

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1966

Volume I
Part I

*Summary records
of the second part
of the seventeenth session*

3 - 28 January 1966

UNITED NATIONS



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INTRODUCTORY NOTE

The summary records in this volume include the corrections to the provisional summary records requested by 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 Special Rapporteur's fifth report on the law of treaties (A/CN.4/183 and Add. 1-4) and certain other documents, including the Commission's report, are printed in Volume II of this *Yearbook*. The Special Rapporteur's fourth report on the law of treaties (A/CN.4/177 and Add. 1-2) is printed in Volume II of the 1965 *Yearbook*.

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MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Roberto AGO	Italy	Mr. Angel M. PAREDES	Ecuador
Mr. Gilberto AMADO	Brazil	Mr. Obed PRESSOU	Senegal
Mr. Milan BARTOŠ	Yugoslavia	Mr. Paul REUTER	France
Mr. Mohammed BEDJAOUTI	Algeria	Mr. Shabtai ROSENNE	Israel
Mr. Herbert W. BRIGGS	United States of America	Mr. José M. RUDA	Argentina
Mr. Marcel CADIEUX	Canada	Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Erik CASTRÉN	Finland	Mr. Senjin TSURUOKA	Japan
Mr. Abdullah EL-ERIAN	United Arab Republic	Mr. Grigory I. TUNKIN	Union of Soviet Socialist Republics
Mr. Taslim O. ELIAS	Nigeria	Mr. Alfred VERDROSS	Austria
Mr. Eduardo JIMÉNEZ de ARÉCHAGA	Uruguay	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. Milan BARTOŠ
First Vice-Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA
Second Vice-Chairman: Mr. Paul REUTER
Rapporteur: Mr. Taslim O. ELIAS

Mr. Constantin A. Baguinian, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

AGENDA

[A/CN.4/174/Rev.1]

The agenda for the seventeenth session was adopted by the Commission at its 775th meeting, held on 3 May 1965, and was as follows :

1. Filling of a casual vacancy in the Commission (article 11 of the Statute)
2. Law of treaties
3. Special missions
4. Relations between States and inter-governmental organizations
5. Organization of future sessions
6. Dates and places of meetings in winter and summer 1966
7. Co-operation with other bodies
8. Other business

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List of volumes published to date

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1949 Summary records and documents of the first session	57.V.1
1950, vol. I Summary records of the second session	57.V.3, vol. I
1950, vol. II Documents of the second session	57.V.3, vol. II
1951, vol. I Summary records of the third session	57.V.6, vol. I
1951, vol. II Documents of the third session	57.V.6, vol. II
1952, vol. I Summary records of the fourth session	58.V.5, vol. I
1952, vol. II Documents of the fourth session	58.V.5, vol. II
1953, vol. I Summary records of the fifth session	59.V.4, vol. I
1953, vol. II Documents of the fifth session	59.V.4, vol. II
1954, vol. I Summary records of the sixth session	59.V.7, vol. I
1954, vol. II Documents of the sixth session	59.V.7, vol. II
1955, vol. I Summary records of the seventh session	60.V.3, vol. I
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1956, vol. I Summary records of the eighth session	56.V.3, vol. I
1956, vol. II Documents of the eighth session	56.V.3, vol. II
1957, vol. I Summary records of the ninth session	57.V.5, vol. I
1957, vol. II Documents of the ninth session	57.V.5, vol. II
1958, vol. I Summary records of the tenth session	58.V.1, vol. I
1958, vol. II Documents of the tenth session	58.V.1, vol. II
1959, vol. I Summary records of the eleventh session	59.V.1, vol. I
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1965, vol. II Documents of the first part of the seventeenth session	66.V.2

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE SECOND PART OF THE SEVENTEENTH SESSION

Held in Monaco from 3 to 28 January 1966

822nd MEETING

Monday, 3 January 1966, at 3.15 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. Pessou, Mr. Rosenne, Sir Humphrey Waldoock, Mr. Yasseen.

Address of Welcome by the Minister of State of the Principality of Monaco

1. The CHAIRMAN, after declaring open the second part of the Commission's seventeenth session, said he wished first, on behalf of the Commission, to express his thanks to the Government of the Principality of Monaco for its invitation to the Commission to meet in Monaco, for its hospitality, and for its warm welcome. He then invited H.E. Mr. Jean-Emile Reymond, Minister of State of the Principality of Monaco, to address the Commission.

