paragraph 1 be modified to read "with the consent of the receiving state".
53. Mr. BARTOŠ, Special Rapporteur, said that at that point it would be premature to speak of "the receiving State".
54. The CHAIRMAN, speaking as a member of the Commission, said that the expression "to which it is intended to send them" would be preferable.
55. Mr. YASSEEN observed that the stress should fall on the idea of making contact with the State whose consent was necessary. Furthermore, he preferred the adjective *temporaires* to the adverb *temporairement* in the context, for it was not the sending that was temporary but the mission itself.
56. The CHAIRMAN, speaking as a member of the Commission, proposed the following wording: "For the performance of specific tasks, States may send temporary special missions with the consent of the State to which they intend to send them".
57. Mr. LACHS said that paragraph 1 overemphasized the time element: the fulfilment of a special mission might take a long time. Furthermore, he thought the words "to which they are sent" were not entirely appropriate.
58. The CHAIRMAN, speaking as a member of the Commission, said that the Drafting Committee had faithfully reproduced the Commission's idea that the temporary nature of special missions should be stressed in contrast to the permanence of regular diplomatic missions.
59. Mr. ROSENNE, referring to Mr. Lachs's second remark, said that the purpose of that passage in question was to cover all types of special missions and to stress that in each case the consent of the State in which such missions were to perform their task had to be obtained.
60. Mr. LACHS suggested that the missions in question should be described as being "of a non-permanent character" instead of "temporary".
61. Mr. CASTRÉN said that, while he considered the Chairman's formula sound, he would prefer the wording: "... temporary special missions to other States with their consent".
62. Mr. BARTOŠ, Special Rapporteur, said that the object was to capture the ideas expressed by the Commission, in particular the idea that special missions were temporary in nature. He agreed with the Chairman's formula.
63. After some discussion concerning the phrase *auprès duquel*, the CHAIRMAN suggested that the meaning of the phrase should be explained in the commentary.
64. He proposed that in paragraph 2 the phrase "either for the sending or for the reception" should be substituted for the phrase "for the sending and reception".
- It was so agreed.*
- Article 1 was adopted unanimously, with the amendments proposed by the Chairman.*
- ARTICLE 2 (The task of a special mission)
65. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following text for article 2:
- "1. The task of a special mission shall be specified by mutual consent of the sending State and of the receiving State.
- "[2. During the existence of a special mission, its tasks shall be presumed to be excluded from the competence of the regular diplomatic mission.]"
66. The requirement of mutual consent was stated explicitly in paragraph 1. Opinion had been divided on paragraph 2 which had accordingly been submitted in square brackets. The Special Rapporteur had been of the opinion that the provision should be retained in order to elicit the views of Governments, while other members of the Committee had considered that the Commission should not submit alternative texts on matters which it should be in a position to decide. If the passage in brackets was not approved as part of the article, the point should be dealt with in the commentary.
67. Mr. de LUNA said that he could appreciate the Special Rapporteur's concern but thought that article 2 as drafted would not entirely avoid all possibility of conflict between special missions and regular missions.
68. Any difficulties that arose should remain within the domestic jurisdiction of the sending State, and matters of precedence and the like should be settled between the heads of mission.
69. It would be better to omit the provision as drafted in order to avoid any dispute.
70. Mr. BARTOŠ, Special Rapporteur replied that the question, if it arose, would not be internal but international; if any doubt about a special mission's competence was raised after it had finished its work, the dispute had to be settled between the States concerned. He had no very strong opinion on the matter and for that reason had asked that paragraph 2 be put within square brackets; he would now prefer that the provision be deleted and that Governments' attention be drawn to the question in the commentary.
71. The CHAIRMAN said that accordingly paragraph 2 would be dropped from article 2, but its substance would be mentioned in the commentary.
72. Mr. CASTRÉN said that, though he would have preferred paragraph 2 to be retained tentatively, he would bow to the majority.
- Article 2 was adopted unanimously, subject to the deletion of paragraph 2 and to a drafting amendment affecting the French text.*

ARTICLE 3 (Appointment of the head and members of the special mission)

73. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following text for article 3 :

"Except as otherwise agreed, the sending State may freely appoint the head of the special mission and its members. Such appointment does not require the prior consent of the receiving State."

74. Mr. BARTOŠ, Special Rapporteur, proposed that the words "the head and members of the special mission and of its staff" be substituted for "the head of the special mission and its members".

75. The CHAIRMAN, speaking as a member of the Commission, said that the wording should be amended to refer the head and members of the special mission as well as its staff, and the following sentence should read "such appointments do not require..."

It was so agreed.

Article 3, as amended, was adopted unanimously.

ARTICLE 4 (Persons declared *non grata* or not acceptable)

76. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following text for article 4 :

"1. The receiving State may, at any time and without having to explain its decision, notify the sending State that the head or any other member of the special mission or a member its staff is *persona non grata* or not acceptable.

"2. In any such case, the sending State shall either recall the person concerned or terminate his functions with the special mission. If the sending State refuses to carry out its obligations, the receiving States may refuse to recognize the person concerned as the head or a member of the special mission or as a member of its staff."

77. Paragraph 1 had been condensed and both that provision and paragraph 2 were modelled on article 9 of the Vienna Convention on Diplomatic Relations, 1961.

78. Mr. YASSEEN proposed the deletion of the words "a member of" before "its staff" in paragraphs 1 and 2.

It was so agreed.

Article 4, as amended, was adopted unanimously.

ARTICLE 5 (Sending the same mission to several States)

79. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following text for article 5 :

"A State may send the same special mission to more than one State. In that case the sending State shall give the States concerned prior notice of the sending of that mission. Each of those States may refuse to receive such a mission."

Article 5 was adopted unanimously, subject to drafting changes affecting the French text.

ARTICLE 6 (Composition of the special mission)

80. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee had prepared two new articles, based on a redraft prepared by the Special Rapporteur, to replace the original article 6. The new article 6 read :

"1. The special mission may be entrusted to a single representative or to a delegation composed of a head and other members.

"2. The special mission may include diplomatic staff, administrative and technical staff and service staff.

"3. In the absence of an express agreement as to the size of the staff of a special mission, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances and to the needs of the special mission, in the light of its tasks."

81. The CHAIRMAN, speaking as a member of the Commission, drew attention to the ambiguity resulting from the use of the word "mission" in paragraph 1 in the sense of "task". The paragraph should be redrafted; it might read: "The special mission may be constituted by...". Another possibility, preserving the original meaning of the term, would be: "The tasks of the special mission may be entrusted...".

82. Mr. de LUNA agreed. In addition he thought that paragraph 3 might be simplified, for the expression: "having regard to... tasks" was an unnecessary repetition. The notion of task was already inherent in the phrase concerning circumstances and needs. The phrase "in the light of its tasks" might therefore be dropped.

83. The CHAIRMAN pointed out that the text was modelled on article 20 of the Vienna Convention on Consular Relations, 1963.

84. Mr. BARTOŠ, Special Rapporteur, said that, admittedly, the term "needs" of the mission included the notion of tasks. He therefore agreed with Mr. de Luna, for in a draft on special missions it was not necessary to take into account all the considerations which had influenced the drafting of the Vienna Convention on Consular Relations. The word "tasks", however, as important.

85. The CHAIRMAN, speaking as a member of the Commission, said that the text should be as close as possible to that of the Vienna Convention on Diplomatic Relations. He suggested that the phrase in question in paragraph 3 should read: "having regard to circumstances, to the tasks and to the needs of the mission".

86. Mr. BARTOŠ, Special Rapporteur, said that he accepted that amendment.
87. Mr. LACHS also agreed, and proposed that paragraph 1 should begin: "The tasks of the special mission may be entrusted to...". That formula would be in keeping with article 1, paragraph 1.
88. The CHAIRMAN, speaking as a member of the Commission, suggested that, as the article was concerned essentially with the composition of the special mission, paragraph 1 should begin with the words "The special mission may be constituted by a single...". To that extent he would like to amend his earlier suggestion.
89. Mr. BARTOŠ, Special Rapporteur, explained that the term "representative" in paragraph 1 had been chosen after lengthy discussion and a good deal of difficulty to cover cases in which a mission was composed of a single person only.
90. He had wished to meet the Commission's wishes in connexion with paragraph 2. After considerable thought, however, he had come to the conclusion that some experts were neither diplomats nor members of the technical staff. He could explain in the commentary that the Commission had meant the term "diplomatic staff" to cover both diplomats in the strict sense and experts.
91. The best formulation might be: "A special mission may attach to itself experts and a diplomatic staff".
92. Mr. TUNKIN said that formula would involve some contradiction. A dividing line could hardly be drawn between experts and diplomatic staff, for some persons might be both.
93. Mr. BARTOŠ, Special Rapporteur, said that although it was certainly conceivable that the same person might be an expert and a diplomat, there were also cases in which Governments declined to confer the status of diplomat upon experts, however eminent.
94. The phrase might therefore read "A diplomatic staff, experts, administrative and technical staff...".
95. Mr. TUNKIN said that the usual phrase was "advisers and experts". The term "diplomatic staff" covered both categories.
96. Mr. ROSENNE agreed with Mr. Tunkin and believed that it would be wiser to leave the text untouched because, if the Commission departed from the wording of the Vienna Convention, difficulties might arise over the question of privileges and immunities.
97. Mr. de LUNA suggested that the text should be kept, leaving room for experts, to whom no reference was made in the Vienna Convention. He acknowledged the drawback pointed out by Mr. Tunkin, but said that, in practice, persons entitled to diplomatic rank would always claim diplomatic status. The effect of the text as it stood would be, however, that the other persons would not be included among the technical and administrative staff.
98. The CHAIRMAN, speaking as a member of the Commission, asked whether the experts and the other members of the staff mentioned in the article were to be regarded as forming part of the mission.
99. Mr. BARTOŠ, Special Rapporteur, said that the case under discussion was that where experts were not members of a mission. It was for the sending State to decide whether they were truly part of the diplomatic staff.
100. Mr. TSURUOKA asked what would happen if experts who were not members of a mission claimed the same privileges as its members. An agreement between the countries concerned would be required. Either that would have to be provided for or else such experts would have to be excluded from the categories which enjoyed diplomatic privileges.
101. The CHAIRMAN suggested that that problem should be deferred until the topic of privileges was considered.
102. Mr. BARTOŠ, Special Rapporteur, said that the terms to which Mr. Tunkin had referred occurred in the Convention on the Privileges and Immunities of the United Nations,⁴ section 16 of which defined "representatives" as including advisers and technical experts. The intention had been to place representatives on the same footing as experts on mission for the United Nations who were referred to in section 22 of the said Convention. However, experts accompanying government representatives on special mission were not in the same position.
103. At the Vienna Conference of 1961, where the problem had been quite different, technical assistants of heads of mission had been regarded as diplomats in order to draw the distinction between them and the technical services and other attachés and counsellors belonging to what had previously been customarily known as senior diplomatic staff. The Commission had therefore regarded experts as diplomatic staff.
104. The CHAIRMAN suggested that explanations concerning the position of experts on special mission should be given in the commentary and that their position should be reconsidered in connexion with privileges. He put article 6 to the vote, with the amendments thereto, in particular a wording for the end of paragraph 3: "having regard to circumstances and to the needs and tasks of the mission".
- Article 6, as amended, was adopted unanimously.*
- ARTICLE 6 A (Authority to act on behalf of the special mission)
105. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following text for article 6 A:
- "1. The head of the special mission of the representative is normally authorized to make statements

⁴ United Nations *Treaty Series*, Vol. 1.

- on behalf of the special mission. The receiving State shall pass its communications to the special mission through the head of the mission.
- "2. A particular member of the mission may be authorized either by the sending State or by the head of the special mission to replace the head of the mission if the latter is unable to perform his functions, and to perform particular acts on behalf of the mission."
106. Mr. AMADO said that the expression "through the head of the mission" was not accurate.
107. The CHAIRMAN, agreeing, suggested that the phrase should read: "shall address to the head of the mission its communications to the special mission".
108. Mr. LACHS said that the reference to a representative might create misunderstanding.
109. Mr. BARTOŠ, Special Rapporteur, said that the words "or the representative" might be omitted, for the intention was self-evident if the mission was not composed of more than one person.
110. The CHAIRMAN added that it was equally obvious, that, if a mission was composed of only one member, that person could speak on his own behalf.
111. Mr. TSURUOKA suggested that the word "normally", which was already in the first sentence, should be added in the second. The word "Similarly" might be inserted at the beginning of the second sentence.
112. Mr. TUNKIN suggested that the word "normally" should be deleted.
113. Mr. TSURUOKA said that the provision was concerned mainly with the relationship between the permanent mission and the head of the special mission or whichever of its members was authorized to make statements on behalf of the special mission. The powers of a special mission might be very limited, and the permanent mission might on occasion be instructed to make certain statements. There was no established practice, and hence the Commission should not be too categorical or too explicit.
114. The CHAIRMAN said that all that the article should state was that only the head of mission was authorized to make statements on behalf of the mission.
115. Mr. BARTOŠ, Special Rapporteur, said in reply to Mr. Tsuruoka that in practice the responsibility and work were apportioned from the outset within each mission, and even if the mission's task was limited, that allocation of functions was carried out normally in daily practice.
116. Mr. LACHS said that the Chairman's suggestion was acceptable but as drafted paragraph 1 was too restrictive. The head of the special mission might not necessarily wish to make a statement but might, for example, wish to communicate by letter with the receiving State. In addition, his function of representing the special mission should be mentioned in the first sentence of paragraph 1.
117. Mr. AMADO pointed out the difference between the title and the text. The title referred to acts and the article to statements. Did "to act" mean the same as "to make communications"?
118. He doubted whether the word "particular" was useful in the opening passage of paragraph 2.
119. The CHAIRMAN said that Mr. Amado had found the right word, "communications". Statements were continually being made in the course of negotiation, but the context dealt with the expression of the mission's intention, and that meant statements which bound and committed the mission.
120. Mr. TUNKIN criticized the phrase "on behalf of the special mission". Should it not rather be replaced by "on behalf of the State"? Surely a Prime Minister when speaking as the head of the special mission was acting primarily on behalf of the State.
121. Mr. BRIGGS said that paragraph 1 might be simplified to read: "The head of the special mission normally represents and speaks for the special mission, and the receiving State shall address its communications to the special mission through the head of the special mission".
122. Mr. BARTOŠ, Special Rapporteur, agreed with Mr. Tunkin. He added, however, that most special missions were not at such a high level and consequently were very careful to refrain from speaking on behalf of the State. He also supported Mr. Briggs's suggestion.
123. Mr. AMADO said that the head of the mission expressed the mission's thought and that communications were to be addressed to him by the receiving State.
124. The CHAIRMAN suggested that the references to "representation" and "State" should be omitted.
125. Mr. de LUNA said that he supported the formula suggested earlier by the Chairman. To his mind, it would be better not to specify too clearly on behalf of whom communications were passed. The point to stress was that the head of the mission alone was authorized to pass and receive communications.
126. Mr. BARTOŠ, Special Rapporteur, said that a special mission might not only pass and receive communication, but might also draw up documents, such as an instrument demarcating a frontier, for example.
127. Mr. ROSENNE agreed with Mr. Amado that it was most undesirable to go into too much detail. In some respects the subject matter of article 6 A would be governed by the initial agreement between two States and by the full powers or credentials. The discussion indicated that paragraph 1 was redundant and could be deleted without loss.
128. After further debate, the CHAIRMAN suggested that the meaning of the word "normally" should be explained in the commentary and that article 6 A should be amended to read:

" 1. The head of the special mission is normally the only person authorized to act on behalf of the special mission and to send communications to the receiving State. Similarly, the receiving State shall normally address its communications to the head of the special mission.

" 2. A member of the mission may be authorized..." [remainder as proposed by the Drafting Committee].

Article 60 A, as so amended, was adopted unanimously.

ARTICLE 7 (Notification)

129. Mr. BRIGGS, Chairman of the Drafting Committee proposed the following wording for article 7 :

" 1. The sending State shall notify the receiving State of :

" (a) the composition of the special mission and of its staff, the arrival and final departure of such persons, the termination of their functions with the mission, and any subsequent changes ;

" (b) the arrival and final departure of any person accompanying the head or a member of the mission or a member of its staff ;

" (c) the engagement and discharge of persons residing in the receiving State as members of the mission or as private servants of the head or of a member of the mission or of a member of the mission's staff.

" 2. If the special mission has already commenced its functions, the notifications referred to in the preceding paragraph may be communicated by the head of the special mission or by a member of the mission or of its staff designated by the head of the special mission."

130. The CHAIRMAN said that the new draft followed the text of the corresponding provision in the Vienna Convention on Diplomatic Relations. He wished to point out that in paragraph 1 (a) the word *leur* was incorrectly used, and that any " changes " to be notified necessarily took place before the departure of the mission.

131. Mr. BARTOŠ, Special Rapporteur, said that he, too, was dissatisfied with the drafting of paragraph 1 (a). He had included the reference to " any subsequent changes " at the last moment.

132. Mr. LACHS said that paragraph 1 should be redrafted so as to mention first the notification of the composition of the mission and of any changes in that composition occurring before its arrival, next notification of its arrival and departure, thirdly, notification of the arrival and departure of accompanying persons, and last notification of the termination of functions.

It was so agreed.

Article 7, redrafted as suggested, was adopted unanimously.

ARTICLE 8 (General rules concerning precedence)

133. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following text for article 8 :

" 1. Except as otherwise agreed, where two or more special missions meet in order to carry out the same task, precedence among the heads of the special missions shall be determined by alphabetical order of the names of the States.

" 2. The precedence of the members and the staff of the special mission shall be notified by the head of that mission to the appropriate authority of the receiving State."

134. Mr. BARTOŠ, Special Rapporteur, said that all the necessary explanations regarding alphabetical order would be given in the commentary and would take into account what had been said during the discussion.

135. Mr. YASSEEN suggested that the reference to the head of mission should be omitted from paragraph 2 of the article ; the order of precedence might in some cases be notified by the Minister for Foreign Affairs.

136. Mr. LACHS agreed with that suggestion.

137. Mr. BARTOŠ, Special Rapporteur, said that he would prefer to leave the text as it was ; in practice, the Department of Protocol always asked the head of a mission to confirm the order of precedence already communicated to it. He agreed to mention the matter in the commentary.

Article 8 was adopted unanimously.

ARTICLE 9 (Precedence among special ceremonial and formal missions)

138. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following text for article 9 :

" Precedence among two or more special missions which meet on the same formal or ceremonial occasion shall be governed by the protocol in force in the receiving State."

139. Mr. TSURUOKA asked whether the expression " formal occasion " was correct.

140. The CHAIRMAN said that he preferred the expression " special ceremonial and formal missions " used in the title of the article.

141. Mr. LACHS said that he did not know what was meant by a " formal " mission and hoped that that designation could be dropped.

142. Mr. ROSENNE said that he, too, was unaware of the difference between a ceremonial and a formal mission.

143. Mr. BARTOŠ, Special Rapporteur, said that in practice the two were quite distinct. For instance, a

funeral was a ceremonial occasion ; but the conveyance of congratulations on an occasions such as the inauguration of a new head of State was not.