2. Mr. REYMOND (Minister of State of the Principality of Monaco), welcoming the Commission on behalf of H.S.H. Prince Rainier III and the Government of Monaco, said that, as he was unable to mention all the eminent members of the Commission separately, he would pay a special tribute to its senior member, Mr. Amado, who brought so much lustre to its reputation.

3. It was the first time that the United Nations, represented by one of its most important organs, had held a meeting in Monaco, and he wished it every success in achieving its three aims of freedom, victory over hunger, and peace. It was also the first time that the International Law Commission was meeting elsewhere than at one of the main offices of the United Nations, and he was particularly happy that it had chosen Monaco.

4. The territory of the Principality might be small, but it lay wide open to the sea, the subject both of some of the Commission's major achievements — the Conventions on the High Seas, the Continental Shelf, the Territorial Sea and Fishing and Conservation of the Living Resources of the High Seas — and of the re-

searches of Albert I of Monaco, known as the Prince of the Oceans.

5. The Commission was about to continue its work on the law of treaties, a subject which it had been considering since 1949; its desire thereby to contribute to the establishment and maintenance of friendly relations between States was in happy accord with the age-old aspirations of the Principality.

6. The CHAIRMAN asked Mr. Ago to reply to Mr. Reymond on behalf of the Commission.

7. Mr. AGO said that he spoke on behalf of all the members of the Commission in expressing his warm thanks to the Minister of State for his good wishes and his gracious words. The contribution made by Monaco to international understanding was familiar the world over, and the interests of the Principality and those of the Commission had been particularly close at the time when the Commission had been engaged in its codification of the law of the sea.

8. The Commission was not one of the more spectacular organs of the United Nations; its labours did not produce immediate results and it did not seek to solve the world's most pressing problems. It was in the long term that its work was of importance to peace.

9. It was a source of pleasure to the Commission that Monaco had been chosen as the scene of its first winter session, and it wished to express its gratitude to the Principality for its hospitable welcome.

10. Mr. AMADO, after thanking the Minister of State for his more personal remarks, said it was a pleasure to work in the Principality. Whether it was reformulating existing rules of positive law or dealing with a subject like the continental shelf, on which neither State practice nor conventions had existed at the time, the Commission's overriding purpose was to reconcile the interests of States, for without agreement between States there could be no law.

11. Mr. BAGUINIAN, Secretary to the Commission, speaking on behalf of the Secretary-General of the United Nations, said he wished to express to H.S.H. Prince Rainier and the Government of the Principality of Monaco his gratitude for their generous invitation to the Commission, for the facilities placed at its disposal and for the co-operation the Secretariat had received from officials of the Government. In particular, he wished to thank H.E. Mr. Reymond, Minister of State, for having made the session possible and H.E. Mr. Crovetto,

Minister Plenipotentiary, who had first put forward the idea of a session of a United Nations organ at Monaco.

12. During the present year, in order to complete two important sets of draft articles before the expiry of the term of office of its present members, the Commission would meet for longer than in any year since it had been set up in 1949. If those tasks were successfully completed, it would be due in large measure to the contribution of the Government of Monaco.

13. The CHAIRMAN said that Monaco had always made an important contribution in the international sphere to humanitarian endeavours and to scientific work on the sea. In particular, its contribution had had a marked influence on the elaboration of modern international law. He wished to associate himself with previous speakers in expressing the Commission's thanks to the Principality.

Law of Treaties

(A/CN.4/177 and Add.1-2, A/CN.4/183 and Add.1-2)

[Item 2 of the agenda]

ORDER OF DISCUSSION OF THE DRAFT ARTICLES

14. The CHAIRMAN said that several members of the Commission, some of whom were also members of the Drafting Committee, had been detained by other duties but had informed him that they would be arriving shortly. The Drafting Committee could nevertheless begin its work, though the French and Spanish texts of the articles it would draft would have to be regarded as provisional until the members who had been given by the Commission the responsibility for drafting in those languages had arrived.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been asked by Mr. Ruda, whom he had seen in London, to convey to the Commission his regrets that, since Argentina was now a member of the Security Council, and he had been appointed to represent his country at the United Nations, it would not be possible for him to attend the earlier meetings of the present session.

16. The Commission had before it his fifth report on the law of treaties (A/CN.4/183 and Add. 1 and 2). Its first objective must be to complete its work on the articles in part II and to dispose of articles 8 and 9, on participation, and article 13 on accession, in part I (A/CN.4/177).

17. In his fifth report, he had followed the same general method as in the fourth (A/CN.4/177 and Add.1 and 2), giving for each article an analysis of the comments by governments together with his own suggestions in the light of those comments.

18. In paragraph 10, he had made certain proposals regarding the arrangement of the articles. The matter was of immediate importance because, in his fifth report, he had presented the various articles in the order indicated in paragraph 10, and he accordingly suggested that, at a very early stage in the present session, the Drafting Committee examine that question of arrangement and submit proposals to the Commission.

19. He had suggested re-arranging the articles, partly because he had noticed from their comments that governments had not always appreciated the impact of certain general provisions or realized the interdependence and inter-action of the various articles, and partly in order to allay in some measure the concern expressed by certain governments at the possible effect on the stability of treaties of the various provisions on essential validity and termination. If the provisions which indicated the limitations imposed on invoking grounds for invalidity and termination were placed at the beginning of part II, that part as a whole would be so presented as not to seem to encourage too easy a recourse to those grounds.

20. In his fifth report, he had made brief references to articles 30, 31 and 32 but the texts of those articles, his analysis of the government comments thereon and his own proposals for redrafts were to be found in his fourth report (A/CN.4/177/Add.2).

21. He proposed that the Commission start by examining the articles as set out in his fifth report and that the Drafting Committee be requested to consider the question of the arrangement of the articles in part II, so as to clarify that matter during the present winter session.

22. Mr. BRIGGS asked whether the Secretariat had received any further government comments on part II in addition to those already referred to in document A/CN.4/175 and the addenda thereto.

23. Mr. WATTLES (Secretariat) replied that the only additional ones were some short comments from the Government of Pakistan.

24. Sir Humphrey WALDOCK, Special Rapporteur, said that he had seen an advance copy of those comments and they did not appear to add very much to the statements made by the delegation of Pakistan in the Sixth Committee of the General Assembly, which were already analysed in document A/CN.4/175 and addenda.

25. Mr. BRIGGS said that in that case he could support both the proposals of the Special Rapporteur.

26. Mr. AGO said that he could accept the Special Rapporteur's first proposal regarding the Drafting Committee; he had considerable doubts, however, about the second proposal. Admittedly, comments by governments had, in general, to be taken into account, but he was less disposed to follow them where the arrangement of the Commission's draft was concerned, since questions of system were essentially a matter for the Commission itself. Pending the conclusions of the Drafting Committee, he would prefer that provisionally the Commission take as a basis the system it had adopted previously, which was a logical one, for normally the subject matter of articles 30-35 should be dealt with before that of the articles which the Special Rapporteur proposed to insert between articles 30 and 31.

27. Mr. ROSENNE said he would urge that articles 8, 9 and 13 be discussed by the Commission only when the maximum feasible attendance of members was present.

28. The CHAIRMAN said that the Sixth Committee of the twentieth General Assembly had adopted a resolution requesting the International Law Commission

to take the Committee's discussions on the drafts submitted to it by the Commission into account, and directing that the summary records of those discussions be communicated to the Commission.

29. Personally, he did not agree with those delegations which had said that, since Foreign Ministries had not had time to submit their comments in writing, the views expressed by government representatives during the Assembly's session should be accepted in lieu of the comments of governments. But the Commission had to respect the wishes of the Sixth Committee, and so must take those views into account. He asked whether the Special Rapporteur had taken those views into consideration.

30. Sir Humphrey WALDOCK, Special Rapporteur, said that, in preparing his fifth report, he had so far as possible taken into account the views expressed in the General Assembly. Inevitably, however, the necessity to submit his report to enable it to be translated in time into the other languages for the winter session had meant that only a part of those comments had been taken into consideration.