Article 9 was adopted by 12 votes to none, with 1 abstention.

ARTICLE 10 (Commencement of the function of a special mission)

144. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following text for article 10 :

“The function of a special mission shall commence as soon as that mission enters into official contact with the appropriate organs of the receiving State. The commencement of its function shall not depend upon official presentation by the regular diplomatic mission or upon the submission of letters of credence or full powers.”

145. Mr. YASSEEN considered that there was no need to qualify the word “presentation” by the word “official”.

146. Mr. de LUNA hoped that the term would be kept, since presentation had a very specific meaning in protocol.

147. Mr. TSURUOKA proposed that the second sentence be placed in the commentary rather than in the body of the article.

148. He also suggested that the commentary should explain what was meant by “appropriate organs”.

149. Mr. YASSEEN thought that that suggestion concerned substance, especially in view of the phrase “submission of letters of credence or full powers”.

150. Mr. BARTOŠ, Special Rapporteur, agreed that a matter of substance was involved. In practice, presentation was often deliberately delayed.

151. The CHAIRMAN suggested that the sentence should read : “...shall not depend upon official presentation of the special mission by the regular diplomatic mission”.

152. Mr. TSURUOKA said his principal concern was that the article should not give the impression that the mere fact of forming part of a special mission could empower a person to commit a State.

153. Mr. BARTOŠ, Special Rapporteur, said that the text reflected existing practice.

154. The CHAIRMAN said that it was clear that the text in no way exempted a State from the duty to submit letters of credence and full powers ; but, in his opinion, it would be enough to explain that in the commentary.

Article 10 was adopted unanimously.

The meeting rose at 1.10 p.m.

769th MEETING

Friday, 17 July 1964, at 3.40 p.m.

Chairman : Mr. Roberto AGO

Special Missions

(continued)

[Item 4 of the agenda]

ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 11 (End of the function of a special mission)

1. The CHAIRMAN drew attention to the following text proposed by the Drafting Committee for article 11 :

“The function of a special mission shall come to an end, *inter alia* :

“(a) upon the expiry of the duration of the special mission ;

“(b) upon the completion of the task of the special mission ;

“(c) upon notification of the recall of the special mission by the sending State ;

“(d) upon notification by the receiving State that it considers the mission terminated.”

2. He suggested that the word “functions” in the plural should be used instead of “function”, a change which would necessitate a consequential change in article 10.

It was so agreed.

Article 11, as amended and subject to drafting changes, was adopted unanimously.

Law of Treaties

(resumed from the 767th meeting)

[Item 3 of the agenda]

ARTICLE 70 (General rule) [concerning the interpretation of treaties],

ARTICLE 71 (Cases where the meaning of a provision is in doubt),

ARTICLE 72 (Terms having a special meaning) and

ARTICLE 69 A (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law)

3. Sir Humphrey WALDOCK, Special Rapporteur, said that he had redrafted articles 70, 71, 72 and 69 A¹ to read :

“ Article 70

“ General rule

“ 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each provision —

“ (a) in the context of the treaty and in the light of its objects and purposes ;

and

“ (b) in the light of the rules of international law [in force at the time of its conclusion].

“ 2. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty, including its preamble :

“ (a) any instrument annexed or related to the treaty and drawn up in connexion with its conclusion ;

“ (b) any agreement between the parties regarding the interpretation of the treaty.

“ 3. Any subsequent practice in the application of the treaty which establishes the common understanding of all the parties regarding its interpretation shall also be taken into account as if it formed part of the context of the treaty.

“ Article 71

“ Cases where the meaning of a provision is in doubt

“ If the interpretation of a provision in accordance with article 70 — (a) leaves the meaning ambiguous or obscure ; or (b) leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty, recourse may be had to further means of interpretation, including the preparatory work of the treaty, the circumstances of its conclusion and any relevant indications in the practice of individual parties.

“ Article 72

“ Terms having a special meaning

“ Notwithstanding anything contained in article 70, a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning.

“ Article 69 A

“ Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law

“ The operation of a treaty may also be modified —

“ (a) by a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible ;

“ (b) by a subsequent practice of the parties in the application of the treaty establishing their tacit agreement to an alteration or extension of its provisions ; or

“ (c) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.”

4. He explained that the new form of article 70 had been suggested by the Chairman and several other members of the Commission. In redrafting the rule, he had tried to assign a slightly less important place than in his earlier draft (A/CN.4/167/Add.3) to subsequent concordant practice. Logically, there was some difficulty about including a reference to subsequent practice in article 70. The fundamental rule, it would be generally agreed, was that a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to each provision. If subsequent practice coincided with the ordinary meaning, it was of interest only in showing that the ordinary meaning had been correctly interpreted. Subsequent practice was of special value when doubts arose, for in that case it might indicate the correct interpretation. He had hesitated to put subsequent practice, as a means of interpretation, on the same level as instruments or agreements. In order to be able to mention subsequent practice in article 70 at all, he had used the formula, familiar in English law, that it should be taken into account “as if it formed part of the context of the treaty”. A majority of the Commission appeared to desire that context and subsequent practice should be treated in article 70 after a brief definition of the general rule. The Commission should now decide on the exact contents of paragraph 2 and on how to deal with subsequent practice when it was concordant.

5. Article 71 related to the main cases in which doubt arose as to the meaning of a provision. The “relevant indications in the practice of individual parties” were on a different level from concordant practice. A State might by its practice acknowledge a certain interpretation of its obligations. For example, in the case of the *South West Africa mandate*,² the mandatory Power had acknowledged its obligations and subsequently tried to evade them, so that a form of estoppel had arisen.

6. The Commission would also have to decide whether to retain article 72, dealing with terms having special meanings. In the *Eastern Greenland case*,³ for instance, the meaning of the word “Greenland” had been disputed, and the Permanent Court of International Justice had decided that evidence of the special meaning to be attached to a term was admissible but that the burden of proof was upon the party desiring to establish that special meaning. He personally thought that where a special meaning could be established by special evidence, it was very probable that that meaning would appear in the context of the treaty. In most cases in which a special meaning of a term had been pleaded, the tribunals appeared to have rejected the special meaning. Since, however, there was a great deal of jurisprudence behind the provision and since it might be of some importance in determining on whom fell the burden of proof, he had included it.

7. In article 69 A, he had tried to deal with the impact on a treaty of a subsequent treaty, subsequent practice

¹ Article 69A replaces former article 73 in the Special Rapporteur's original draft (A/CN.4/167/Add.3).

² *I.C.J. Reports*, 1962.

³ *Legal Status of Eastern Greenland, P.C.I.J.* (1933), Series A/B, No. 53.

and customary law. Article 69 A should be included in section II (Modification of treaties) of part III of the Commission's draft on the law of treaties.

ARTICLE 70

8. Mr. TUNKIN thought that in article 70, paragraph 1 (b), the words "in force at the time of its conclusion" should be omitted. It was also too much to suggest that a treaty should be interpreted "in the light of the rules of international law", since not all rules, but only the basic principles of international law which had a bearing on the treaty were applicable in its interpretation. With regard to paragraph 2 (a), he agreed on the relevance of any instrument annexed to the treaty, but would like the Special Rapporteur to explain what he meant by a related instrument. A party to a treaty might draw up a document in connexion with the conclusion of the treaty. Surely, if such a document was purely unilateral it should not be taken into account in the interpretation of the treaty. In paragraph 3, he would hesitate to consider subsequent practice "as if it formed part of the context of the treaty" and would prefer those words to be omitted. Besides, the word "any" before "subsequent practice" was too sweeping.

9. The CHAIRMAN, speaking as a member of the Commission, suggested that sub-paragraph 1 (a) and (b) of article 70 should be redrafted to read "(a) in the context of the treaty and taking into account its objects and purposes; and (b) in the light of the general principles of international law". The expression "rules of international law" was unsuitable, because the treaty itself created rules of international law, and international law was, in fact, largely treaty law.

10. Sir Humphrey WALDOCK, Special Rapporteur, agreed that international law consisted to a large extent of treaty law. It was precisely for that reason that he preferred not to speak of general rules or general principles. A treaty among Latin American States, for example, would have, as a definite context, the rules of international law applicable to those States and would be interpreted in the context of those rules. If the draft stated that the interpretation of such a treaty should be based exclusively on the general rules or principles of international law, it might be understood to mean that that specific context could not be taken into account.

11. Mr. YASSEEN thought that the expression "rules of international law in force at the time of its conclusion" should be retained because more than general principles were involved; the definition of a term employed in a treaty might well depend on the meaning attached to that term in the context of a previous treaty, and the parties concluding the new treaty might find it unnecessary to define the term afresh precisely because its meaning was clear from the earlier treaty. In the *North Atlantic Coast Fisheries* case,⁴ it

had, in fact, been decided that the term "bay" had to be interpreted in the light of earlier international law and could not be interpreted in the light of whatever new ideas were reflected in later conventional rules and custom.

12. The CHAIRMAN, speaking as a member of the Commission, said that he had serious doubts on paragraph 1 (b), since a treaty might establish rules derogating entirely from previous rules.

13. Mr. de LUNA said that a treaty was concluded not in a vacuum, but in the framework of an existing international legal order. He could not accept the arguments in favour of including the word "general" before the word "rules" in paragraph 1 (b). In some cases, regional law, as established by regional treaties, applied to a certain area, and the inclusion of the adjective "general" before the word "rules" would fail to make allowance for that fact.

14. With regard to sub-paragraph 2 (a), he said he could appreciate Mr. Tunkin's objection to the words "[instrument] related to [the treaty]"; but if those words were omitted only the words "any instrument annexed to the treaty" would remain, and that phrase would hardly suffice in the definition of the "context" of a treaty. Cases had occurred where the main obligation arising out of an agreement had been included, not in the treaty itself or in instruments annexed to the treaty, but simply in notes exchanged at the time of the conclusion of the treaty, a procedure adopted for the purpose of evading parliamentary control. Clearly, in such cases, the obligations in question were set forth in instruments which were not annexed but merely related to the treaty.

15. With regard to paragraph 3, he adhered to the view that subsequent practice was more essential to interpretation than *travaux préparatoires*, but would not object to the deletion of the words "as if it formed part of the context of the treaty", if a majority of the Commission desired to omit those words. As to paragraph 2 (b), an element of doubt persisted. If any agreement between the parties regarding the interpretation of the treaty was considered part of the context, a tacit agreement between them would also be so considered.

16. Mr. ROSENNE shared the doubts as to the need for paragraph 1 (b). In article 1 (a) of the Commission's draft on the law of treaties⁵ the term "international agreement" was defined as an agreement "governed by international law". That definition applied to the whole of international law which might be applicable at any given moment, and article 70, paragraph 1 (b), therefore seemed redundant. There was an element of redundancy also in article 70, paragraph 2, since article 1 (a) defined a treaty as "any international agreement in written form, whether embodied in a single instrument or in two or more related instruments". Nor could he see any reason for referring, in article 70,

⁴ *Reports of International Arbitral Awards*, Vol. XI (United Nations publication, Sales No. 61.V.4).

⁵ *Yearbook of the International Law Commission*, 1962, Vol. II, p. 161.

paragraph 2 (a), to instruments annexed to the treaty since such instruments formed part of the treaty. In article 70, paragraph 3, he favoured the deletion of the words "as if it formed part of the context of the treaty" and the addition of paragraph 3 as a sub-paragraph to paragraph 2.

17. The CHAIRMAN, speaking as a member of the Commission, suggested that the definition of the "context of the treaty" in article 70, paragraph 2, should end with the words "or related to the treaty". A third paragraph should then indicate that subsequent practice should be taken into account together with the context but subsequent practice should not be described as forming part of the context.

18. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that interpretative agreements were sometimes concluded before the treaty itself; he had intended paragraph 2 (b) to cover such agreements concluded both before and after the treaty.

19. The CHAIRMAN said that an interpretative agreement concluded, perhaps, ten years after a treaty, could not be regarded as part of the context.

20. Sir Humphrey WALDOCK, Special Rapporteur, agreed, but thought that some reference to interpretative agreements was desirable.

21. Mr. BRIGGS thought that if the words "in force at the time of its conclusion" in article 70, paragraph 1 (b) were omitted, the reference to the rules of international law would be out of place in the article, which was merely intended to give guidance on interpretation. He considered that the whole of the sub-paragraph should be retained, for it indicated the relevance of usage prevailing at the time of the conclusion of the treaty. As to paragraph 2 (a), he agreed that the Special Rapporteur should define the meaning of the expression "related to the treaty and drawn up in connexion with its conclusion".

22. Mr. RUDA urged the retention of the words "or related to" in paragraph 2 (a). As an illustration, he mentioned the Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro, 1947,⁶ and the Bogota Charter of the Organization of America States, 1948. Such terms as "legitimate self-defence" and "collective security", wherever used in those inter-American instruments, should be construed in the sense given to them in the United Nations Charter.

23. Sir Humphrey WALDOCK, Special Rapporteur, explaining his reference to instruments "related to" the treaty, said that when a treaty was concluded, certain documents were frequently drawn up which, for the purposes of interpretation, were regarded as part of the treaty. It would be unwise to rely entirely on the definition of the term "agreement" in article 1, as Mr. Rosenne had suggested. Not only ratifications accompanied by reservations, but other instruments such as declarations of policy might affect the inter-

pretation of a treaty. He had also thought it necessary to indicate by the words "drawn up..." that such instruments had to be in writing. The Commission had used similar language before when dealing with reservations.

24. Mr. TUNKIN said that it was virtually meaningless to speak of the rules of international law in paragraph 1 (b), because the need to take the relevant rules into account was self-evident and because the treaty itself constituted a rule of international law. There would be more point in referring to "other rules" of international law, but that, too, would not be entirely satisfactory. With regard to the words "in force at the time of its conclusion", there would be general agreement that the interpretation of a treaty should be guided not only by the intentions of the parties at the time of its conclusion, but by subsequent practice accepted by the parties as signifying a certain interpretation. He added that the rules in force at the time of the conclusion of a treaty were often superseded by a subsequent development of the rules.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that it might be that Mr. Tunkin's concept of interpretation differed slightly from his. The purpose of article 70 was surely to establish the meaning of the treaty at the time of its conclusion, for which purpose it was necessary to take into account the rules in force at that time, which formed part of the context. He had hesitated to include paragraph 3, concerning interpretation in the light of subsequent practice, in an article concerned with the interpretation of a treaty in the light of its context at the time of conclusion. In his view, interpretation based on subsequent practice or on the subsequent development of international law was different from the other kind of interpretation. Admittedly, subsequent development might have an impact on a treaty, and in article 69A he had endeavoured to deal with the influence of later events on the interpretation of a treaty. It was often difficult to know where interpretation ended and where modification began. For instance, in using the expression "territorial waters" in a treaty, the parties might originally have intended to refer to territorial waters as understood at the time — say, the sea area within the three-mile limit. If subsequently the expression "territorial waters" came to mean a broader belt of sea, then the scope of the treaty changed and its provisions would have to be re-interpreted. In most cases, however, where a new rule relating to the subject matter emerged, it probably tended to modify earlier treaties.

26. He would hesitate to agree to the deletion of the words "in force at the time of its conclusion" in paragraph 1 (b); on the other hand, he would be prepared for the purpose of arriving at a compromise to accept the words "the general rules of international law".

27. The CHAIRMAN, speaking as a member of the Commission, said that he increasingly inclined to the view that paragraph 1 (b) should be omitted. A bare reference to the general principles of international law would hardly suffice. The meaning of a term used in a treaty might not be determined by reference to general

⁶ *United Nations Treaty Series*, Vol. 21.

principles : it might have been defined in a special rule. Furthermore, reference was very frequently made in treaties to concepts of internal law, or to technical ideas, which were apt to evolve in the course of time. It would therefore be confusing, and indeed dangerous, to provide that, in each case, it was necessary to interpret a treaty in the light of the rules in force at the time of its conclusion.

28. Mr. YASSEEN said that he was unable to agree with the Chairman. The purpose of interpretation was to ascertain the meaning and scope of a rule of law. Where that rule was the expression of an act of will, as it was in a treaty, interpretation necessarily had to be based on the intention of the parties. In concluding the treaty, the parties had had in mind a certain situation in fact and in law and it was important to make that clear. He did not, however, dispute the effect of subsequent development ; treaties evolved with time as a result of changes in the legal order.

29. Mr. TABIBI said that he accepted article 70, paragraph 1, which contained all the basic elements for the purpose of the interpretation of a treaty — the context and the objects and purposes of the treaty. The words “in the light of the rules of international law” should be retained because, although the parties might create special rules, such rules would come within the meaning of “context” as defined and would in any case be in accord with the intentions of the parties.

30. Mr. AMADO said that he could not accept the words “in the light of the rules of international law” ; it was surely inconceivable that the parties could have concluded a treaty not governed by those rules.

31. Mr. de LUNA said that he was in favour of the text of paragraph 1 (b) as it stood, including the words in brackets. There was no harm in stating a fact, even if it was obvious.

32. Mr. VERDROSS said that, if that was the majority view, he would have no objection to the deletion of article 70, paragraph 1 (b), since its contents were obvious ; but if it was retained, the reference should be to “the general rules of international law”, for a treaty itself contained rules of international law. Moreover, that phrase had been used by the Permanent Court of International Justice and in certain arbitral awards. The Institute of International Law had used the formula “in the light of international law”, and Judge Huber had used a similar phrase.⁷

33. The CHAIRMAN, speaking as a member of the Commission, said that the words used in the resolution of the Institute of International Law (cited in paragraph (11) of the commentary in document A/CN.4/167/Add.3) did not mean very much.

34. Mr. AMADO said that interpretation should be left to the good sense of future judges. The Commission could not include in its rules a reference to every judicial decision.

35. A reference had been made to the use of the expression “territorial waters” in a treaty, which might be affected by a new rule of international law. Surely however, a treaty could not be drafted by reference to what the law was going to be in future ; it obviously had to be based on existing international law.

36. His impression was that the reference in the opening words of paragraph 1 (b) to the rules of international law had been made mainly in order to justify the inclusion of the passage “in force at the time of its conclusion”.

37. Mr. TUNKIN said that he still maintained that there must be a reference in some form to international law. Perhaps it might be possible to use the formulation of the Institute of International Law.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that the Institute’s formula was a weak one, on the point under discussion. Simply to adopt it would be tantamount to an admission by the Commission that it could not form an opinion on that point.

39. It was true that a treaty might create rules, but that difficulty was avoided by adding the words “in force at the time of its conclusion”. There was always a certain presumption, in the interpretation of a treaty, that a State had intended to abide by the rules of international law.

40. Mr. BRIGGS said that, as he understood it, the object of interpretation was to establish what a treaty meant, not to say whether or not it was in accordance with international law. If there was to be no reference to the possibility of interpretation in accordance with contemporary usage at the time of the conclusion of the treaty, he would prefer paragraph 1 (b) to be omitted altogether.

41. Mr. AMADO said that anyone interpreting a treaty in good faith could hardly help assuming that it had been drafted in the light of the rules of international law.