31. Mr. WATTLES (Secretariat) said that the Secretariat regularly prepared a digest of the views expressed in the Sixth Committee, but since the summary records on which it was based were as yet only provisional, it could not be available to the Commission until the summer session.

32. The CHAIRMAN said that, in requesting the Commission to take note of the Sixth Committee's summary records, the Committee had not specified any time limit; it would certainly be sufficient if the Commission consulted the final summary records during its summer session.

33. Mr. ELIAS said it would be best to defer consideration of the controversial articles 8, 9 and 13 until the eighteenth session, when there was a greater likelihood of nearly all the members of the Commission being present.

34. As far as the order of discussion was concerned, he was in favour of taking up the articles in the order in which they appeared in document A/CN.4/L.107 and of considering their final arrangement later, a matter which would probably have to be dealt with towards the end of the eighteenth session.

35. Mr. PESSOU, supporting Mr. Ago's proposal, said it was a functional proposal which presupposed a methodical approach. Each article had a clearly defined juridical function and produced a specific effect. If the Commission discussed the articles piecemeal, co-ordination would become impossible. It was for the Commission to decide on a systematic approach. It had a technical task which was entirely divorced from political matters.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that he was not altogether clear as to what considerations had prompted Mr. Ago's proposals.

37. The first question that the Commission had to consider was the arrangement of the content of part II of the draft. It would have to decide how to deal with a number of general provisions, such as those concerning

preclusion and separability which related to the essential validity of treaties and their termination, and whether or not it was desirable to stress the grounds which might prevent a treaty from being applied.

38. In his fifth report, he had made some changes of order for reasons of more systematic presentation, and also in an attempt to meet the strong objections by certain governments that some of the provisions might threaten the security and stability of treaties. He had transferred the provisions which had the effect of restricting the right to invoke invalidity to the beginning of part II, to follow article 30. In its previous draft the Commission had repeated in a number of articles some of the provisions concerning separability, but had not done so with the provisions on preclusion.

39. In the interests of clearer presentation, it might be wiser to indicate which general provisions affected all the articles, apart from certain specified exceptions, and that was a matter that could be considered by the Drafting Committee.

40. Mr. ROSENNE said that in some respects the order adopted at the fifteenth session had been accidental and that the provisions concerning separability, which had proved particularly troublesome, had been as it were tacked on at the end of part II. Perhaps in the interest of orderly discussion the wisest course would be to take up the articles in the order adopted at the fifteenth session, and then to consider whether any rearrangement was required in the light of the discussion both in the Commission and in the Drafting Committee. Though of considerable importance, the order was a technical matter.

41. He agreed with what had been said by Mr. Elias concerning articles 8, 9 and 13, particularly in view of the statement by the Secretariat.

42. Mr. BRIGGS said he agreed with the Special Rapporteur's suggestion, which would not entail the Commission's having to make a final decision as to the order of the articles.

43. He also supported Mr. Elias's proposal to postpone consideration of articles 8, 9 and 13 until the eighteenth session.

44. Mr. AGO said that he would have preferred that the Special Rapporteur should indicate whether it was for practical reasons that he thought certain articles should be dealt with before others. In his (Mr. Ago's) opinion, the fact that certain articles preceded others would hardly reassure States which were concerned over the stability of treaties; that reassurance would be given by the text as a whole.

45. Since cross-references to earlier or later articles were inevitable, the lesser evil should be chosen; for example, it seemed neither logical nor elegant to mention the loss of the right to invoke reasons for invalidity before the conditions for the validity of treaties had been dealt with. The Commission should therefore adhere to the order it had chosen, subject to a final review of the order of the articles by the Drafting Committee.

46. Mr. CASTRÉN said that, while not perhaps agreeing with the Special Rapporteur in every respect so far as the new order was concerned, the redraft was

an improvement as to form. He accordingly thought that the order proposed by the Special Rapporteur should be followed. The Special Rapporteur had prepared the redraft in the light of that order and would find it difficult to rearrange the text if the Commission reverted to the former order.

47. Sir Humphrey WALDOCK, Special Rapporteur, said he hoped that the new version of article 47, paragraph 1, would satisfy Mr. Ago and meet his criticism that it would be inelegant to refer to the loss of a right to allege the nullity of a treaty before laying down the conditions of validity.