42. He suggested that in the French text of paragraph 1 the expression *qui doit être donné* should be replaced by the words *à attribuer*.

It was so agreed.

43. The CHAIRMAN said that in view of the difference of opinion the decision on paragraph 1 would be postponed until the next meeting.

44. Mr. TABIBI noted that annexes to the treaty were relegated to paragraph 2 (a), whereas the preamble was referred to in the opening passage of the paragraph. But in many cases an annex was as important as the treaty itself : for instance, a map might constitute an annex and the treaty would be meaningless without it. He therefore suggested that the concluding words of the opening paragraph should read : “including its preamble and annexes” ; the words “annexed or” in paragraph 2 (a) would then be deleted.

It was so agreed.

⁷ In the *Island of Palmas* arbitration, *Reports of International Arbitral Awards*, Vol. II.

45. Mr. ROSENNE thought that it would be better to say "shall comprise" in the opening passage rather than "shall be understood as comprising".
46. Sir Humphrey WALDOCK, Special Rapporteur, accepted that suggestion.
47. The CHAIRMAN said that, as Mr. Tunkin had pointed out earlier, the word "instrument" in paragraph 2 (a) was unsatisfactory in that it excluded declarations. It would be better to say "any agreement".
48. Sir Humphrey WALDOCK, Special Rapporteur, said that the question would then arise whether an instrument of ratification could be regarded as included in the word "agreement". Such instruments were not exchanged in the case of a general multilateral treaty.
49. Mr. YASSEEN said that in his view instruments of ratification should accordingly not be taken into account for the purpose of interpretation, for ratification was a unilateral expression of will after the adoption of the text.
50. Mr. BARTOŠ said that it was often possible for the parties to make reservations at the time of ratification and it was impossible to keep the text of those reservations separate. If a reservation had been accepted, or had been submitted within the agreed time limit and no party had protested against it, it was legally part of the instrument.
51. The CHAIRMAN suggested that the difficulty could be surmounted if paragraph 2 contained the words "any agreement or instrument related to the treaty". Such an expression would cover verbal agreements and instruments of ratification containing reservations.
- It was so agreed.*
52. Mr. ROSENNE pointed out that a situation might arise where, for instance, there might be a unilateral understanding on the meaning of a treaty by the United States Senate that was not always accepted by the other side. A purely unilateral interpretative statement of that kind made in connexion with the conclusion of a treaty could not bind the parties. It was true that in Part I of its draft the Commission had carefully distinguished between the international and domestic aspects of treaty-making, but he thought it advisable to draw attention to the existence of that danger.
53. Sir Humphrey WALDOCK, Special Rapporteur, said that the two phrases "related to" and "drawn up in connexion with its conclusion" had been used in order to indicate that the instrument had to be germane to the actual conclusion of the treaty.
54. Mr. ROSENNE suggested that a looser formula such as "accepted by" (rather than "drawn up" by) the parties, might be used in order to avoid a reference that might include purely unilateral action; the passage would then read "any agreement or instrument related to the treaty and accepted by the parties in connexion with its conclusion".
55. In the light of a suggestion by the Chairman, Sir Humphrey WALDOCK, Special Rapporteur, suggested the following wording for paragraph 3 of article 70:
- "There shall also be taken into account, together with the context
- "(a) any agreement between the parties regarding the interpretation of the treaty;
- "(b) any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation."
- That revision of paragraph 3 was adopted.*

ARTICLE 71

56. Mr. YASSEEN, referring to the redraft of article 71, said that the clearness or ambiguity of a provision was a relative matter; sometimes one had to refer to the preparatory work or look at the circumstances surrounding the conclusion of the treaty in order to determine whether the text was really clear and whether the seeming clarity was not simply a deceptive appearance. He could not accept an article which would impose a chronological order and which would permit reference to preparatory work only after it had been decided that the text was not clear, that decision itself being often influenced by the consultation of the same sources.

57. Sir Humphrey WALDOCK, Special Rapporteur, noted that it was sometimes impossible to understand clearly even the objects and purpose of the treaty without such reference.

58. The CHAIRMAN, speaking as a member of the Commission, thought that the second part of article 71 should come first, so that the text would provide that recourse could be had to further means of interpretation, including those serving to confirm the interpretation resulting from the context or to establish it, in cases where the interpretation according to article 70 would lead to an obscure meaning.

59. Mr. BRIGGS said that as article 71 dealt with cases in which the meaning of a provision was ambiguous or in doubt, a second paragraph could be added to the effect that the same method could be used to confirm a meaning established by a textual approach.

60. Sir Humphrey WALDOCK, Special Rapporteur, preferred the Chairman's suggestion as being closer to his original version.

61. Mr. BARTOŠ said that if an interpretation was to be objective — as he thought it should be — all the circumstances and the preparatory work had to be taken into account to permit, firstly, verification then confirmation, and, thirdly, to provide a way out of an impasse. The redraft of article 71 seemed to be concerned solely with the first aspect. As Mr. Yasseen had pointed out, it was not easy to determine what was clear and what was not.

62. Mr. de LUNA supported the Chairman's suggestion.

63. Mr. RUDA said that he opposed the Chairman's suggestion for reasons which he had stated earlier. If the general rule of article 70 was applied and a clear conclusion was reached there was no need for confirmation. The need for recourse to other methods arose only if the matter was unclear.

64. Mr. ROSENNE believed that it would be going too far to undertake to say both when recourse could be had to preparatory work and other further means of interpretation and for what purpose. He preferred to deal with the "when" aspect, as there was a large element of fiction in the confirmation doctrine as advanced by many international tribunals.

65. Sir Humphrey WALDOCK, Special Rapporteur, recalled the instructions he had been given to strike out (a), (b) and (c) of his original draft article 71, paragraph 2 (A/CN.4/167/Add.3) and that some members, including Mr. Ruda, would have preferred that confirmation should not be mentioned. In his view it was unrealistic to imagine that the preparatory work was not really consulted by States, organizations and tribunals whenever they saw fit, before or at any stage of the proceedings, even though they might afterwards pretend that they had not given it much attention. He thought it would probably suffice to state the basic rule firmly in article 70. From another point of view, the reference to confirmation and, *a fortiori*, verification tended to undermine the text of a treaty in the sense that there was an express authorization to interpret it in the light of something else; nevertheless that was what happened in practice.

66. Mr. YASSEEN believed that a text could not be deemed clear until its entire dossier had been studied. There also remained the problem of what should be done if reference to the preparatory work showed that such an interpretation was not clear.

67. Sir Humphrey WALDOCK, Special Rapporteur, agreed that the same obscurity might well be found in the preparatory work. In that case the only possibility was to use any other indications available, and it was then that the objectives and purposes of the treaty assumed a particular importance. Nevertheless, some difficulties of interpretation were inescapable.

68. Mr. TUNKIN believed it might be wiser to avoid excessive detail and not to indicate the purposes for which the preparatory work should be used. It would be sufficient to state that it could be consulted for the purpose of interpretation.

69. The CHAIRMAN suggested that in that case it would be possible to say, simply "In the interpretation of a provision, recourse may be had also to other means...".

70. Mr. de LUNA said he preferred the present wording.

71. Sir Humphrey WALDOCK, Special Rapporteur, agreed with Mr. de Luna. To adopt the suggested change would be to return to the language of the resolution of the Institute of International Law. Throughout, the Commission had shown a strong predilection

for textual interpretation, in the interests of stability and certainty of treaty relations. All were agreed that the text was not everything and that the preparatory work had its place, but to reduce the passage to "Recourse may be had to other means" would solve nothing and weaken the text.

72. Mr. TUNKIN considered that the last phrase in article 71 "and any relevant indications in the practice of individual parties", should be deleted. While the practice of individual parties might be taken into consideration in some instances, such practice should not be placed on the same level as preparatory work.

73. For example, where one of the parties consistently violated the provisions of a treaty and the other, possibly owing to weakness, hesitated to protest, surely such a constant practice of one of the parties should not be taken into account.

74. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the concept needed to be preserved because there were certain cases where indications of the practices of a number of States could be very important, especially in the case of multilateral treaties.

75. Mr. BARTOŠ favoured the retention of the phrase but agreed with Mr. Tunkin that only common practice should be taken into account.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the practice of individual parties might be mentioned in the commentary as one of the other forms of evidence, without its being given special importance.

77. The CHAIRMAN suggested that article 71 should be revised along the following lines: "Recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to verify or confirm the meaning resulting from the application of article 70, or to determine the meaning of the interpretation... and purposes of the treaty".

It was so agreed.

ARTICLE 72

78. Mr. BRIGGS referring to article 72, considered it desirable to retain the article for the reasons he had expressed earlier.

79. Mr. BARTOŠ also favoured retention of article 72, since it was not uncommon for parties to accept new meanings and to invent new terms.

80. Mr. LACHS agreed that article 72 should be retained, but wondered if the cross-reference should be to the first part of article 70 or to the entire article.

81. The CHAIRMAN, speaking as a member of the Commission suggested that the words "paragraph 1 of" should be added before the words "article 70".

It was so agreed.

It was agreed that articles 70, 71 and 72 should be revised in the light of the discussion.

The meeting rose at 6.5 p.m.

770th MEETING

Monday, 20 July 1964, at 3 p.m.

Chairman : Mr. Roberto AGO

Special Missions

(resumed from the 768th meeting)

[Item 4 of the agenda]

ARTICLES PROPOSED BY THE DRAFTING COMMITTEE**ARTICLE 12 (Seat of the special mission)**

1. The CHAIRMAN invited the Commission to consider the text of article 12 of the draft on special missions as proposed by the Drafting Committee :

“ 1. In the absence of prior agreement, a special mission shall have its seat at the place proposed by the receiving State and approved by the sending State.

“ 2. If the special mission's tasks involve travel or are performed by different sections or groups, the special mission may have more than one seat.”

Article 12 was adopted unanimously.

ARTICLE 13 (Nationality of the head and the members of the special mission and of its staff)

2. The CHAIRMAN invited the Committee to consider the text of article 13 as proposed by the Drafting Committee which read :

“ 1. The head and members of a special mission and the members of its staff should in principle be of the nationality of the sending State.

“ 2. Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.

“ 3. The receiving State may reserve the right provided for in paragraph 2 with regard to the nationals of a third State who are not also nationals of the sending State.”

3. Mr. YASSEEN suggested that in paragraph 1 the expression “and of its staff”, which appeared in the title, should be substituted for the expression “and the members of its staff”.

4. The CHAIRMAN, speaking as a member of the Commission, considered the text of paragraph 1 was more correct than the title.

5. Mr. de LUNA observed that the text of the paragraph was based on the corresponding provisions of the Vienna Convention on Diplomatic Relations.

6. The CHAIRMAN suggested that the words “the members of” be inserted before the words “of its staff” in the title, and that in paragraph 1 the expression “members of its staff” be kept in the English version, and in the French version “*membres de son personnel*” should be substituted for “*membres du personnel*”.

It was so agreed.

Article 13, as so amended, was adopted unanimously.

ARTICLE 14 (Right of special missions to use the flag and emblem of the sending State)

7. The CHAIRMAN invited the Commission to consider the text of article 14 as proposed by the Drafting Committee which read :

“ A special mission shall have the right to display the flag and emblem of the sending State on the premises of the mission, on the residence of the head of the mission and on the means of transport of the mission.”

Article 14 was adopted unanimously.

ARTICLE 15 (Activities of special missions in the territory of a third State)

8. The CHAIRMAN invited the Commission to consider the text of article 15 as proposed by the Drafting Committee which read :

“ 1. Special missions may not perform their functions in the territory of a third State without its consent.

“ 2. The third State may impose conditions which must be observed by the sending State.”

Article 15 was adopted unanimously.

9. Replying to congratulations by the CHAIRMAN, Mr. BARTOS, Special Rapporteur, said that the article concerning special missions adopted at the current session by the Commission did not really cover the entire subject and that the first part would still need to be supplemented.

10. He thanked the Drafting Committee and the Commission for their co-operation.

Law of Treaties

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 70 (General rule) [concerning the interpretation of treaties]

11. The CHAIRMAN invited debate on article 70 as revised by the Commission at its previous meeting :

- "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term —
- "(a) in the context of the treaty and in the light of its objects and purposes, and
- "(b) in the light of the rules of international law in force at the time of its conclusion.
- "2. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty, including its preamble and annexes, any agreement or instrument related to the treaty and made in connexion with its conclusion.
- "3. There shall also be taken into account, together with the context,
- "(a) any agreement between the parties regarding the interpretation of the treaty;
- "(b) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation."
12. Mr. VERDROSS proposed that in paragraph 1 (b) the word "general" should be added before "international law".
13. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had had a long discussion on that point. The introduction of the word "general" would involve the difficulty that it could be construed as excluding regional rules, such as those that existed between Latin American countries, and even local customs between the States concerned.
14. The CHAIRMAN said that the Institute of International Law, in its draft, had used the expression "principles of international law", without the qualification "general".
15. Mr. VERDROSS said that the term "principles" implied rules that were valid for the whole international community generally.
16. Mr. TUNKIN said that it would perhaps be preferable to refer to "principles of international law" instead of to "general rules of international law". The provision under discussion was intended to deal not with a conflict between rules of international law and the treaty, but rather with the influence of the international law in force on the interpretation of a treaty.
17. Sir Humphrey WALDOCK, Special Rapporteur, said that much of the usefulness of the provision would be lost if the reference to rules of international law were to be replaced by a reference to principles of international law. It was not only the general principles, but the rules of international law which were of assistance in arriving at the meaning of terms and phrases used in the treaty.
18. Mr. YASSEEN said that, where interpretation was concerned, the reference should be to all the rules of international law, for sometimes, for the purpose of interpreting a term, it was necessary to refer to a special rule which defined the meaning and scope of certain concepts in inter-State relations. Accordingly, he favoured the retention of the word "rules" in paragraph 1 (b).
19. The CHAIRMAN, speaking as a member of the Commission, said that he would prefer the text to stand as drafted.
20. Mr. TUNKIN said that he would be prepared to accept the text as it stood.
21. Mr. VERDROSS said that he would have preferred the text to have been amended in the manner suggested by Mr. Tunkin, but he would not press the point, the matter not being of great importance.
22. The CHAIRMAN, referring to paragraph 2 of article 70, suggested that the word "made" should be replaced by "reached or drawn up".
23. Mr. BARTOŠ asked what meaning was to be attached to the phrase "in the light of the rules of international law" in paragraph 1 (b) if the rules were not the same for all. He also wished to know for whom the rules could be said to be "in force".
24. The CHAIRMAN suggested that in paragraph 3 (b) of article 70 the English term "understanding" should be rendered in French by *accord*.
25. Mr. TUNKIN suggested that it would be appropriate to add to paragraph 3 a reference to any rules of international law in force at the time of interpretation. International law changed, and at the time of interpretation those rules might well not be the same as the rules in force at the time of the conclusion of the treaty.
26. The problem to which he thus drew attention was quite distinct from that of the modification of a treaty by the subsequent emergence of a new rule of customary international law, a problem dealt with in subparagraph (c) of article 69A, in the redraft submitted at the previous meeting.
27. Sir Humphrey WALDOCK, Special Rapporteur, said that in some cases it would be obvious from the language of the treaty that the meaning of some of the terms used in it would be affected by any change in international law. A case in point was a treaty which referred to "territorial waters" or "the territorial sea": any change in the legal content of that term would certainly affect its meaning as used in the treaty.
28. He recalled the arbitral awards in the disputes which had arisen regarding the question whether the continental shelf was covered by the intention of the parties in certain particular treaties.
29. Mr. de LUNA said that the text of a treaty was never drawn up *in vacuo*. Except as otherwise expressly provided, the States concerned took into account general international law in force at the time. That had been the attitude adopted by Judge Verzijl in the *Georges Pinson* case.¹

¹ *Annual Digest of Public International Law Cases, 1927/28* (Verzijl as President of the French-Mexican Claims Commission); also reported in *Reports of International Arbitral Awards*, Vol. V (United Nations publication, Sales No. 52.V.3).

30. In cases where a treaty did not expressly say whether its provisions should be interpreted in a manner derogating from or consistent with a rule of international law in force, the interpretation should be in conformity with the rule in question, for States were presumed to be under a duty to conform with international law, even where it was a case of *jus dispositivum*.

31. In case of ambiguity, the precedent established by the Permanent Court of International Justice in the *River Oder Commission*² case should be followed. With regard to the incorporation of the rules of international law in a treaty, instances that came to mind were the *German Interests in Polish Upper Silesia* case³ and the *Ambatielos* case⁴; in the latter, the Court, though making a distinction between "right" and "benefit", had decided to interpret the most-favoured-nation clause in the light of international law, as the United Kingdom had requested.

32. The CHAIRMAN, speaking as a member of the Commission, said that the problem could be illustrated by a treaty under which a State was prohibited from fishing in waters subject to the sovereignty of the other State concerned. On the assumption that the treaty had been concluded on the basis of the idea of the territorial sea, and that the idea of a contiguous zone, also subject to the sovereignty of the coastal State, had subsequently come into being, then in his opinion the prohibition contained in the treaty would also apply to the contiguous zone.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that in cases of that type the problem was one of determining what the parties themselves had meant. It was not a question of interpreting the treaty in the light of the international law in force.

34. Mr. de LUNA agreed with the Special Rapporteur that what mattered was the intention of the parties at the time of the conclusion of the treaty; they could not be expected to know how the meaning of a term they had used in the treaty would evolve. Case-law also gave support to that principle.

35. Mr. BRIGGS said that unless paragraph 1(b) was retained as it stood, he would urge its deletion and be content with the provisions contained in paragraph 1(a).

36. The CHAIRMAN invited the Commission to vote on article 70, paragraph by paragraph.

Paragraph 1 of article 70 was adopted by 12 votes to none, with 3 abstentions.

Paragraph 2 of article 70, with the Chairman's amendment, was adopted unanimously.

Paragraph 3 of article 70, subject to the amendment of the French text, as proposed by the Chairman, was adopted unanimously.

² *Territorial Jurisdiction of the International Commission of the River Oder, P.C.I.J. (1929), Series A, No. 23.*

³ *P.C.I.J., Series A, No. 7.*

⁴ *I.C.J. Reports, 1953.*

Article 70 as a whole, as amended, was adopted unanimously.

ARTICLE 71 (Cases where the meaning of a provision is in doubt)

37. The CHAIRMAN invited debate on article 71 as revised by the Commission at its previous meeting:

"Recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to verify or confirm the meaning resulting from the application of article 70, or to determine the meaning when its interpretation according to article 70 —

"(a) leaves the meaning ambiguous or obscure; or

"(b) leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty."

38. Mr. ROSENNE said that he wished to place on record his reservations regarding article 71; it was normal to have recourse to *travaux préparatoires* for purposes of interpretation. For the reasons he had given at a previous meeting, he could not accept the limitations which the article apparently placed on the purposes for which *travaux préparatoires* might be used.

39. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that Mr. Rosenne's reservation applied more to article 70 than to article 71. Under article 71, a fairly wide use of *travaux préparatoires* was permitted.