48. Mr. AGO said it was evident from Mr. Castrén's and the Special Rapporteur's remarks that the order of the articles must inevitably affect the substance of the articles. The text would vary with the Commission's decision regarding the placing of any one article. He therefore maintained his proposal that, for the time being, the Commission retain the earlier order.

49. Mr. YASSEEN said that the Commission customarily took the Special Rapporteur's draft as the basis for its discussion. In his latest report, however, the Special Rapporteur had changed the order, and the change in the order of the articles reflected a change in approach which to some extent affected the scope of certain rules. If the Commission took the Special Rapporteur's report as the basis for its discussion, it should follow the order suggested by the Special Rapporteur, but that course would not necessarily imply its acceptance of the order.

50. In his opinion, the Commission should, for the sake of convenience, follow the order proposed by the Special Rapporteur, without prejudice to its future attitude regarding the substance, and subject to the proviso that it was at liberty to revert to the original order.

51. Mr. AMADO said that the order of the articles should be dealt with later and that, instead of looking at the outside, the Commission should look at the intrinsic foundations of the structure of its draft. What he personally was interested in was the content of the one or other article, in order that he could make up his mind whether the article deserved his approval.

52. Mr. CADIEUX said that the discussion should proceed on the basis of the Special Rapporteur's proposals. The Commission was clearly caught in a vicious circle because the placing of an article would influence its drafting. The Commission should, however, tackle the problem without prejudice to its future decision regarding the order of the articles. The Special Rapporteur's proposals made it possible to deal with the question in the light of new factors and to make progress.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the decision as to the order in which the articles were to be discussed was perhaps not of such fundamental importance as some members thought. He had tried in his new text not to alter the substance of the articles previously approved, except where that was called for by well-founded observations from governments or where some variation of nuance was needed. The advantage of transferring general provisions to the

beginning of part II was a technical one and could appropriately be discussed by the Drafting Committee. He would have thought it might be convenient to follow the order he had chosen in his fifth report primarily for scientific reasons, though he had no wish to impose his views on the Commission.

54. The CHAIRMAN said that opinion was divided and that, since at present the Commission only had a quorum for discussion, not for voting, it could not settle the matter by a vote. He suggested that the discussion be continued the next day, by which time more members would have arrived.

55. Mr. AGO said he supported the Chairman's suggestion.

56. Mr. BRIGGS said he presumed that the Commission would start by discussing article 30 and that he hoped agreement would soon be reached on which articles it would take after that, so as to give members due warning as to which articles they should study first.

57. The CHAIRMAN said that, at the next meeting, the Commission would first consider article 30, and would then decide whether to go on to article 31 or whether to take article 49.

The meeting rose at 5.20 p.m.

823rd MEETING

Tuesday, 4 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/177 and Add.1-2, A/CN.4/183 and Add. 1-2, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 30 Presumption as to the validity, continuance in Force and operation of a treaty)

Article 30

Presumption as to the validity, continuance in force and operation of a treaty

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, unless the nullity, termination or suspension of the operation of the treaty or the withdrawal of the particular party from the treaty results from the application of the present articles. (A/CN.4/L.107, p. 31)

1. The CHAIRMAN welcomed Mr. Caicedo-Castilla, the observer for the Inter-American Juridical Committee, who had arrived to attend the Commission's proceedings.

2. He said he had been informed that, for health reasons, Mr. El-Erian had had to postpone his arrival by a few days, while Mr. Paredes had had to give up entirely the idea of attending the session.

3. He invited the Commission to begin its consideration of article 30, for which the Special Rapporteur, in his fourth report (A/CN.4/177/Add.2, p. 7), had proposed a rewording which read :

Every treaty concluded and brought into force in accordance with the provisions of part II shall be considered as being valid, in force and in operation with regard to any party to the treaty, unless the invalidity, termination or suspension of the operation of the treaty or the withdrawal of the party in question from the treaty results from the application of articles 31 to 51 inclusive.

4. Mr. CASTRÉN said that he wished first to comment on the title of part II of the draft articles. He agreed with the Special Rapporteur's proposal that the title be expanded by the inclusion of a mention of the suspension of the operation of treaties.

5. He hoped, however, that in that title, and also in that of section 2, the term " validity " would be used instead of the term " invalidity " because, first, the validity of a treaty was the normal and not the exceptional case, a point stressed not only in article 30 but also in article 31. Neither in treatises on international law nor in monographs on international treaties was the negative form used. Secondly, there were cases where a treaty, although not valid *per se*, nevertheless remained in force because no party had invoked its invalidity within a reasonable period. Thirdly, under the heading " validity " it would be possible to deal with exactly the same points as under the head " invalidity ", so that the affirmative form offered only advantages.

6. Sir Humphrey WALDOCK, Special Rapporteur, said that the question raised by Mr. Castrén regarding the title of part II was connected with the general problem of the arrangement of the draft articles as a whole. It would therefore be advisable to leave that question to the Drafting Committee.

7. When he had first dealt with the subject matter of part II in his second report, he had used the title " The essential validity, duration and termination of treaties ".¹ The present title, " Invalidity and termination of treaties ", had resulted from a decision of the Commission at the end of its fifteenth session;² it had been felt then that the subject matter of the articles in part II really related to invalidity.

8. The question of the title of part II was also connected with his own general preoccupation with the impact of the articles in part II on the stability of treaties. It was that preoccupation that had led him to place at the beginning of part II a provision laying down the presumption that a treaty was valid until some grounds of invalidity had been established. The Commission had, at its fifteenth session, adopted that provision as the opening article of part II in order to offset the fact that

subsequent articles in the same part contained somewhat destructive provisions.

9. With regard to article 30 itself, when the Commission had adopted it, it had not yet dealt with the *pacta sunt servanda* rule; since that time, the Commission, at its sixteenth session, had adopted article 55, which dealt with that rule, so that article 30 might now be less essential. No decision on the retention or otherwise of article 30 should, however, be taken until the Commission had decided on the arrangement of the articles as a whole. If article 55 were finally to appear at the beginning of the series of articles following part I, on the conclusion of treaties, the purpose of article 30 would be largely served. Even so, article 30 might still be useful to meet the concern expressed by governments regarding the effect of the draft articles on the stability of treaties.

10. In his fourth report, he had put forward a rewording of article 30, which took into account the fact that the draft articles now dealt not only with the invalidity and termination, but also with the suspension of the operation of treaties.

11. He asked the Commission to consider whether article 30 should be retained, a question which to some extent depended on the general structure of the draft articles, and if so, whether it wished to change the wording of the article 30 as adopted at its fifteenth session.³

12. Mr. YASSEEN, referring to the title of part II, said that the new wording proposed by the Special Rapporteur suffered from the defect, at least in the English text, that it did not sufficiently differentiate between invalidity and termination — which affected the treaty itself — and suspension, which affected not the treaty itself but its operation. The difference was important from the point of view of the effects of the provisions contained in the article.

13. Mr. ROSENNE said that he felt hesitant with regard to the retention of article 30. Its contents represented perhaps the other side of the *pacta sunt servanda* rule, and one possibility might be to combine them with the provisions of article 55.

14. Article 30 had certainly been necessary in 1963, before the Commission had adopted article 55, but the whole question now appeared in a different light. It might be that the thought contained in article 30 should ultimately find a place in the preamble to the future convention on the law of treaties, although it was not, of course, the practice of the Commission to submit a preamble for its draft conventions, and he did not suggest any change in that practice.

15. He made those remarks with all reservations because he did not wish to commit himself on the question of article 30 at the present stage; he agreed with the Special Rapporteur that its retention depended largely on the terms of the other articles and their placing. With those reservations, he wished to make certain suggestions on the rewording now proposed by the Special Rapporteur.

16. The text of article 30 had been drawn up in 1963; since then, at the first part of its seventeenth session, the

¹ *Yearbook of the International Law Commission, 1963*, Vol. II, p. 38.

² *Ibid.*, p. 189, para. 11.

³ *Ibid.*, p. 189.

Commission had adopted a new version of articles 1 to 29. In particular, it had refined its formulation of the various stages through which a transaction proceeded before it became a binding and operative treaty for a given State. In consequence, care would be needed in determining the exact stage in that process at which article 30 itself would start to take effect.