Article 71, subject to drafting changes, was adopted by 13 votes to none, with 2 abstentions.

40. Mr. RUDA explained that he had abstained from voting on article 71 for both logical and juridical reasons. As indicated by the International Court of Justice in its Advisory Opinion on the Competence of the General Assembly regarding the Admission of States to the United Nations, "there is no occasion to resort to preparatory work if the text of a Convention is sufficiently clear in itself".⁵ That ruling of the International Court of Justice conformed with the "consistent practice of the Permanent Court of International Justice".⁶ The relevant passage from that Opinion had been quoted by the Special Rapporteur in paragraph (16) of his commentary (A/CN.4/167/Add.3).

ARTICLE 72 (Terms having a special meaning)

41. The CHAIRMAN invited the members to consider the text of article 72 as revised by the Commission at its previous meeting:

"Notwithstanding the provisions of paragraph 1 of article 70, a meaning other than its ordinary

⁵ *I.C.J. Reports, 1948, p. 63.*

⁶ *Ibid.*

meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning.”

42. Mr. BARTOŠ said that the provisions of article 72 should not be construed as permitting the parties to give to a term a meaning which conflicted with international law.

43. Mr. PAREDES said he would abstain from voting on article 72 because he believed that, where the parties wished to give to a term a special meaning, they should say so explicitly in the treaty. It was not sufficient to specify in article 72 that the special meaning should be “established conclusively”.

Article 72 was adopted by 14 votes to none, with 1 abstention.

ARTICLE 69A (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law)

44. The CHAIRMAN invited the Commission to consider article 69A (former article 73), as redrafted by the Special Rapporteur.⁷

45. Mr. VERDROSS proposed the deletion of the word “tacit” in paragraph (b).

The proposal was adopted unanimously.

46. The CHAIRMAN said that the English text of paragraph (b) was clearer than the French. The latter should be adjusted accordingly.

47. Mr. LIANG, Secretary to the Commission, said that there was some ambiguity even in the English text.

48. Mr. ROSENNE suggested that the ambiguity would be removed if the word “agreement” was replaced by “assent”.

49. Mr. TUNKIN urged the retention of the word “agreement”. It should be remembered that the subsequent practice in question would have the effect of amending an international treaty, which constituted an agreement. An agreement could be modified only by another agreement.

Article 69A, as amended and subject to drafting changes, was adopted unanimously.

ADDITIONAL ARTICLE FOR PART I (FORMER ARTICLE 60)

50. Sir Humphrey WALDOCK, Special Rapporteur, recalled that article 60 in his report (A/CN.4/167) had dealt with the application of a treaty concluded by one State on behalf of another. The case envisaged had been a special sort of representation by one State of another in the conclusion of a treaty. After some discussion, the Commission had referred article 60 to the Drafting Committee which was to consider whether the substance of article 60 should form part of a new article to be included in Part I, since the contents of the article

seemed more related to that part of the draft articles than to Part III. The Drafting Committee had been unable to find a satisfactory text for the proposed new article, and proposed that the Commission should not, at that stage, put forward even a tentative draft on the subject. He suggested that the report should include an explanation of the circumstances in which it had been decided not to include the article in question.

51. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to the course suggested by the Special Rapporteur.

It was so agreed.

ARTICLE 62 (Treaties providing for obligations for States not parties)⁸

52. The CHAIRMAN invited the Commission to consider the text of article 62 proposed by the Drafting Committee and reading:

“An obligation may arise for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound.”

53. Mr. BRIGGS, Chairman of the Drafting Committee, said that the English text of article 62 remained unchanged and there were only drafting changes in the French text.

Article 62 was adopted unanimously, subject to drafting changes.

ARTICLE 74 (Treaties drawn up in two or more languages)

54. The CHAIRMAN invited the Commission to consider article 74 as proposed by the Drafting Committee and reading:

“1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, except in so far as a different rule may be agreed upon by the parties.

“2. A version drawn up in a language other than one in which the text of the treaty was authenticated shall also be authoritative, and considered as an authentic text if —

“(a) the parties so agree; or

“(b) the established rules of an international organization so provide.”

55. Sir Humphrey WALDOCK, Special Rapporteur, said that the words “of those” should be inserted after the words “language other than one” and the comma after the word “authoritative” should be deleted in paragraph 2.

Article 74, as so amended, was adopted unanimously.

⁷ Text in summary record of the 769th meeting.

⁸ Article previously discussed at the 759th meeting.

ARTICLE 75 (Interpretation of treaties having two or more texts or versions)

56. The CHAIRMAN invited the Commission to consider the text of article 75 as proposed by the Drafting Committee and reading :

“ 1. The expression of the terms of a treaty is of equal authority in each authentic text, unless the treaty itself provides that, in the event of divergence, a particular text or method of interpretation shall prevail.

“ 2. The terms of a treaty are presumed to have the same meaning in each text. Except in the case referred to in paragraph 1, when a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity is not removed by the application of articles 70-74, a meaning which is common to both or all the texts shall be preferred.”

57. Sir Humphrey WALDOCK, Special Rapporteur, said that the text of the article had been very considerably shortened from his original draft (A/CN.4/167/Add.3). His original version had contained a provision under which, in cases where the meaning of one text was clear and that of the other was not clear, the former would be adopted. But that clause had been dropped, even though it appeared to offer the common sense solution, because that might not always be the correct solution, and it had been decided to leave the matter for interpretation by the States concerned or by a tribunal. The provision contained in paragraph 5 of the original version concerning the possible use of non-authentic texts when all other methods of interpretation had failed to yield a meaning had been dropped on the grounds that it might open the door to too wide a reference to secondary versions of the treaty.

58. The CHAIRMAN said that the meaning of the phrase “the expression of the terms of a treaty” was not clear.

59. Mr. de LUNA explained that the purpose of article 75, in contra-distinction to that of article 74, was to concord the terminology of treaties having more than one version.

60. Sir Humphrey WALDOCK, Special Rapporteur, said that article 74 dealt with the texts or versions which could be consulted for the purposes of interpretation, whereas article 75 was concerned with the comparative authority of texts. The first part of paragraph 1 might be redrafted to read : “The text of the treaty is of equal authority in each language, unless etc.”.

61. He suggested, in addition, that the words “or versions” should be deleted from the title of article 75 and the words “or method of interpretation” from paragraph 1.

62. Mr. BARTOŠ referred to the difficulties which had arisen in connexion with the Chinese text of the Convention for the Prevention and Punishment of the Crime of Genocide.⁹

63. Mr. PAREDES said that paragraph 2 of article 75 was not clear. The paragraph dealt with cases in which a comparison of two texts disclosed that the different terms used in them led to some ambiguity or obscurity. At the end of the paragraph, however, it was stated that a meaning which was common to both or all the texts should be preferred. That obviously involved a contradiction.

64. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the words “so far as possible reconciles the different texts shall be adopted” should be substituted for the words “is common to both or all the texts shall be preferred” in paragraph 2.

65. Mr. BARTOŠ observed that the reconciliation of different meanings raised a very special difficulty. An illustration was the Agreement on Reparations from Germany,¹⁰ signed at Paris, the text of which had been drawn up in French and English. Both texts spoke of undertakings placed under enemy “control” (*contrôle*), and yet the word “control” meant something quite different from *contrôle*. The Inter-Allied Reparations Agency had been compelled to interpret the word over a long period. The head of the French delegation had understood the word in the French sense of surveillance, whereas the head of the British delegation had understood it to mean the management of the undertaking. Hence, in that case there had been no meaning common to both texts.

66. The CHAIRMAN put to the Commission the following amended text for article 75 :

“ 1. The different authentic texts of a treaty are equally authoritative in each language unless the treaty itself provides that, in the event of divergence, a particular text shall prevail.

“ 2. The terms of the treaty are presumed... articles 70-74, a meaning which so far as possible reconciles the different texts shall be adopted”.

Article 75, as so amended, was adopted unanimously.

67. Mr. BRIGGS said that he found it difficult to admit that the text of a treaty agreed upon by the parties could become several texts as the results of being expressed in several languages.

68. Mr. ROSENNE said that he shared that view but supposed that the problem of substance would be reviewed when the Commission took up article 7 in second reading.

69. The CHAIRMAN said the Commission had completed another part of its draft on the law of treaties. He thanked the Special Rapporteur on behalf of all members of the Commission, for to him must go the credit for any success that the Commission had achieved. The Commission would now await the comments from Governments in order to bring its work on the topic to a conclusion.

⁹ *United Nations Treaty Series*, Vol. 78.

¹⁰ *United Kingdom Treaty Series* No. 56 (1947), Cmd. 7173.

**Draft Report of the Commission on the Work
of its Sixteenth Session
(A/CN.4/L.106/Add.1 and 2)**

70. The CHAIRMAN invited the Commission to consider its draft report.

**CHAPTER I: Organization of the session
(A/CN.4/L.106/Add.1)**

71. Mr. YASSEEN, Rapporteur, proposed that paragraph 6 should read: "U Thant, Secretary-General of the United Nations, attended the 767th meeting held on 16 July 1964. The Chairman and the Secretary-General made statements on this occasion."

It was so agreed.

72. Mr. TABIBI said that the Commission should follow the practice of the other bodies and annex to its report the texts of both the Secretary-General's speech and the important statement by the Chairman.

73. The CHAIRMAN said that if that were done the somewhat brief mention of the matter in paragraph 6 would suffice.

74. Sir Humphrey WALDOCK said that it would be preferable to annex a summary of the two statements.

75. The CHAIRMAN suggested that the summary might be based on certain passages in the press release.

76. Mr. BRIGGS considered that it should be specified in paragraph 3 that the elections had been held at a private meeting.

77. Mr. LIANG, Secretary to the Commission, said that to the best of his recollection it had not been the practice in the past to indicate in the report that members elected by the Commission to fill vacancies had been elected at a private meeting.

78. The CHAIRMAN said that the Secretariat would ascertain the Commission's previous practice.

79. Mr. BARTOŠ pointed out that the summary records mentioned that the new members of the Commission had been elected at a private meeting.

80. Mr. ROSENNE said that, as the Commission had been criticized for not meeting often enough, both the number of its private meetings and that of the Drafting Committee's meetings should be mentioned in paragraph 9.

It was so agreed.

81. Mr. TABIBI referring to paragraph 5, said it would be invidious to mention that Mr. Reuter had left before the end of the session.

82. Mr. LIANG, Secretary to the Commission, said that the Commission had abandoned its earlier practice of mentioning in its reports the dates of members' attendance during the session.

83. The CHAIRMAN proposed that the third sentence in paragraph 5 be modified so as to indicate only that at its 762nd meeting held on 9 July the Commission had decided to co-opt Mr. Obed Pessou, a member of the Drafting Committee.

It was so agreed.

84. Mr. TABIBI said that it was unnecessary to mention in paragraph 7 that Mr. Stavropoulos had attended one meeting.

85. Mr. BRIGGS pointed out that mention had been made of the Legal Counsel's visits in the past.

**CHAPTER IV: Programme of work and organization
or future sessions (A/CN.4/L.106/Add.2)**

86. Mr. BRIGGS considered that paragraph 1 should mention that the Commission had adopted its programme of work for 1965 and 1966 in a private meeting.

87. Mr. LIANG, Secretary to the Commission, agreed with Mr. Briggs that there would be good reason for indicating that the Commission had discussed its programme of work at considerable length in private.

88. Mr. YASSEEN, Rapporteur, said that, if it was proposed to mention private meetings, there should also be a reference to the meeting of the Commission's officers and to that of the four Special Rapporteurs.

89. The CHAIRMAN agreed. He added that the third sentence in paragraph 1 was neither clear nor accurate, and suggested that the sentence should read: "It also decided to continue its work on relations between States and inter-governmental organizations". A sentence on the following lines might then be added: "The Commission will subsequently study the succession of States and State responsibility and will give priority to the aspects of those topics which are directly related to the law of treaties."

90. Mr. TUNKIN said that as at present worded the last sentence in paragraph 1 might suggest that, if the Commission did not finish its work on relations between States and inter-governmental organizations by 1966, its work on the law of treaties would not have been completed.

91. The CHAIRMAN said that it would have to be stated that the Commission would later decide on the priority to be accorded to the studies on State succession and State responsibility.

92. Mr. LACHS said there was hardly any need to state that the Commission had decided to continue certain work; what should be stressed was that it had decided to give priority to its work on relations between States and inter-governmental organizations.

93. Sir Humphrey WALDOCK pointed out that in any case there would be a special section in the report describing the instructions the Commission had decided to give to the Special Rapporteur on the topic of relations between States and inter-governmental organizations.

94. Mr. TABIBI pointed out that as the General Assembly had adopted a resolution about the Commission's programme of work something explicit should be stated on the matter.

95. The CHAIRMAN suggested that the last sentence in paragraph 1 be redrafted to read: "As to the other subjects on its agenda, the Commission decided to give priority to its work on relations between States and intergovernmental organizations. The questions of State succession and State responsibility would be dealt with as soon as work on the subjects previously mentioned had been completed."

That wording was approved.

96. Mr. TUNKIN said it was inadvisable to go into so much detail about the length of the Commission's sessions in paragraphs 3 to 6. It would suffice to state in paragraph 6 that: "In view of its heavy programme the Commission decided to hold a winter session, etc."

97. Mr. YASSEEN, Rapporteur, said that he agreed with Mr. Tunkin. Paragraph 6 contained an account of what had transpired, and he had thought it advisable to put it before the Commission, but he personally did not consider it desirable to report discussions concerning such international affairs.

98. The CHAIRMAN said that the Commission had decided not only to hold a four-week winter session in 1966 but had considered a possible winter session in 1967 as well.

99. Mr. BRIGGS asked whether the Commission had in fact decided to restrict its annual session in 1965 to ten weeks, as was stated in paragraph 6.

100. Mr. ROSENNE said it would be enough to state that the Commission had decided, in order to complete its programme of work, to hold a session of ten weeks in 1965 and two sessions in 1966 of 14 weeks in all.

101. Mr. BRIGGS considered that express mention should be made of the decision to hold a winter session in 1966.

102. Mr. ROSENNE agreed.

103. Mr. TABIBI said that the Commission should give the paragraph further thought because of its budgetary implications.

The meeting rose at 6.30 p.m.

771st MEETING

Tuesday, 21 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Draft Report of the Commission on the Work of its Sixteenth Session

(A/CN.4/L.106 and addenda)

(continued)

CHAPTER IV: Programme of work and organization of future sessions (A/CN.4/L.106/Add.2) *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of chapter IV of its draft report on the session (A/CN.4/L.106/Add.2).

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraphs 3, 4, 5 and 6

2. Mr. TUNKIN proposed the deletion of paragraphs 3, 4 and 5 and of the opening words of paragraph 6. That paragraph would then begin with the words: "In view of the heavy programme of work the Commission had to complete...".

3. Mr. ROSENNE supported that proposal. However, he thought that chapter IV should indicate that the Commission's decision to prolong its 1964 session by one week was linked with the Commission's inability to hold a winter session in January 1965 because of circumstances beyond its control, specifically the late General Assembly session in the autumn of 1964. In addition, some reference should perhaps be included to the question of honoraria, which the Commission had discussed at the current session.

4. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, the question of honoraria should not be mentioned at that point, but elsewhere, if at all. On the other hand, it should be explained that the current session had been extended by one week owing to the circumstances mentioned by the preceding speaker. It should also be stated that the Commission considered that it would need a four-week session in January 1966, without prejudging any later decision.

5. Mr. LIANG, Secretary to the Commission, said that the Commission's decision to extend its 1964 session by one week had not been entirely due to the fact that it would be unable to hold a winter session in January 1965. In fact, it was the Commission's inability to hold a winter session in January 1964 which had led to the Secretariat's offer of an extension by two weeks of the regular 1964 session.

6. The CHAIRMAN, speaking as a member of the Commission, suggested the following wording :

"Being anxious to complete the study of several topics before 1966, the Commission considered the problem of the duration of its sessions. In order to be able to complete its 1964 programme, the Commission decided to prolong its present session by one week. It regretted that owing to circumstances beyond its control, such as the late opening of the 19th session of the General Assembly, it would be unable to hold an additional winter session in 1965, as it had intended. It considers it indispensable, however, to arrange a four-week winter session in 1966, in order to have at its disposal the minimum time necessary in the light of the heavy programme of work to be completed before the end of the 1966 session."

7. Mr. LACHS supported the Chairman's proposal.

8. The question of honoraria should not, he thought, be mentioned in the Commission's report. The matter was one for the General Assembly.

9. Mr. YASSEEN agreed with Mr. Lachs's remarks concerning honoraria.

10. Mr. BRIGGS considered it essential that some reference to the question of honoraria should be included in the report. If the report was silent on that point, there would be no occasion for any delegation to raise the question in the General Assembly. The question of honoraria was linked with that of the duration of the Commission's sessions, which were to last for more than ten weeks annually.

11. Mr. BARTOŠ agreed with the view of Mr. Lachs and Mr. Yasseen that it would be inadvisable to mention the question of honoraria in the Commission's report.

12. Mr. TUNKIN also agreed with Mr. Lachs. The subject of honoraria had been mentioned in previous reports, and it was open to any delegation to raise it in the General Assembly.

13. Sir Humphrey WALDOCK said that any delegation could raise the subject of honoraria by pointing to the Commission's programme of work and to its decision to sit for more than ten weeks annually.

14. The CHAIRMAN, speaking as a member of the Commission, said that if there was no reference to honoraria in the report — and that, he considered, would be the better course — the report should nevertheless set forth the factors which representatives might mention in the General Assembly as reasons for requesting an increase — first, the length of the sessions and, secondly, the special importance of the topic under study, which demanded a great effort on the part of members of the Commission.

15. Mr. YASSEEN agreed that stress should be laid on the very considerable preparatory work to be done by members.

16. Mr. ROSENNE supported the Chairman's suggestion but thought that no comparison should be made

with the work of the Commission in the past. He proposed an amendment to that effect. The Commission had, for example, in the past devoted ten years to the law of the sea.

17. The CHAIRMAN fully agreed with the amendment proposed by Mr. Rosenne and said that a passage would be drafted stressing the importance of quality rather than quantity in the work of the Commission. In his own report to the General Assembly, he would naturally lay stress on those aspects of the work of the Commission.

18. Mr. BARTOŠ said that some reference should be included to the fact that members needed to work in the intervals between the sessions on the topics which would come before the Commission.

19. The CHAIRMAN suggested that, in view of the importance of the matter, a redraft of paragraph 6 should be submitted to the Commission at one of its next meetings.

It was so agreed.

Paragraph 7

20. Mr. TUNKIN said that the last sentence of paragraph 7 was not correct. No decision had been taken by the Commission to consider at its 1966 session the question of succession of States as it applied to treaties.

21. The CHAIRMAN, speaking as a member of the Commission, said that the sentence really meant that the Commission intended to do some preparatory work on State succession or State responsibility in order that the future Commission might have a basis on which to work. It might be as well to make a specific reference to that.

22. Sir Humphrey WALDOCK drew attention to the following passage in paragraph 7 of chapter II of the draft report (A/CN.4/L.106) dealing with the law of treaties :

"In the case of succession of States and Governments, the question is whether this topic should or should not be dealt with in the context of the effect of treaties on third States. The Commission decided that this question should be left aside from the present discussion of the draft articles. The Commission, as already indicated in the decision recorded in paragraph 58 of its report for 1963, intends to study the question on the basis of a report to be submitted by the Special Rapporteur on the topic of succession of States and Governments and will decide later whether or not it is appropriate to include provisions regarding State succession in its final draft on the law of treaties".

23. It was very unlikely that the Commission would ultimately decide to include in the draft on the law of treaties any provision on that point.

24. The CHAIRMAN, speaking as a member of the Commission, said that it would be unwise to separate

the topics in that way; the Commission should not give any specific bent to the topic of State succession even before studying it thoroughly.

25. Mr. YASSEEN agreed with the Chairman. In the sentence criticized by Mr. Tunkin it would be better to say that the Commission would consider at the same session the possibility of studying the topic of relations between States and inter-governmental organizations and that of succession of States as it applied to the law of treaties.

26. Mr. ROSENNE said that he did not recollect that the Commission had taken any decision on the question. For his part, he would prefer the sentence in question to be omitted.

27. Mr. PAL agreed with Mr. Rosenne. The sentence in question appeared to contain a promise that the Commission would deal at its 1966 session with the question of relations between States and inter-governmental organizations and with the topic of succession of States as it applied to treaties.

28. Mr. TUNKIN said that the Commission should not prejudice in any way how it would deal with the topic of State succession as it applied to treaties. Any reference to that point and to the doubts of the Commission as to the topic under which that particular subject should be discussed could mislead readers of the report into believing that the Commission had not completed its work on the law of treaties.

29. The CHAIRMAN, speaking as a member of the Commission, suggested the following wording: "At the same session it would consider the question of relations between States and inter-governmental organizations. If possible, it would also undertake some preparatory work on one of the two topics — State succession or State responsibility — which are to be the main subjects to be dealt with at its forthcoming session".

30. Mr. TUNKIN pointed out that the text of the last sentence created the impression that the Commission would consider in 1966 the topic of relations between States and inter-governmental organizations.

31. Mr. ROSENNE suggested that the text proposed by the Chairman should be amended so as to state that the Commission would carry out "further" preparatory work on the topics in question, for two Sub-Committees of the Commission and previously (in January 1963) considered the topics of State succession and State responsibility.

32. Mr. PESSOU suggested that the word "simultaneously" should be substituted for "if possible" in the Chairman's amendment.

33. The CHAIRMAN said that the Commission would find it easier to take a decision when it had before it the revised text of the paragraph, the end of which might be amended to read: "At the same session, it would consider the question of relations between States and inter-governmental organizations, the examination of which would be continued at the following session. Simul-

taneously, and within the time available, the Commission would also continue its preparatory work on State succession and State responsibility, which are to be the main subjects to be dealt with during its next term of office."

34. Mr. PESSOU, supported by Mr. ROSENNE, said that the term "Succession of States and Governments" should be used.

35. The CHAIRMAN said that, if there were no objection, he would consider that the Commission adopted (subject to drafting changes) paragraph 7 with the amendments proposed by Mr. Pessou, Mr. Rosenne and himself.

It was so agreed.

Paragraph 8

36. Mr. ROSENNE suggested that the closing passage should be redrafted so as to avoid giving the impression that the articles on special missions were being submitted to Governments for their comments. Those articles were included in the report for the session purely for information.

37. Mr. LIANG, Secretary to the Commission, pointed out that the passage in question did not say that Governments were requested to send their comments on the draft on special missions by January 1965. If, by the end of its 1965 session, the Commission's draft on special missions was completed, the articles on that topic would be submitted to Governments for their comments.

38. Mr. YASSEEN said that in paragraph 8 the Commission was expressing its wish to complete the whole of the work on special missions; Governments would therefore understand that they should send in their comments as soon as possible.

39. Mr. ROSENNE said that the point was largely one of drafting. It was essential to draw a distinction between the articles on the law of treaties which were being submitted to Governments in pursuance of articles 16 and 21 of the Commission's Statute, and the articles on special missions. He suggested that the draft on special missions should form the subject of a separate sentence indicating that the Commission planned to complete its work on special missions in 1965 and contemplated suspending the two-year rule for government comments on the articles of special missions, in the same manner as it had done for the articles on the law of treaties adopted at the present session.

40. The CHAIRMAN said that if there were no objection he would consider that the Commission agreed to adopt paragraph 8 with that adjustment.

It was so agreed.

CHAPTER V: *Other decisions and conclusions of the Commission (A/CN.4/L.106/Add.4)*

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted without comment.

Paragraph 5

Paragraph 5 was adopted subject to a drafting change.

Paragraph 6

41. The CHAIRMAN, speaking as a member of the Commission, suggested that in the second sentence of paragraph 6 some such words as "at the present time" should be inserted before the word "include".

It was so agreed.

Paragraph 6 as so amended was adopted.

Paragraph 7

42. Mr. ROSENNE pointed out that the Commission had discussed not only the distribution of documents, which was mentioned in paragraph 7, but also the exchange of documentation with other bodies with which the Commission maintained relations, following a preliminary examination of that aspect in 1963.¹

43. Mr. BARTOŠ suggested that a passage should be added to paragraph 7 to cover the point mentioned by Mr. Rosenne.

44. Mr. LIANG, Secretary to the Commission, pointed out that the Secretariat memorandum (A/CN.4/171) cited in that paragraph referred not only to the distribution of Commission's documents but also to the exchange of documentation with other bodies. He therefore suggested that the proposed reference should be added at the end of the first sentence of paragraph 7.

45. The CHAIRMAN said that, if there was no objection, he would consider that the Commission agreed to adopt article 7 with the changes suggested by Mr. Bartoš and by the Secretary.

It was so agreed.

Paragraph 8

46. The CHAIRMAN suggested that, in paragraph 8 which dealt with the tribute paid to the Secretary of the Commission, it should be indicated that the tribute had been paid in connexion with Mr. Liang's retirement. He further suggested that the statement that he had exercised the duties of Secretary since 1949 should be qualified so as to recognize the distinguished manner in which those duties had been fulfilled.

47. Mr. LACHS said that paragraph 8 seemed somewhat oddly placed between paragraph 7 on the distribution of documents and paragraph 9 on the date and place of the next session. He suggested that it should be moved further up in the chapter.

48. Sir Humphrey WALDOCK pointed out that paragraph 7, dealing with the distribution and exchange of documents, followed logically upon paragraph 6 dealing with co-operation with other bodies. He proposed that paragraph 8 should be moved to the end, where it would bring the chapter to an appropriate conclusion.

49. The CHAIRMAN said that, if there were no objection, he would consider that the Commission

agreed to adopt paragraph 8 with the changes proposed by Sir Humphrey Waldock and himself.

It was so agreed.

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted without comment.

Chapter V, as amended, was adopted.

CHAPTER II: Law of treaties (A/CN.4/L.106)

50. The CHAIRMAN invited the Commission to consider the introduction (A/CN.4/L.106) to chapter II of the draft report.

A. INTRODUCTION: Summary of the Commission's proceedings

Paragraph 1

Paragraph 1 was adopted without comment.

Paragraph 2

51. Mr. RUDA pointed out that the Commission had decided to replace the term "revision" by "amendment". It was not therefore altogether correct to say that the draft articles dealt with "the topics mentioned" in the Special Rapporteur's report.

52. The CHAIRMAN said that since, in the first sentence, the title of the report was not given within quotation marks, the simplest course would be to replace the term "revision" by "modification" in that sentence.

Paragraph 2 was adopted with that amendment.

Paragraph 3

53. Mr. TUNKIN said that there seemed to be some inconsistency between the two parts of the last sentence in paragraph 3.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that the sentence was one which had appeared in the report on the previous session.² All it meant was that, although the fourth and fifth reports by Sir Gerald Fitzmaurice had not been formally examined, they had presumably been studied by members of the Commission and, through the work of the Special Rapporteur, had been taken into account.

55. Mr. BARTOŠ observed that some comments had been made on Sir Gerald's two reports during the discussions.

56. Mr. LACHS said that there was no need to pass judgment, as it were, on the work done at the previous session; he thought the last sentence in paragraph 3 should be omitted.

57. Sir Humphrey WALDOCK, Special Rapporteur, said that he could see no objection to the inclusion of what was simply a statement of fact.

¹ Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, para. 70.

² *Ibid.*, para. 10.

58. Mr. de LUNA agreed with Mr. Lachs that the last sentence should be deleted.

59. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion the reference was not necessary.

60. Mr. ROSENNE said that the sentence might be redrafted to read "Neither of those reports had been examined at the time; at the present session they have been taken into account."

61. Mr. TUNKIN suggested that the sentence should read: "The Commission at this session has naturally taken these reports into consideration".

62. The CHAIRMAN suggested that the sentence be retained with the insertion of the words "at the time" after the word "examined" and the substitution of the words "at the present session the Commission has taken them into account" for the words "the Commission has naturally given them full consideration".

It was so agreed.

Paragraph 3 was adopted as amended.

Paragraph 4

63. Mr. TUNKIN proposed the deletion of the word "self-contained" in the second sentence, for the word was inaccurate.

It was so agreed.

Paragraph 4 was adopted as amended.

Paragraph 5

64. Mr. RUDA said that no mention should be made in the last sentence of paragraph 5 of the month in which the eighteenth session would commence in 1966.

It was so agreed.

Paragraph 5 was adopted as amended.

Paragraph 6

65. Mr. de LUNA said that he doubted whether the question of conflicts between treaties referred to in the second sentence really had anything to do with the rules concerning treaties and third parties; it was, however, closely linked with the rules concerning the modification and the interpretation of treaties.

66. The CHAIRMAN suggested the following wording: "... which it found to be closely connected especially with the rules concerning the interpretation and modification of treaties"

The Chairman's suggestion was adopted.

Paragraph 6 was adopted as so amended.

Paragraph 7

67. Mr. BRIGGS proposed the deletion of the word "all" in the fourth sentence, as the question of State responsibility was, in fact, referred to in one of the articles on the law of treaties.

It was so agreed.

68. Sir Humphrey WALDOCK, Special Rapporteur, said that the latter part of paragraph 7 might need adjustment in the light of the discussion earlier in the meeting about the topic of State succession.

69. Mr. TUNKIN said that the whole paragraph needed to be entirely recast or omitted altogether.

70. Sir Humphrey WALDOCK, Special Rapporteur, agreed that the paragraph might be too explicit but it would be difficult to omit it altogether as he had received express instructions from the Commission to mention in the introduction the question of the points at which the topics of State responsibility and State succession impinged upon the law of treaties.

71. The CHAIRMAN said that in the first sentence the expression "overlap to a certain extent" was not satisfactory.

72. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the words "have some connexion with" might be substituted for the expression in question.

73. The CHAIRMAN proposed that at the end of the paragraph the words "and will decide later ... law of treaties" should be omitted.

Paragraph 7 was adopted with the changes suggested by Mr. Briggs, the Special Rapporteur and the Chairman.

Paragraphs 8, 9, 10, 11, 12 and 13

Paragraphs 8, 9, 10, 11, 12 and 13 were adopted subject to drafting changes.

The meeting rose at 12.20 p.m.

772nd MEETING

Wednesday, 22 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Draft Report of the Commission on the Work of its Sixteenth Session (A/CN.4/L.106 and addenda)

(continued)

CHAPTER II: Law of treaties

1. The CHAIRMAN invited the Commission to continue its consideration of chapter II (Law of treaties) of its draft report.

Commentary on article 55 (Pacta sunt servanda)
(A/CN.4/L.106/Add.3).

Paragraph 1)

2. Mr. VERDROSS said that the Commission should explain that by "good faith" it meant that a treaty should be applied in accordance with its spirit rather than too strictly according to the letter: *Scire leges non hoc est verba earum tenere, sed vim ac potestatem.*

3. The CHAIRMAN, speaking as a member of the Commission, said that the first sentence might be taken to mean that the principle *pacta sunt servanda* dated only from the signing of the Charter.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that in drafting the paragraph he had had in mind the kind of reader to whom it was addressed. It was stated that the obligation to perform in good faith was a fundamental principle of the law of treaties, but the concept of good faith, being difficult to express, had better be left undefined. The word "moreover" should be deleted from the second sentence.

5. Mr. BRIGGS said that the Chairman's point might be met by inserting a full stop after the word "treaties" in the first sentence and by amending what would then become the second sentence to read "Its importance is emphasized etc." He agreed with the Special Rapporteur that it would be undesirable to attempt a definition of good faith even for insertion in a commentary.

It was so agreed.

6. The CHAIRMAN, speaking as a member of the Commission, thought that the rulings of the International Court cited in paragraph 2 of the commentary should to some extent suffice to explain what was meant by "good faith".

Paragraph 1) was adopted as amended.

Paragraphs 2) and 3)

Paragraphs 2) and 3) were adopted.

Paragraph 4)

7. The CHAIRMAN suggested that, in the first sentence ("... advantage in also stating the negative aspect of the rule, namely, that a party ..."), the reference to the "negative aspect" should be omitted.

It was so agreed.

Paragraph 4) was adopted as amended.

Commentary on article 57 (Application of treaty provisions ratione temporis)

Paragraphs 1) and 2)

Paragraphs 1) and 2) were adopted without comment.

Paragraph 3)

8. Mr. ROSENNE said that as drafted paragraph 3) was not acceptable because the extract from the Permanent Court's judgment in the *Mavrommatis Palestine Concessions* case, in fact, substantiated the first proposition, whereas the jurisdictional clause itself, being attached to the substantive clauses of a treaty as a means of securing their application, came within the

scope of the second proposition. The paragraph in fact dealt with the definition of disputes and it should not touch upon the jurisdiction of courts *ratione temporis*. If the paragraph could not be omitted altogether only the first sentence should be retained with the text of the two sentences in footnote 1.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the paragraph dealt with a particularly difficult problem and might perhaps be shortened, but the extract from the *Mavrommatis Palestine Concessions* case certainly helped to elucidate the provisions of the article, which had been drafted with considerable care.

10. Mr. BRIGGS agreed that the paragraph would lose in clarity if the quotation were removed.

11. Mr. PAL said that there was no disagreement on the question of the principle of non-retroactivity and thought that the quotation should be retained.

12. Mr. ROSENNE suggested the deletion of the full stop at the end of the first sentence and of the words "When the treaty is purely and simply a treaty of arbitration or judicial settlement, the jurisdictional clause will normally". The word "providing" should then be substituted for the word "provide".

13. The sentence opening with the words "The reason is that the 'disputes' with which the clause is concerned" should also be eliminated, as there could be other reasons.

Those changes were accepted.

It was also agreed to delete the words "Thus, being called upon to determine the effect of Article 26 of the Palestine Mandate", the words "On the other hand" and the words "found not in a treaty of arbitration or judicial settlement but".

Paragraph 3) was adopted as amended.

Paragraph 4)

14. Mr. ROSENNE proposed the deletion of the last sentence as the Commission had not considered the problem of extradition in any great detail.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that he would be glad to delete the sentence particularly as he had some misgivings about the substance.

16. Mr. BRIGGS said that, as the member responsible for having brought up the question of extradition in the discussion, he would have no objection to the deletion of that sentence.

Paragraph 4) was adopted subject to the omission of the sentence in question.

Paragraph 5)

17. The CHAIRMAN said that there was some ambiguity in the reference to "facts or acts which are completed" and to "situations which have ceased when the treaty comes into force". He therefore suggested the following wording: "In other words, the treaty will not apply either to facts or acts which have been completed before the treaty comes into force or to situations which have ceased (and do not recur) when the treaty comes into force".

It was so agreed.

Paragraph 5) was adopted as amended.

Paragraphs 6) and 7)

Paragraphs 6) and 7) were adopted without comment.

Commentary on article 65 A (The effect of breach of diplomatic relations on the application of treaties)

Paragraph 1)

18. Mr. VERDROSS asked for the deletion of the sentence reading: "Similarly, the problems arising in the sphere of treaties from the absence or withdrawal of recognition do not appear to be such as should be covered in a statement of the general law of treaties". He could not see how it was possible to refuse to recognize a State which actually existed and, in any case, he did not think one could speak of the withdrawal of recognition. The only possible case was that of the severance of diplomatic relations. The Commission should not give the impression that it accepted such a paradoxical situation.

19. Sir Humphrey WALDOCK, Special Rapporteur, said that in referring to recognition, he had had in mind the recognition of Governments, not that of States. He suggested that the sentence in question should be redrafted in a more non-committal way e.g. "Similarly, any problems that may arise, etc.".

20. Mr. TUNKIN proposed the deletion of the words "or withdrawal" and the insertion of the words "of a Government" after the word "recognition" in the third sentence.

The changes suggested by the Special Rapporteur and Mr. Tunkin were accepted.

Paragraph 1) was adopted as amended.

Paragraph 2)

21. Mr. ROSENNE proposed as a matter of drafting the substitution of the word "severance" for the word "breach" in the second sentence.

It was so agreed.

Paragraph 2) was adopted as amended.

Paragraph 3)

Paragraph 3) was adopted without comment.

Paragraph 4)

22. Mr. YASSEEN thought that it was going too far to talk of a "decisive criterion" said to be inherent in the nature of the treaty. The machinery of the treaty itself might lead to suspension; for the application of the treaty might necessitate action by the diplomatic mission of the State.

23. The CHAIRMAN, agreeing with Mr. Yasseen, suggested that the word "decisive" be deleted.

It was so agreed.

Paragraph 4), as amended, was adopted.

Paragraph 5)

Paragraph 5) was adopted without comment.

Commentary on article 58 (The territorial scope of a treaty) (A/CN.4/L.106/Add.5)

Paragraph 1)

24. Mr. TUNKIN said that there seemed to be no logical connexion between the third and fourth sentences.

25. He proposed in addition that the seventh sentence should be omitted.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that in the third sentence he had sought to provide examples of the territorial scope of a treaty. In the light of Mr. Tunkin's remark, he suggested that the seventh sentence should be dropped as should the phrase in the fourth sentence reading "or the circumstances of its conclusion" and the word "thus" at the beginning of the fifth sentence.

It was so agreed.

27. The CHAIRMAN suggested that the reference to the boundary treaty between Italy and Yugoslavia might be dropped, so that the examples cited would be of a general nature.

It was so agreed.

Paragraph 1) was adopted as amended.

Paragraph 2)

Paragraph 2) was adopted without comment.

Paragraph 3)

At Mr. Tunkin's suggestion, the last sentence was deleted.

Paragraph 3) was adopted as amended.

Paragraph 4)

28. Mr. ROSENNE proposed the deletion of the last part of the paragraph from the words "until it was in possession".

29. Sir Humphrey WALDOCK proposed that the last part of the paragraph from the word "aside" be replaced by the words "to be examined in connexion with its study on the topic of succession of States and Governments".

It was so agreed.