17. Article 30 had been drafted in the form of a presumption. The Commission, however, had been making every effort to avoid drafting its articles in the form of presumptions pure and simple, or mere descriptions, and had worked more in the direction of stating the law in terms of legal rules or statements of legal principle. If article 30 were to be retained merely in the form of a presumption, it might have the effect of detracting from the stability of treaties and of introducing an additional source of uncertainty, confusion and even tension. For those reasons, he felt that article 30 should lay down a clear binding rule of law rather than a presumption.

18. With those considerations in mind, he had two observations to make on the Special Rapporteur's rewording of article 30. The first related to the use in the opening words of both the term "concluded" and the term "brought into force". Such use was not consistent with the time-structure of the creation of a treaty obligation as it emerged from articles 15 and 23, as adopted at the first part of the present session, and the provisions of article 56, as adopted at the sixteenth session, regarding the validity in time of a treaty. The point of time to which article 30 must be attached should be the moment from which the treaty entered into force for a given State in accordance with the provisions of article 23.

19. His second observation related to the closing words "results from the application of articles 31 to 51 inclusive". That reference might perhaps be sufficient to cover invalidity, but the termination or the suspension of the operation of a treaty could emerge from other articles as well. Articles on reservations provided one example; other examples were provided by article 63 (Application of treaties having incompatible provisions) and article 64 (The effect of severance of diplomatic relations on the application of treaties); possibly also, the provisions of article 68 (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law) might in fact lead to some sort of suspension of the operation of the treaty. There could also be cases of suspension, and even of termination, which were not covered by the Commission's draft articles at all; for instance, the important case of obsolescence, although that could perhaps be brought within the scope of the articles on revision or interpretation.

20. He accordingly suggested that article 30 be reworded on some such lines as the following:

"Every treaty, after its entry into force in accordance with the provisions of section 2 of part I, shall be operative with regard to any party to the treaty unless the invalidity, the termination or the suspension of the operation of the treaty, or the withdrawal of a party from that treaty, results from the application of these articles".

21. In that form, article 30 would be stating a rule of law and not a presumption, and would also be better

co-ordinated with the draft articles adopted by the Commission during the first part of its seventeenth session.

22. With regard to the title of part II, he supported for the time being the position of the Special Rapporteur.

23. Mr. AGO said that, before discussing the actual text of article 30, the Commission should settle the preliminary question asked by the Special Rapporteur as to whether the article should be retained or not. For the moment his personal inclination was to support the Special Rapporteur's proposal that article 30 should stand. He certainly did not share the opinions of those who were reluctant to restate in article 30 what was stated in article 55, or who thought of amalgamating the two articles.

24. The two articles dealt with entirely different questions. Article 55 laid down the rule *pacta sunt servanda* and the obligation of the parties to perform in good faith a treaty which was in force. Article 30, on the other hand, dealt with the question of determining whether a treaty was or was not in force, in other words of determining whether the necessary condition for the application of article 55 was fulfilled. To try to amalgamate article 30 with article 55 would therefore lead to confusion.

25. The question whether the provision was or was not necessary could hardly be answered without examining the subsequent articles which enumerated the grounds that could be invoked for regarding a treaty as invalid.

26. He could see two reasons for retaining article 30. The first, which had been stressed by the Special Rapporteur, was a general political reason; namely, that several governments had expressed the view that the draft gave rather too much prominence to the grounds on which a treaty could be regarded as invalid. A clause to reassure governments with regard to the stability of existing treaties might therefore be useful.

27. The second reason was, as Mr. Rosenne had said, that article 30 did not in fact lay down a presumption but rather a rule of substance. It was indispensable to state clearly that the only grounds for invalidity were those specified in the subsequent articles, and that in all cases other than those expressly specified the treaty was in force. Such a rule would greatly contribute to the stability of treaties.

28. Mr. TUNKIN said that, at the first reading, he had already expressed some doubts regarding the necessity for article 30. Since then, in article 55, the Commission had stated the *pacta sunt servanda* rule, which was the essential rule in the matter.

29. Article 30 seemed rather pointless: it stated the obvious fact that a treaty was valid when it was not invalid, and that it was in force unless, under some provision of the draft articles, it was not in force. At a conference of plenipotentiaries, it would no doubt be felt that article 30 contained an academic statement, and stated a logical presumption rather than a legal rule. Perhaps some of its contents could be incorporated in article 55.