Commentary on article 61 (General rule limiting the effects of treaties to the parties)

Paragraphs 1) and 2)

Paragraphs 1) and 2) were adopted without comment.

Paragraph 3)

30. Mr. VERDROSS said that the *German Interests in Polish Upper Silesia* case did not substantiate the provision in the article itself, according to which a treaty could not create rights in favour of third States. Nor did the other two cases mentioned in paragraph 3) offer convincing support of that provision, for they had only yielded the finding that normally rights could not be created in favour of third States, and in neither had it been laid down that such rights could never be created.

31. Sir Humphrey WALDOCK, Special Rapporteur, said that the cases mentioned were relevant to situations where there was a doubt as to whether rights had been created and had arisen out of claims by non-party States to rights under treaties in which the parties had not included provisions conferring rights on others.

32. Mr. ROSENNE proposed that the first part of the quotation from the Permanent Court's finding, reading "A treaty only creates law as between the States which are parties to it" be transferred to paragraph 1) of the commentary on article 61. The second part of the quotation should be dropped.

It was so agreed.

Paragraph 3) was adopted as amended.

Paragraph 4)

Paragraph 4) was adopted without comment.

Commentary on article 62 (Treaties providing for obligations for States not parties)

Paragraph 1)

It was agreed that in the English text of the commentary and titles of the articles concerned (though not in the articles themselves) the expression "third State" should be used instead of "non-party".

Paragraph 2)

Paragraph 2) was adopted without comment.

Paragraph 3)

33. Mr. BRIGGS said that paragraph 3) could be omitted as the discussion on the subject could be found in the summary records.

34. Mr. TUNKIN believed that that course would be contrary to the Commission's decision to mention in the commentary an important issue and one that was acquiring growing significance in the modern world.

35. The CHAIRMAN suggested that the second and third sentence should be redrafted to read "The Commission recognized that they would fall outside the principle laid down in the present article and would concern the question of the sanctions for violations of international law."

It was so agreed.

36. Mr. ROSENNE said that the Commission had consistently refrained from interpreting the Charter of the United Nations and accordingly the words "constitute a violation of the principles of the Charter and would not therefore" should be deleted in the last sentence.

It was so agreed.

Paragraph 3) was adopted as amended.

Commentary on article 62 A (Treaties providing for rights for States not parties)

The commentary was adopted.

CHAPTER III : Special missions

37. The CHAIRMAN invited the Commission to consider chapter III of its draft report, relating to the topic of special missions.

INTRODUCTION (A/CN.4/L.106/Add.6)

Paragraph 1)

38. Mr. BARTOS, Special Rapporteur, said that footnote 1 should be omitted.

39. The CHAIRMAN suggested that, to avoid the use of the word "mission" in the sense of "task" the phrase "questions relating to special missions entrusted with tasks for specific purposes" should be substituted for the phrase "questions relating to special missions, that is to say, to temporary envoys entrusted with special missions for specific purposes".

It was so agreed.

Paragraph 1), as amended, was adopted.

Paragraph 2)

40. The CHAIRMAN asked that the expression "it was based on the idea that... should be applied" should be substituted for "it took the view that... should be applied".

41. To avoid repetition, the words in the fourth sentence, "based on the idea of applying the general rules by analogy" should be deleted and the sentence might read simply: "The Commission expressed the opinion that this brief draft should be transmitted...".

Paragraph 2), as amended, was adopted.

Paragraphs 3) to 10)

Paragraphs 3) to 10) were adopted subject to drafting changes.

Paragraph 11)

42. The CHAIRMAN suggested that the word "provisionally" should be added before the word "adopted" in the third sentence.

It was so agreed.

43. Mr. ROSENNE suggested the addition of a passage stating that the articles on special missions provisionally adopted at the current session were included in the report for information only. A passage of that type had been included in the report on similar occasions in the past, to show that the draft articles in question were not submitted for Government comments and that no action on them was called for.

44. Mr. BARTOS, Special Rapporteur, suggested that the sentence: "They are reproduced in the draft below for the information of the General Assembly" should be added.

It was so agreed.

Paragraph 11), as amended, was adopted.

Commentary on article 1 (The sending of special missions)

Paragraph 1)

Paragraph 1) was adopted without comment.

Paragraph 2) (a)

45. Mr. TUNKIN said that it was unnecessary to say that a State was a subject of international law.

46. The CHAIRMAN suggested that the first sentence should read: "it must be sent by a State to another State".

47. At the end of the next sentence the word "such" should be inserted before "a movement".

48. He asked the Special Rapporteur what precise meaning and weight he attached to the use of the word "provisional" in connexion with the recognition of political movements as subjects of international law.

49. Mr. BARTOŠ, Special Rapporteur, replied that such recognition was very often provisional or subject to conditions. He had no objection, however, to the deletion of the word "provisionally".

Paragraph 2)(a), as amended, was adopted.

Paragraph 2)(b)

50. The CHAIRMAN said that the word "precisely" was unnecessary at the end of the first sentence. In the second sentence the word "examination" might be substituted for "review".

51. Mr. TSURUOKA said that it would be preferable to use the adverb "narrowly" rather than "severely" in the second sentence.

52. Mr. ROSENNE suggested that the last two sentences of paragraph 2)(b) should be merged.

53. The CHAIRMAN suggested that the two sentences might be simplified to read: "In the Commission's view, the specified task of a special mission should be to represent the sending State in political matters and also in technical matters".

Paragraph 2)(b) was adopted as amended and subject to drafting changes.

Paragraph 2)(c)

54. The CHAIRMAN said that the text might be simplified to read: "... but the Commission points out that the way in which consent is expressed to the sending of a permanent diplomatic mission differs from that used in connexion with the sending of a special mission".

55. In reply to a remark by Mr. Rosenne he suggested that the last sentence might be amended to read: "In practice recourse is generally had to an informal agreement and, less frequently, to a formal treaty providing that a specific problem will be entrusted to a special mission ...".

Paragraph 2)(c), as so amended, was adopted.

Paragraph 2)(d)

56. The CHAIRMAN said that the phrase "the term fixed for the duration of the mission" was inappropriate. He also thought that the words "its being given a specific assignment" should be dropped. He therefore suggested that the second sentence should read: "Its temporary nature may be established either by the

term fixed for the mission or by its being entrusted with a specific task and it is usually terminated either on the expiry of its term ...".

Paragraph 2)(d), as amended, was adopted.

Paragraph 3)

57. Mr. ROSENNE suggested that in the fourth sentence the concluding passage, stating that certain writers had alleged that special missions could be exchanged only by States that maintained diplomatic or consular relations with each other, should be omitted. Preferably the Commission should not engage in polemics with individual authors.

58. In addition he suggested that the last sentence of paragraph 3) should be reworded, since its meaning was not clear.

It was so agreed.

Paragraph 3) was adopted as amended and subject to drafting changes.

Paragraph 4)

59. Mr. PESSOU considered the expression "there are a number of ways of achieving this end" inappropriate.

60. Mr. TSURUOKA suggested that the words "with specific assignments" in sub-paragraph (a) should be omitted; it would be sufficient to refer to a special mission, without mentioning its assignment.

61. Mr. BARTOŠ, Special Rapporteur, accepted Mr. Tsuruoka's suggestion; the necessary explanations regarding the characteristics of special missions were given in earlier passages.

62. Mr. ROSENNE thought that, in sub-paragraph (b), it would be preferable to refer to "questions ... settled by a special mission" rather than to "questions ... settled through the sending of a special mission".

63. Mr. BARTOŠ, Special Rapporteur, said that he preferred the expression "by means of a special mission", for, in that context, it was necessary to convey a very precise shade of meaning. It was not the special mission which would settle the questions; rather the procedure of sending a special mission was used to settle them.

Paragraph 4) was adopted as amended and subject to drafting changes.

Paragraph 5)

64. The CHAIRMAN suggested that the opening passage should be amended to read "Where regular diplomatic relations have been broken off or armed hostilities are in progress between the States".

65. He asked the Special Rapporteur whether it would not be possible to omit the words "or for the settlement of preliminary questions on which the establishment of such relations depends" at the end of the paragraph. To some extent those words seemed to be repetitive.

66. Mr. BARTOS, Special Rapporteur, said that he had wished to emphasize that two different stages were involved. In the first, the special mission was used as a kind of mission of enquiry, whereas in the second it was used for the immediate object of establishing diplomatic relations. In any case the object was always the establishment of diplomatic relations. Accordingly, he had no objection to the amendment suggested by the Chairman.

Paragraph 5) was adopted as amended.

Paragraph 6)

67. Mr. de LUNA said that the text of paragraph 6) was somewhat cumbersome. In practice, negotiations with a special mission sent by one State to another could be conducted either by a delegation expressly appointed for that purpose by the receiving State or directly with the Ministry of Foreign Affairs or some other appropriate authority. There was therefore no need to speak of "appointing a particular delegation as a special mission".

68. Mr. ROSENNE said that he had no quarrel with the contents of paragraph 6) as such, but considered that it belonged more properly to the general introduction than to the commentary on article 1. The contents of paragraph 6) of the commentary did not relate to any of the provisions in article 1.

69. Mr. BARTOŠ, Special Rapporteur, said that the article was of an introductory nature. In practice, certain Ministries of Foreign Affairs considered it indispensable to appoint special delegations when a special mission was sent by another State. It would therefore be desirable to indicate in the text that that practice did not necessarily have to be followed. There was no need for the two negotiating bodies to have the same status.

70. The CHAIRMAN thought that Mr. Rosenne's comment might well apply to paragraph 7) also.

It was agreed that paragraph 6) would be amended in the light of the foregoing remarks.

Paragraph 7)

Paragraph 7) was adopted without comment.

Commentary on article 2 (The task of a special mission)

Paragraph 1)

Paragraph 1) was adopted.

Paragraph 2)

71. Mr. YASSEEN suggested that the "consent" should be qualified by the word "mutual". In the third sentence the words "the instrument by which the sending and reception of special missions is agreed on" should read "the instrument relating to the sending and reception".

It was so agreed.

Paragraph 2) was adopted as amended and subject to drafting changes.

Paragraph 3)

72. Mr. de LUNA suggested that the word "some"

should be inserted before the word "importance" in the last sentence.

It was so agreed.

73. The CHAIRMAN suggested that, in the third sentence, the words "propitious atmosphere" should be replaced by the words "propitious circumstances" and that the word "beneficial" in the phrase "certain beneficial treaties" should be dropped.

It was so agreed.

74. Mr. ROSENNE pointed out that, in cases like these mentioned in the second sentence special missions had been known not only to enter into treaties but to perform other acts such as making binding statements.

75. Mr. BARTOŠ, Special Rapporteur, said that Satow in his "Guide to Diplomatic Practice" mentioned that treaties had been concluded by delegations which had come to convey their condolences on the occasion of the death of the King of England.

76. The CHAIRMAN suggested that the passage in question should read: "... propitious circumstances to conduct negotiations on other subjects". The next sentence would be omitted.

It was so agreed.

Paragraph 3) was adopted as amended and subject to drafting changes.

Paragraph 4)

77. Mr. YASSEEN suggested that the words "prior treaties" in the first sentence should be replaced by the words "a prior treaty".

78. Mr. BARTOŠ, Special Rapporteur, suggested that, in the same sentence, the words "or by the agreement concerning the sending and acceptance of the special mission" might be deleted. In the third sentence the word "permanent" should be deleted.

It was so agreed.

Paragraph 4) was adopted as amended and subject to drafting changes.

Paragraph 5)

79. Mr. de LUNA said that the text of paragraph 5) should be toned down. There was no need to dwell so much on possible disputes between special missions and permanent diplomatic missions. He had in mind more especially the second and third sentences, where there was a reference to the intervention by permanent missions in the negotiations and to the fact that they considered themselves entitled to override the special mission.

80. Mr. TUNKIN suggested that the opening words of the paragraph should be amended to read "A question which also arises ...".

It was so agreed.

81. The CHAIRMAN suggested that in the light of Mr. de Luna's criticism the two sentences relating to intervention by regular diplomatic mission in the work of the special mission should be omitted.

It was so agreed.

82. Mr. TSURUOKA thought that in the penultimate sentence, the words "In practice the guiding principle has been" should be amended to read "Certain members of the Commission held that".

It was so agreed.

83. Mr. TUNKIN said that it seemed to him to be an exaggeration to refer in the last sentence to the importance of the point for the safeguarding of juridical relations between States. It would be better to say simply "The Commission decided to draw the attention of Governments to this point and to ask them...".

84. Mr. BARTOS, Special Rapporteur, said that, although he accepted Mr. Tunkin's suggestion, he did so with reluctance, for in practice the question was one of the greatest importance.

Paragraph 5) was adopted as amended and subject to drafting changes.

Paragraph 6)

Paragraph 6) was adopted subject to drafting changes.

85. Mr. TUNKIN said that he would have preferred the paragraph to be omitted altogether, in order to avoid placing too much emphasis on the disputes that might arise between the two missions.

Communication from the International Law Association

86. The CHAIRMAN read to the Commission a letter he had just received from the President of the International Law Association inviting the Commission to send a representative to its session to be held at Tokyo in August.

87. The letter raised a question of principle: should the Commission send an official representative to meetings of bodies such as the International Law Association? The Commission had never done so in the past.

88. In any event, for various reasons, and in particular for financial reasons, it did not seem possible to send a representative.

89. Mr. BARTOS said that Mr. Liang had attended the Brussels meeting of the International Law Association, not as a representative of the Commission but as a member of the Secretariat. It would be advisable to keep in contact with such bodies, but it would probably be enough to send a message.

90. The CHAIRMAN suggested that Mr. Bartos should be asked to convey orally the Commission's best wishes for the success of the meeting of the International Law Association.

It was so agreed.

The meeting rose at 1.10 p.m.

773rd MEETING

Thursday, 23 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Draft Report of the Commission on the Work of its Sixteenth Session

(A/CN.4/L.106 and addenda)

(continued)

CHAPTER II: Law of Treaties (A/CN.4/L.106/Add. 7 and 10)

1. The CHAIRMAN invited the Commission to continue consideration of chapter II of the draft of its report. He suggested that the Commission should concentrate on substance and should empower the Secretariat to make any necessary drafting and linguistic corrections, in particular in the chapter concerning special missions.

It was so agreed.

Commentary to article 62 B (Revocation or amendment of provisions regarding obligations or rights of States not parties)

The commentary to article 62 B was approved without comment

Title of article 64 (Rules in a treaty becoming binding through international custom)

2. The CHAIRMAN proposed that the title of article 64 should be amended so as to make it clear that it referred to the rules in a treaty that became binding for third States in consequence of the formation of international custom; the omission of all reference to third States from the title would make it difficult to understand the meaning.

3. Mr. ROSENNE said that it would not be appropriate to introduce the words "for third States" after "binding". Article 64 dealt with the case where a treaty created or reflected international custom binding for all States and not just for third States.

4. Mr. de LUNA pointed out that the matter was explained in paragraph 2) of the commentary.

5. Mr. BRIGGS proposed that the question should be dealt with by introducing the word "generally" before "binding".

The title of article 64 was adopted with that amendment.

Commentary to article 64

Paragraph 1)

6. Mr. ROSENNE said that the language of the second sentence of paragraph 1) would have to be adjusted: it was not correct to say that a treaty could "for-

mulate" a territorial, fluvial or maritime régime. He therefore proposed that after the word "or" and before the words "a territorial, fluvial or maritime régime" the words "may establish" should be inserted.

Paragraph 1) was adopted with that amendment.

Paragraph 2)

7. The CHAIRMAN suggested that, in the concluding portion of the second sentence, the words "other States accept rules..." should be replaced by "other States recognize rules".

Paragraph 2) was adopted with that amendment.

Paragraph 3)

8. The CHAIRMAN suggested that in the penultimate sentence the passage "together with the process mentioned in the present article of the expansion of the ambit of treaties through custom" should be omitted.

Paragraph 3) was adopted with that amendment.

The commentary to article 64 was adopted as a whole as amended.

Title of article 65 (Application of incompatible treaty provisions)

9. The CHAIRMAN suggested that the title of article 65 should be amended to read: "Application of treaties having incompatible provisions".

It was so agreed.

Commentary to article 65

Paragraphs 1) and 2)

Paragraphs 1) and 2) were adopted without comment.

Paragraph 3)

10. The CHAIRMAN suggested that the first sentence should be amended, in line with the new title, so as to refer to "treaties having incompatible provisions" instead of to incompatible treaties. In addition, in that same sentence, he suggested that the word "revision" should be replaced by "modification".

Paragraph 3) was adopted with those amendments.

Paragraphs 4) and 5)

Paragraphs 4) and 5) were adopted without comment.

Paragraph 6)

11. Mr. ROSENNE suggested that the words "Many former treaties" used at the beginning of the sixth sentence should be replaced by "Many older treaties".

Paragraph 6) was adopted without comment.

Paragraph 7)

Paragraph 7) was adopted without comment.

Paragraphs 8) and 9)

12. The CHAIRMAN suggested that in the French text the verb "to override" used in the first sentence of each of the two paragraphs should be rendered by "l'emporte sur".

Paragraphs 8) and 9) were adopted with that amendment.

Paragraph 10)

13. Mr. de LUNA said that he could not accept the concluding portion of the last sentence, reading "and that their relevance is that, by specifying that the prior treaty does not permit contracting out, they conclude the question whether the later agreement is or is not compatible with the prior treaty."

14. That passage could be misconstrued to mean that the article disposed of the question of the compatibility of the two treaties.

15. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the passage in question should be omitted.

Paragraph 10) was adopted with that amendment.

Paragraph 11)

16. Mr. ROSENNE proposed that the reference to paragraphs 5) to 9) should be replaced by a reference to paragraphs 5) to 10).

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the concluding passage of paragraph 11) had been taken from the report of the previous Special Rapporteur; he proposed to include a footnote to clarify the matter.

18. The CHAIRMAN said that, if there was no objection, he would consider that the Commission agreed to adopt paragraph 11) with the changes proposed by Mr. Rosenne and the Special Rapporteur.

It was so agreed.

Paragraph 12)

19. Mr. ROSENNE suggested that in the first sentence the words "from a different angle" should be added after the words "covers the same ground".

Paragraph 12) was adopted with that amendment.

Paragraph 13)

20. The CHAIRMAN pointed out that, in the penultimate sentence, the expression "in principle" had been mistranslated in the French version.

Subject to the correction of the French text, paragraph 13) was adopted.

Paragraph 14)

21. Mr. ROSENNE said that, in the last sentence of paragraph 14), the word "consideration" should be replaced by "considerations".

Paragraph 14) was adopted with that amendment.

Paragraphs 15) to 20)

22. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that paragraphs 15) to 20) were quoted from his second report (A/CN.4/156 and Add.1-3) included in the Commission's report for purposes of information as indicated in paragraph 14).

Paragraphs 15) to 20) were adopted without comment.

Paragraph 21)

23. Mr. BARTOS suggested that the title of the Hague Conventions mentioned in the penultimate sentence of paragraph 21) should be given in full.

Paragraph 21) was adopted with that amendment.

Paragraph 22)

24. The CHAIRMAN criticized, from the point of view of substance, the opening sentence of paragraph 22) reading "To attach the sanction of nullity to an agreement is to deny that the parties possessed any competence under international law to conclude it". The sanction of nullity could arise from causes other than the lack of competence to conclude the treaty.

25. He suggested that the sentence in question should be reworded along the following lines: "The nullity of an agreement may result from the lack of competence of the parties to conclude it".

26. Mr. ROSENNE suggested that, in the eighth sentence, the word "revision" should be replaced by "modification".

27. The CHAIRMAN criticized the expression "legal responsibility" used in the last sentence of paragraph 22). It would be sufficient to refer to "responsibility".

28. Mr. BARTOŠ pointed out that the Security Council of the United Nations had drawn a distinction between the political responsibility of States, their legal responsibility and their moral responsibility.

29. The CHAIRMAN suggested that the expression "legal responsibility" should be replaced by "State responsibility".

30. He said that, if there was no objection, he would consider that the Commission agreed to adopt paragraph 22) with the two changes proposed by him and the change proposed by Mr. Rosenne.

It was so agreed.

Paragraph 23)

31. Mr. ROSENNE said that it was not altogether accurate to say, as did the first sentence of paragraph 23), that "the article does not provide for any exceptions to the rules stated in paragraph 4), other than the general exceptions...". Article 65 did not deal with the two general exceptions mentioned in the concluding part of that first sentence; those exceptions were provided for in other articles of the draft.

32. The CHAIRMAN suggested that the first sentence should be amended to read "Accordingly, no other exceptions to the rules stated in paragraph 4) are provided for, other than the general exceptions...".

Paragraph 23) was adopted with that amendment.

The commentary to article 65 was adopted as a whole as amended.

Commentary on article 67 (Procedure for amending treaties) and on article 68 (Amendment of multilateral treaties) (A/CN.4/L.106/Add.10)

33. In reply to a question by the Chairman, Sir Humphrey WALDOCK, Special Rapporteur, confirmed that the words "amending" and "amendment" were being used in the titles of articles 67 and 68 but the word "modification" was used in the text of the articles

in the commentary. An explanation of the terminology chosen was given in paragraph 5) of the commentary.

Paragraphs 1) and 2)

Paragraphs 1) and 2) were adopted without comment.

Paragraph 3)

34. Mr. YASSEEN suggested that the word "almost" should be added before the word "dead letter" in the penultimate sentence; in the opinion of some authors Article 19 of the Covenant of the League of Nations had provided the grounds for the revision of the Treaty of Lausanne of 24 July 1923. Indeed, Turkey's request for revision had been based on that article.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of Article 19 had never been applied successfully, but he was prepared to change the passage in question to read "Article 19 was practically a 'dead-letter'".

It was agreed that the passage should be so amended.

36. Mr. ROSENNE said that during the discussion on the modification of treaties Mr. Lachs had suggested, and he had supported the suggestion, that the Commission should in its report draw the attention of the General Assembly to the need for a general review of the older multilateral treaties.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that, although he entirely agreed with the proposition, the defects in the procedure for the amendment of treaties might well have the consequence that amending instruments would be ratified by fewer parties than had ratified the original treaties. No real progress would be achieved unless there was a real will on the part of States to extend participation in existing conventions; perhaps the matter should be left to them.

38. Mr. BARTOŠ said that the Commission's view on the subject had been set forth in chapter III of its report on its 15th session.¹ He suggested that a footnote reference would suffice in the present context.

It was so agreed.

Paragraph 3) was adopted as amended.

Paragraph 4)

Paragraph 4) was adopted without comment.

Paragraph 5)

39. Mr. de LUNA said that he doubted transactions varying or supplementing a treaty were in fact covered by the term "modification", as was implied in the last sentence of the paragraph.

It was agreed to delete from the last sentence the words "or supplement" and the words "without amending the treaty as such".

Paragraph 5) was adopted as amended.

¹ Official Records of the General Assembly, Eighteenth Session, Supplement No. 9.

Paragraphs 6) to 9)

Paragraphs 6) to 9) were adopted without comment.

Paragraph 10)

At Mr. Rosenne's suggestion it was agreed to delete the second sentence ("This is a matter upon which it seems important that the Commission should take a clear position").

Paragraph 10) was adopted as amended.

Paragraphs 11) and 12)

Paragraphs 11) and 12) were adopted without comment.

Paragraph 13)

It was agreed to replace the words "the principle of 'preclusion'" by the words "the general principle 'nemo potest venire contra factum proprium'".

Paragraph 13) was adopted as amended.

Commentary on article 69 (Agreements to modify multilateral treaties between certain of the parties only)

Paragraph 1)

At the Chairman's suggestion it was agreed to delete the words "modifications of a treaty by an" in the fourth sentence.

Paragraph 1) was adopted as amended.

Paragraphs 2) and 3)

Paragraphs 2) and 3) were adopted without comment.

CHAPTER III: Special missions
(A/CN.4/L.106/Add. 8 & 9)

40. The CHAIRMAN invited the Commission to resume consideration of the chapter of the draft report containing the commentary on the draft articles concerning special missions.²

Commentary on article 3 (Appointment of the head and members of the special mission)

Paragraph 1)

41. Mr. ROSENNE suggested that the French text should be amended so as to convey the idea that prior agreement was necessary for the head of a permanent mission.

It was so agreed.

Paragraph 1) was adopted as amended.

Paragraph 2)

42. Mr. YASSEEN suggested that the phrase "acceptance of its head members or staff" should be substituted for "consent to...".

43. Mr. BARTOŠ, Special Rapporteur, said that he could not accept that amendment for it affected substance. Consent was granted once and for all. According to Mr. Sandström, such consent applied to the head of the mission too.

Paragraph 2) was adopted subject to drafting changes.

Paragraph 3)

44. In response to a suggestion by Mr. Yasseen, Mr. BARTOŠ, Special Rapporteur, proposed that the words "or the interests" be inserted after "sovereign rights" in the first sentence.

It was so agreed.

Paragraph 3) was adopted as amended.

Paragraph 4)

45. Mr. YASSEEN asked the Special Rapporteur whether the concept of prior agreement dominated the whole paragraph.

46. Mr. BARTOŠ, Special Rapporteur, said that it did, for prior agreement constituted an indirect curb on the freedom of appointment, which was the general principle.

Paragraph 4) was adopted subject to drafting changes.

Paragraph 5)

47. Mr. BRIGGS said that the word "politicians" at the end of paragraph 5) was not particularly appropriate in the English text.

Paragraph 5) was adopted subject to drafting changes.

Paragraph 6)

Paragraph 6) was adopted subject to drafting changes.

Paragraph 7)

48. Mr. ROSENNE suggested that the phrase "or other official persons" be substituted for "or heads of other departments".

It was so agreed.

49. In reply to Mr. de Luna and Mr. Briggs, who had remarked on the terminology employed, the CHAIRMAN said that the appropriate services of the Secretariat would check the terminology and quotations and make any necessary editorial changes throughout the draft report.

Subject to such changes, paragraph 7) was adopted as amended.

Paragraph 8)

Paragraph 8) was adopted without comment.

Commentary on article 4 (Persons declared persona non grata or not acceptable)

Paragraphs 1), 2), 3) and 4)

Paragraphs 1) to 4) were adopted, subject to drafting changes.

² Discussion begun at the previous meeting.

Paragraph 5)

50. Replying to a suggestion by the Chairman, Mr. BARTOS, Special Rapporteur, said that in French "qualification" would be wrong in the context, for not only personal competence but also rank and function were involved.

51. The CHAIRMAN suggested that the word *qualités* should be changed to the singular *qualité*.

It was so agreed.

Paragraph 5) was adopted as amended.

Commentary on article 5 (Appointment of a special mission to more than one State)

Paragraphs 1) and 2)

Paragraphs 1) and 2) were adopted without comment.

Paragraph 3)

At Mr. Rosenne's suggestion it was agreed to delete the words "rightly, in the view of the Commission" in paragraph 3 (b).

As so amended paragraph 3) was adopted subject to drafting changes.

Paragraph 4)

Paragraph 4) was adopted without comment.

Paragraph 5)

52. The CHAIRMAN suggested that the third sentence should be reworded to read "... to decide in advance whether they are prepared to receive the proposed special mission". In the next sentence, the words "receivability of the special mission" should be replaced by the word "question".

Paragraph 5) was adopted as amended.

Commentary on article 6 (Composition of the special mission)

Paragraph 1)

Paragraph 1) was adopted without comment.

Paragraph 2)

At the Chairman's suggestion it was agreed to delete the words "and if both are members of the special mission (and not of its staff)" in the third sentence.

It was so agreed.

Paragraph 2) was adopted as amended.

Paragraph 3)

53. The CHAIRMAN asked for an explanation concerning the meaning of the second sentence, relating to the order of precedence among delegates within the sending State, the language of which seemed to him far from clear.

54. Mr. de LUNA suggested that the reference should be to the order of precedence established under the regulations of the State sending the delegation.

55. Mr. BARTOS, Special Rapporteur, said that he accepted that suggestion in principle. The sentence would then read "Neither the rank of the delegates under the internal regulations of the sending State nor the title or function...".

Paragraph 3) was adopted as amended.

Paragraph 4)

Paragraph 4) was adopted without comment.

Paragraph 5)

At Mr. de Luna's suggestion it was agreed to insert the words "of the Vienna Convention" after the words "set out in article 1 (c)" in the second sentence of paragraph 5).

Paragraph 5) was adopted as amended.

Paragraphs 6) and 7)

Paragraphs 6) and 7) were adopted without comment.

Commentary on article 8 (Notification)

Paragraphs 1) and 2)

Paragraphs 1) and 2) were adopted without comment.

Paragraph 3)

It was agreed that the reference to notification "in two stages" should be replaced by a reference to "two kinds of notification".

Paragraph 3) was adopted as amended and subject to consequential drafting changes.

Paragraph 4)

56. Mr. ROSENNE said that the last sentence of paragraph 4) should be toned down so as to remove the criticism of the Commission implied in the passage "The Commission failed to take this fact into account...".

Paragraph 4) was adopted subject to a drafting change on the lines suggested by Mr. Rosenne.

Paragraphs 5) and 6)

Paragraphs 5) and 6) were adopted subject to drafting changes.

Paragraph 7)

57. Mr. ROSENNE said that there was a *non sequitur* in the third sentence of paragraph 7); the words "did not discuss this problem but" should be deleted.

It was so agreed.

Paragraph 7) was adopted as amended.

Paragraph 8)

Paragraph 8) was adopted without comment.

Commentary on article 9 (General rules on precedence)

Paragraph 1)

58. The CHAIRMAN suggested that the order of the first two sentences should be reversed and that the

beginning of the second sentence should read "The question of the rank of heads of special missions arises etc." In addition, he suggested that the words "or on arrival" should be added in the last sentence.

Paragraph 1) was adopted as so amended.

Paragraph 2)

At Mr. Rosenne's suggestion it was agreed to delete the word "special" qualifying the words "rules of courtesy".

Paragraph 2) was adopted as so amended.

59. The CHAIRMAN said that the last sentence implied that the Vienna Convention on Diplomatic Relations was inconsistent with the principle of the sovereign equality of States. Accordingly, he suggested that the sentence in question be deleted.

It was so agreed.

Paragraph 3)

Paragraph 3) was adopted as amended.

Paragraphs 4) and 5)

Paragraphs 4) and 5) were adopted without comment.

Paragraph 6)

60. Mr. ROSENNE said that the last sentence in paragraph 6) ("Except in matters of personal courtesy, the diplomatic title of the head of a special mission is of no official significance") was misleading and should be dropped.

It was so agreed.

Paragraph 6) was adopted as amended.

Paragraph 7)

61. The CHAIRMAN suggested that the words "at all" in the first sentence should be omitted.

It was so agreed.

Paragraph 7) was adopted as amended.

Paragraphs 8) and 9)

Paragraphs 8) and 9) were adopted without comment.

Paragraph 10)

At Mr. de Luna's suggestion the date "1815" was inserted after the words "the Vienna Regulations".

Paragraph 10) was adopted as amended.

Paragraphs 11) to 15)

Paragraphs 11) to 15) were adopted, subject to the deletion of the word "diplomatic" in the penultimate sentence of paragraph 12).

Paragraph 16)

At Mr. Rosenne's suggestion it was agreed to substitute the words "of the opinion" for the word "convinced" in the first sentence and to substitute the word "applicable" for the words "in force" in the second sentence.

Paragraph 16) was adopted as so amended.

Paragraph 17)

62. The CHAIRMAN said that the penultimate sentence seemed far from clear: notifications relating to a special mission were not always made by the permanent diplomatic mission. He suggested that the words "which notifies arrivals and subsequent changes" should be deleted.

It was so agreed.

Paragraph 17) was adopted as amended.

Paragraphs 18) to 21)

Paragraphs 18) to 21) were adopted without comment.

Commentary on article 10 (Precedence among special ceremonial and formal missions)

63. Mr. de LUNA suggested that in paragraph 3(e) the word "status" should be replaced by "function".

The commentary was adopted subject to that change and to drafting changes.

Commentary on article 7 (Authority to act on behalf of the special mission)

Paragraphs 1) and 2)

Paragraphs 1) and 2) were adopted without comment.

Paragraph 3)

64. Mr. ROSENNE said that the implied criticism of the Commission in the fourth sentence should be attenuated by substituting the words "did not deal" for the words "failed to deal".

It was so agreed.

Paragraph 3) was adopted as amended.

Paragraph 4)

65. Mr. de LUNA said that in the French text the word *tantum* in the first sentence should read *juris tantum*.

66. The CHAIRMAN pointed out that part of the text seemed to repeat paragraph 3(h) of the commentary on article 10 (Precedence among special ceremonial and formal missions). He suggested that the passage beginning with the words "Some States hold" and ending "is a manifestation of the common outlook and the equal standing of the members of the delegation" should be deleted.

67. Mr. BARTOŠ, Special Rapporteur, accepted that suggestion.

68. The CHAIRMAN suggested that the words "see sub-paragraph (h) of the commentary on article 10" should be added, in brackets, at the end of paragraph 4).

It was so agreed.

Paragraph 4) was adopted as amended.

Paragraph 5)

69. The CHAIRMAN said that it was inappropriate to use the expression "collective authority" when speaking of members of the special mission.

70. Mr. BARTOŠ, Special Rapporteur, suggested that the word "authority" should be replaced by the words "full powers".

It was so agreed.

Paragraph 5) was adopted as amended.

Paragraph 6)

71. The CHAIRMAN suggested that, for the sake of consistency, the expression "extent of the authority" should be substituted for "limits of the authority".

Paragraph 6) was adopted as so amended.

Paragraph 7)

72. The CHAIRMAN thought it inaccurate to speak of the *substitut* of a head of a special mission.

73. Mr. BARTOŠ, Special Rapporteur, said that *suppléant* would be preferable.

Paragraph 7) was adopted as amended.

Paragraph 8)

74. The CHAIRMAN suggested that the passage in the last sentence dealing with the status of alternate and deputy head should be replaced by some such words as "the Commission placed the two kinds of deputy on the same footing".

It was so agreed.

Paragraph 8) was adopted as amended.

Paragraph 9)

Paragraph 9) was adopted without comment.

Paragraph 10)

75. The CHAIRMAN suggested that the words "acting deputy" in the last sentence should be replaced by the words "deputy administrator".

Paragraph 10) was adopted as so amended.

Paragraphs 11) and 12)

Paragraphs 11) and 12) were adopted without comment.

The meeting rose at 1 p.m.

774th MEETING

Friday, 24 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Draft Report of the Commission on the Work of its Sixteenth Session (A/CN.4/L.106 and addenda) (continued)

CHAPTER III: Special missions (A/CN.4/L.106/Add.11)

1. The CHAIRMAN invited the Commission to continue its consideration of the commentary on the draft articles concerning special missions.

Commentary on article 11 (Commencement of the functions of the special mission)

Paragraphs 1) and 2)

2. The CHAIRMAN said it had been agreed during earlier discussion that the word *fonction* should be replaced by *fonctions* throughout the text of the draft articles and commentary.

With that amendment, paragraphs 1) and 2) were adopted.

Paragraph 3)

3. Mr. de LUNA said he doubted that there were special customary rules having the force of law on the subject. He suggested that the words "usage" should be substituted for "customary rules" in the first sentence.

It was so agreed.

4. The CHAIRMAN suggested that wherever possible the words "the functions of the special mission begin" should be replaced by the words "the mission enters upon its functions".

It was so agreed.

Paragraph 3) was adopted as amended and subject to drafting changes.

Paragraph 4)

5. The CHAIRMAN suggested that the second sentence should read: "There are even fewer rules regarding audiences by Heads of States for the presentation of letters of credence". In the third sentence, the words "and the functions commence immediately" should be replaced by the words "and the mission enters upon its functions immediately". In the fourth sentence, the word "custom" should be replaced by the word "usage".

It was so agreed.

Paragraph 4) was adopted as amended.

Paragraph 5)

Paragraph 5) was adopted without comment.

Paragraph 6)

6. The CHAIRMAN suggested that the words *les parties* should be substituted for *les partenaires* in the second sentence of the French text. The expression "his opposite number" in the third sentence should be replaced by "the person".

Paragraph 6) was adopted as so amended.

Paragraph 7)

7. The CHAIRMAN suggested that the word "necessarily" in the penultimate sentence should be replaced by the word "always".

It was so agreed.

Paragraph 7) was adopted as amended.

Paragraph 8)

Paragraph 8) was adopted subject to the replacement of the word "subsidiaries" by the word "supplétifs".

Paragraphs 9) to 11)

Paragraphs 9) to 11) were adopted without comment.

Paragraph 12)

8. Mr. de LUNA suggested that, in the third sentence, the word "considers" should be substituted for the word "believes".

9. After further discussion, the CHAIRMAN said that the following changes would be made in the text of paragraph 12): the words "they consider that" would be inserted between the words "whether" and "an appropriate rule" in the third sentence; the penultimate sentence would be altered to read "... differences in treatment are due to differences in relations between States"; and the last sentence would be deleted.

Paragraph 12) was adopted as so amended.

Commentary on article 12 (End of the functions of the special mission)

Paragraphs 1) to 3)

Paragraphs 1) to 3) were adopted subject to drafting changes.

Paragraph 4)

10. The CHAIRMAN suggested that the second sentence should be altered to read "A resumption of negotiations would then be regarded as the commencement of the functions of another mission."

Paragraph 4) was adopted as so amended.

Commentary on article 13 (Seat of the special mission)

Paragraph 1)

11. The CHAIRMAN suggested that, in the fourth sentence, the words "Furthermore" and "forming a part of its own organization" should be deleted.

Paragraph 1) was adopted as so amended.

Paragraphs 2) and 3)

Paragraphs 2) and 3) were adopted subject to drafting changes.

Paragraph 4)

12. The CHAIRMAN said that the words "to impose" in the fourth sentence were inappropriate and should be replaced by the words "to require".

Paragraph 4) was adopted as so amended.

Paragraph 5)

Paragraph 5) was adopted without comment.

Commentary on article 14 (Nationality of the head and the members of the special mission or the members of its staff)

Paragraphs 1) and 2)

Paragraphs 1) and 2) were adopted without comment.

Paragraph 3)

13. The CHAIRMAN pointed out that the words "nationals of a country" should read "nationals of the receiving State".

Paragraphs 3) was adopted as so amended.

Paragraph 4)

Paragraph 4) was adopted without comment.

Paragraph 5)

14. Mr. ROSENNE said that the value judgement in the second sentence should be removed, and he therefore proposed the deletion of the words "although it is not very desirable at the present time that they should do so".

15. Mr. BARTOŠ, Special Rapporteur, suggested that the words "some members of the Commission believed" should be inserted before "it is not very desirable".

16. Combining amendments suggested by Mr. BARTOŠ, Mr. PESSOU and Mr. TSURUOKA, the CHAIRMAN suggested that the second sentence should end after the words "in 1960" and the third sentence should begin: "Recent practice has been". A further sentence would read: "Some members of the Commission believed that this practice was not very desirable at the present time". The word "also" should be inserted before "arises" in the first sentence.

It was so agreed.

17. Mr. BARTOŠ, Special Rapporteur, said that the problem of employing refugees on special missions was not one that arose solely at the present time when there were so many political refugees all over the world. Difficulties had arisen between countries of immigration and countries of emigration in the past too; it was a long-standing problem, only the causes of which had changed.

Paragraph 5) was adopted as amended.

Paragraph 6)

18. Mr. ROSENNE said that the first sentence was too categorical since article 14 could be read as implicitly dealing with the problem of dual nationality. Perhaps the word "deliberately" should be omitted and the word "specific" inserted before the word "reference".

19. Mr. BARTOŠ, Special Rapporteur, said that the Commission had discussed that matter only incidentally, as was implied in the last sentence of the paragraph.

20. The CHAIRMAN suggested that the paragraph might open: "The Commission has not specifically referred in the text to the possibility...". In the second sentence it would be clearer to say: "in the case of a person possessing two nationalities, one of which is that of the receiving State, that State has the right...". Further on, the word "exclusively" might be substituted for the passage "without concerning itself with his nationality or nationalities".

Paragraph 6) was adopted as so amended.

Paragraph 7)

21. Mr. ROSENNE proposed that paragraph 7) as a whole be deleted. The substance would, in effect, be covered by paragraph 6) if a reference were inserted there to refugees. Personally he was unable to understand fully what was meant by the difficult concept of a "regular refugee" which had been introduced in paragraph 7) and had not been discussed by the Commission.

22. Mr. BARTOS, Special Rapporteur, said that a distinction should be made between stateless persons and refugees. Although he would be prepared to agree to shorten the paragraph, he considered that the question of the employment of refugees on special missions should be mentioned.

23. Mr. PESSOU suggested that it might be preferable not to mention the subject in the commentary and that Governments should be left free to settle among themselves any questions that might arise in connexion with the employment of refugees on special missions.

24. The CHAIRMAN suggested that only the essential passage be kept and that the latter part of the paragraph, dealing with the employment of refugees because of their special skills on special missions of some States, should be deleted.

25. Mr. ROSENNE said that, if the problem was as complex and important as the Special Rapporteur had implied, it should have formed the subject of a special article and commentary that could have been discussed by the Commission.

It was agreed to delete the four sentences in paragraph 7)

Paragraph 8)

26. The CHAIRMAN asked the Special Rapporteur whether the commentary should really speak of a State's sovereign right to maintain civic discipline.

27. Mr. BARTOS, Special Rapporteur, replied that to avoid any political implications, he would prefer to drop the sentences dealing with the receiving State's restriction on the sending State's freedom of choice in recruiting members of a mission. Consequently, the relevant passage should be deleted and the last sentence would come immediately after the first, after the words "domestic law of the receiving State".

Paragraph 8) was adopted as so amended.

Paragraph 9)

28. Mr. TSURUOKA said that the paragraph should preferably begin: "Nor did the Commission take any decision on [instead of: "consider"] the question whether...".

29. The CHAIRMAN asked whether aliens and stateless persons should be treated on a par in the context.

30. Mr. BARTOS, Special Rapporteur, replied that they should, for there might be cases in which a State refused to allow an alien permanently resident in its territory to be a member of a mission. There was also the case of so-called privileged aliens in some African countries. He accepted Mr. Tsuruoka's amendment.

Paragraph 9) was adopted as amended.

Commentary on article 15 (Right of special missions to use the flag and emblem of the sending State)

Paragraphs 1), 2) and 3)

Paragraphs 1), 2) and 3) were adopted subject to drafting changes.

Paragraph 4)

31. The CHAIRMAN suggested that in the last sentence the word *manifestations* should be substituted for *fonctions* and "when the mission considers that circumstances warrant it" for "circumstances which warrant it, in the judgement of the mission itself".

It was so agreed.

Paragraph 4) was adopted as so amended.

Paragraph 5)

Paragraph 5) was adopted without comment.

Paragraph 6)

32. Mr. TSURUOKA proposed that the words "some States object to this practice" should be substituted for "this practice is objected to in some quarters".

It was so agreed.

33. Mr. ROSENNE said that some reference should be made in paragraph 6) to the fact that it dealt with a matter that might touch upon the sphere of State responsibility.

34. Mr. BARTOS, Special Rapporteur, explained that he had not mentioned that problem because circumstances mitigating or aggravating the responsibility, as the case might be, might very often be involved. He had preferred not to go into detail. He agreed with Mr. Rosenne, however, that the problem touched in substance upon the sphere of State responsibility, but it should preferably not be raised at that point.

35. The CHAIRMAN agreed that the point was a very delicate one and it would be wiser to leave it aside.

Paragraph 6) was adopted as amended.

Commentary on article 16 (Activities of special missions in the territory of a third state)

Paragraphs 1) and 2)

Paragraphs 1) and 2) were adopted without comment.

Paragraph 3)

36. The CHAIRMAN suggested the substitution of "the parties" for "the two parties concerned" in the last sentence.

Paragraph 3) was adopted as so amended.

Paragraphs 4), 5) and 6)

Paragraphs 4), 5) and 6) were adopted subject to drafting changes.

Paragraph 7)

37. Mr. BARTOS, Special Rapporteur, asked that in the second sentence the word "legal" should be deleted before "writers".

38. The CHAIRMAN suggested that in the same sentence the word "exceptional" should be substituted for "irregular".

It was so agreed.

Paragraph 7) was adopted as amended.

Paragraph 8)

39. Mr. ROSENNE said that the first sentence went too far and should be deleted. The words "Should the

third State withdraw its hospitality" should be substituted for the words "In such cases" in the second sentence.

40. Mr. BARTOŠ, Special Rapporteur, replied that the problem was whether a State had the right to withdraw its hospitality.

41. Mr. ROSENNE agreed, but pointed out that if the third State had reached an agreement with the sending States, to that extent, it might have restricted its freedom of action to withdraw its hospitality.

42. Mr. BARTOŠ, Special Rapporteur, explained that the doctrine concerning that point was quite clear. The consent granted for the sending of permanent missions might be withdrawn at any time. The same applied *a fortiori*, according to the authorities, to special missions.

43. Mr. ROSENNE said that the first sentence did not accurately reflect the provision as it appeared in the article as adopted.

44. Mr. BARTOŠ, Special Rapporteur, said it had been agreed that the point should be mentioned in the commentary, not in the body of the article.

45. Mr. TSURUOKA proposed that in the third sentence the words "as a whole" and "any of" should be deleted.

46. Mr. de LUNA said that the text should preferably be left as it stood.

47. The CHAIRMAN suggested drafting changes to cover those points and that in the penultimate sentence the text should read: "this is simply the revocation of the third State's consent".

Paragraph 8) was adopted as amended.

Paragraph 9)

48. The CHAIRMAN said that, in his opinion, the paragraph dealt too summarily with a delicate problem. He suggested that it might be omitted.

It was so agreed.

CHAPTER II: Law of treaties
(A/CN.4/L.106/Add.12 and 14)

49. The CHAIRMAN invited the Commission to resume its consideration of the commentary on the draft articles concerning the law of treaties.

Commentary on article 69 A (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law)

Paragraph 1)

There was no comment.

Paragraph 2)

At the suggestion of Sir Humphrey Waldock, Special Rapporteur, it was agreed to delete the words "the natural and" in the fourth sentence.

Paragraph 3)

There was no comment.

Commentary on articles 70 (General rule, 71 (Recourse to further means of interpretation) and 72 (Terms having a special meaning)

50. Mr. TSURUOKA suggested that the title of article 70 be made more explicit.

At the suggestion of Sir Humphrey Waldock, Special Rapporteur, it was agreed that the title of article 70 should be amended to read "General rule of interpretation".

51. Sir Humphrey WALDOCK, Special Rapporteur, said that the earlier title of article 71 ("Cases where the meaning of a provision is in doubt")¹ was no longer appropriate because the article had been considerably reshaped. He suggested that it might be simplified to read "Further means of interpretation".

It was so agreed.

Paragraph 1)

There was no comment.

Paragraph 2)

At Rosenne's suggestion it was agreed to substitute the word "adopted" for the words "drew up" in the third sentence.

Paragraphs 3), 4) and 5)

There was no comment.

Paragraph 6)

52. Sir Humphrey WALDOCK, Special Rapporteur, said that he would like to omit paragraph 6), which dealt with methods of interpretation, as the matter was already covered in paragraph 3).

It was so agreed.

Paragraph 7)

At the Special Rapporteur's suggestion it was agreed to substitute the word "general" for the words "strictly legal" in the second sentence.

Paragraph 8)

53. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the drafting might be improved if the words "for the purpose of formulating general rules of interpretation" were added after the word "but" in the fourth sentence.

It was so agreed.

54. Mr. ROSENNE proposed that a cross-reference to paragraph 15) should be added to draw attention to the reservation concerning the constituent instruments of international organizations.

It was so agreed.

Paragraph 9)

At the Special Rapporteur's suggestion it was agreed to substitute the word "general" for the words "true legal" in the fifth sentence.

¹ See summary record of the 769th meeting.

*Commentary on article 70**Paragraphs 10), 11), 12), 13), 14) and 15)**There was no comment.**Commentary on article 71**Paragraphs 1) and 2)**There was no comment.**Paragraph 3)*

55. The CHAIRMAN did not think it appropriate to describe *travaux préparatoires* as a secondary, supplementary means of interpretation and suggested that the first sentence should state simply that they were not, as such, an authentic means of interpretation.

*It was so agreed.**Commentary on article 72**There was no comment.*

Commentary on articles 74 (Treaties drawn up in two or more languages) and 75 (Interpretation of treaties having two or more texts or versions)

Paragraph 1)

56. Mr. ROSENNE said that a footnote should be added to indicate that the Secretariat had been asked to make information available concerning the methods of preparing plurilingual texts at international conferences.

*It was so agreed.**Paragraphs 2), 3), 4), 5), 6), 7), 8) and 9)**There was no comment.*

57. Sir Humphrey WALDOCK, Special Rapporteur, said that the paragraphs of the commentary on articles 71-75 would be renumbered to follow consecutively those on the previous articles.

CHAPTER V : Relations between States
and inter-governmental organizations
(A/CN.4/L.106/Add.13)

58. The CHAIRMAN invited the Commission to consider the text of two additional paragraphs to be inserted at the beginning of chapter V (Relations between States and inter-governmental organizations) of the draft report.

Those paragraphs were approved with a drafting change in the last sentence ("Members expressed various other views and suggestions which will be the basis for the preparation..." amended to read: "Other suggestions made by members will be considered in the preparation of a second report by the Special Rapporteur").

CHAPTER I : Organization of the session
(A/CN.4/L.106/Add.1/Rev.1)

59. The CHAIRMAN invited the Commission to consider the revised version of chapter I of the draft report.

*Paragraphs 1) and 2)**There were no comments on paragraphs 1) and 2).**Paragraph 3)*

60. Mr. BARTOS proposed that the nationality of Mr. Gros and that of Mr. Padilla Nervo should be indicated in the usual way by adding "France" and "Mexico" in brackets after their names.

*It was so agreed.**Paragraphs 4), 5) and 6)**There were no comments on paragraphs 4), 5) and 6).**Paragraph 7)*

61. The CHAIRMAN proposed that the middle part of the first sentence should be amended so as to replace the words: "*de l'importance et de l'urgence de la tâche de la Commission...*" by "*...de l'importance et l'urgence qu'aurait à l'avenir la tâche de la Commission...*".

*It was so agreed.**Paragraphs 8), 9), 10) and 11)**There were no comments on these paragraphs.*

CHAPTER IV : Programme of work and
organization of future sessions
(A/CN.4/L.106/Add.2/Rev.1)

62. The CHAIRMAN invited the Commission to consider the revised version of chapter IV of the draft report.

*Paragraph 1)**There were no comment on paragraph 1).**Paragraph 2)*

63. Sir Humphrey WALDOCK proposed that, in the first sentence, the words "but also the study of a more limited topic, such as special missions" should be replaced by "but also the study of special missions".

64. He proposed further that, in the second sentence, the words "in conformity" should be replaced by "in the light of", and that the word "Moreover" which appeared at the beginning of the last sentence of the paragraph, should be deleted.

*It was so agreed.**Paragraph 3)*

65. Sir Humphrey WALDOCK proposed that, in the first sentence, the word "desire" should be replaced by "need" and that the words "before 1966" should be replaced by "before the end of 1966". In the last sentence, he proposed that the words "in view of the heavy programme of work it has to complete" should be replaced by "for the completion of the heavy programme of work it has in hand".

*It was so agreed.**Paragraph 4)*

66. Sir Humphrey WALDOCK proposed the deletion from the first sentence of the words in brackets "the

section on termination of treaties cannot be reviewed without considering the comments of Governments on the third part, which relates to the revision of treaties". He also proposed the deletion from the third sentence of the words "the second part, and the third part of", which appeared before "its draft".

67. Mr. EL-ERIAN proposed the insertion, at the end of the second sentence, of the words "and the topic of relations between States and inter-governmental organizations". He also proposed the insertion in the fourth sentence, after the words "the Commission will also", of the words "continue its study of relations between States and inter-governmental organizations".

68. The CHAIRMAN said that, if there was no objection, he would consider the Commission agreed to the changes proposed by Sir Humphrey Waldock and Mr. El-Erian.

It was so agreed.

Paragraph 5)

69. Mr. BRIGGS proposed that, in the second part of the first sentence, the words "the third part of the draft on the law of treaties" should be qualified by adding "completed in 1964 by the Commission", so that the general reader could readily understand the reference.

70. Mr. TSURUOKA proposed that the concluding words of the first sentence should be amended so as to replace the concluding words "the end of 1966" by "the end of its 1966 session".

71. The CHAIRMAN said that, if there was no objection, he would consider that the Commission agreed to adopt the changes proposed by Mr. Briggs and Mr. Tsuruoka.

It was so agreed.

72. Sir Humphrey WALDOCK suggested that, for the next session, the Secretariat should prepare a single document containing, if possible in the three languages in three separate columns, the texts of all the draft articles on the law of treaties. Such a document would be of great use to the members of the Commission in their work.

73. The CHAIRMAN said that the Secretariat would attend to that request.

The Commission's draft report on its sixteenth session was adopted as a whole, as amended and subject to drafting changes.

Closure of the Session

74. The CHAIRMAN expressed his thanks to the members of the Commission for their co-operation. In particular, he thanked the Vice-Chairmen, the Rapporteur and the Special Rapporteurs for their valuable contributions to the work of the session. He expressed the Commission's appreciation for the excellent services provided by the Secretariat of the Commission and by the European Office of the United Nations.

75. Mr. BRIGGS paid a tribute to the skilful manner in which the Chairman had conducted the Commission's proceedings and thanked him especially for his valuable contributions to the improvement of the draft articles which he had had the opportunity to submit to the Commission as Chairman of the Drafting Committee.

76. Sir Humphrey WALDOCK associated himself most sincerely with the tribute paid to the Chairman and thanked the Secretariat for its devoted work in the preparation of documents.

77. Mr. ROSENNE associated himself with those tributes.

78. Mr. EL-ERIAN paid a tribute to the Chairman, the Rapporteur and the Special Rapporteurs on the law of treaties and special missions for their remarkable work.

79. Since he had been absent from Geneva at the time when the Commission had paid a tribute to Mr. Liang, its retiring Secretary, he wished to place on record his warm appreciation for all his devoted work.

80. He was gratified to report to the Commission that two of its members, Mr. Elias and himself, had taken part in the work of the Committee of Experts which had prepared the draft Protocol of the Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity, and in the deliberations of the Cairo meeting of heads of African States which had adopted that important international instrument for the pacific settlement of disputes.

81. The CHAIRMAN expressed his appreciation for the work performed by Mr. Elias and Mr. El-Erian at the Cairo Conference and also for the latter's work as Special Rapporteur on the topic of relations between States and inter-governmental organizations.

82. Mr. TABIBI associated himself with the tributes paid to the Chairman, the Vice-Chairmen, the Rapporteur and the three Special Rapporteurs.

83. Mr. YASSEEN paid a tribute to the Chairman's distinguished conduct of the debates and to the outstanding reports by the Special Rapporteurs on the topics of the law of treaties and special missions. As Rapporteur, he also thanked the Secretariat for the services placed at the Commission's disposal.

84. Mr. de LUNA associated himself with the tributes paid to the Chairman, the Rapporteur and the Special Rapporteurs, and thanked the Secretariat for its services.

85. Mr. RUDA associated himself with the tributes paid to the officers of the Commission and the Secretariat. In joining the other members who had paid a tribute to the skilful manner in which the Chairman had presided over the session, he wished to render homage to the Latin spirit of which Professor Ago was so distinguished a representative and to recall the strong human links between his own country, Argentina, and the Chairman's.

86. Mr. TSURUOKA associated himself with the tributes addressed to the Chairman, officers and Special Rapporteurs of the Commission, and thanked the Secretariat for the services provided.

87. Mr. BARTOŠ thanked his colleagues for their kind words and associated himself with the tributes paid to the Chairman, officers and Rapporteurs of the Commission as well as to the Secretariat.

88. Mr. PESSOU associated himself with those tributes.

89. Mr. LIANG, Secretary to the Commission, said that it was not customary for a Secretary to express thanks on occasions like the present but perhaps he would be forgiven for breaking with precedent, in order to express the appreciation of all members of the Secre-

tariat for the kind words of the members of the Commission with regard to their work. He had been particularly gratified to hear that the Commission had noted a remarkable improvement in the technical services provided. He did not wish to conclude those remarks without expressing his satisfaction to the members of his Division. In addition he wished to recall the dedicated work done from 1949 to 1961 by Mr. Sandberg, who for those long years had worked as his deputy and who had devoted a considerable part of his life to his work in the Secretariat of the United Nations.

90. The CHAIRMAN, after thanking the members of the Commission for their kind words, declared the sixteenth session of the International Law Commission closed.

The meeting rose at 12.40 p.m.

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