30. Mr. BRIGGS said that, on reflection, he had some doubts regarding the necessity for article 30, and on the whole shared Mr. Tunkin's views.

31. It seemed tautological to speak of a treaty “concluded and brought into force”. As indicated in the 1935 commentary to article 21 of the Harvard Research draft, the word “conclude”, in the case of a treaty, referred to “the sum total of the acts or processes by which a treaty is brought into force with respect to a State”.⁴ If the Commission were to decide to retain article 30, he would therefore suggest dropping the words “and brought into force”.

32. He noted that Mr. Rosenne had made an effort to reword the article, placing the emphasis on the concept of bringing a treaty into operation, but such an approach was hardly consistent with the original intention of article 30.

33. Despite the distinction which Mr. Ago had drawn between the purpose of article 30 and that of article 55, he still felt that article 30 served no useful purpose. Moreover, he could not support the suggestion to amalgamate it with article 55, since that would only weaken the statement, in article 55, of the essential *pacta sunt servanda* rule.

34. Mr. AMADO said that his principal concern was that the fundamental rule, *pacta sunt servanda*, should not be diluted to the point of becoming a residuary rule, a risk against which the Special Rapporteur had rightly warned the Commission. Despite the views expressed during the discussion, he did not see any overriding need for keeping article 30.

35. Mr. YASSEEN said that he adhered to the conclusion he had reached at the Commission's fifteenth session in 1963, which was that the article laid down a rule which, while correct, was self-evident, and thus unnecessary.⁵

36. Mr. CADIEUX said he had the impression that the rule laid down in article 30 might have some positive value. Whether it was essential was a different question, the answer to which would depend in part on the contents of the rest of the draft. Consequently, it was perhaps preferable that the Commission should suspend judgment on that point until it had settled the terms of the other articles.

37. When making its final decision on article 30, the Commission should bear in mind the Special Rapporteur's concern, which was that the comments of governments should be taken into account.

38. Mr. AGO said that it was a very delicate question. Unlike Mr. Amado, he did not believe that article 55 would be in any way weakened if article 30 were retained. The duty to apply a treaty existed only if the treaty was in being and was valid. Article 30 was concerned only with the latter question.

39. Nor was it entirely accurate to say, as Mr. Tunkin had done, that article 30 stated the obvious — that any treaty was valid unless it was invalid. The idea expressed in article 30 should be that any treaty was valid unless it was invalid for any of the reasons enumerated. That

was the heart of the matter. If the Commission should wish to admit possible grounds for invalidity other than those mentioned in articles 31 and subsequent articles, then it should drop article 30. In his opinion, the Commission ought to limit those possible grounds very strictly. Unless that limitation emerged clearly from the subsequent articles, then article 30 should be retained.

40. Mr. AMADO said that, if Mr. Ago's description of article 30 as a restrictive article was correct, then it should be retained, for it would debar all further grounds of invalidity.

41. Mr. ELIAS said he shared the view that article 30 should be deleted. He would, however, be prepared to see it referred to the Drafting Committee for further consideration before the Commission reached a final decision on whether to retain it or to transfer its contents to the commentary to article 55.

42. When the Commission had considered the *pacta sunt servanda* rule in article 55, attempts had been made to introduce a number of exceptions into that article, but the Commission had reached the conclusion that the *pacta sunt servanda* rule should be stated in absolute terms. It was true that article 30 did not contain an express derogation from the provisions of article 55, but its retention was likely to create confusion in the minds of those who were not aware of the reasoning behind the Commission's decisions.

43. Article 30 did not state any very strong rule. It had been adopted in 1963 in order to introduce some kind of logical completeness at a time when the Commission had not yet considered the *pacta sunt servanda* rule. In 1963, it had seemed appropriate to include article 30 in order to link the contents of part I with those of part II. If, however, the Commission, when it adopted article 55, had re-examined article 30, many members would have doubted the usefulness of retaining it.

44. Mr. CASTRÉN said that article 30 was useful for the reasons given by Mr. Ago. The text was open to criticism in that it stated only the obvious, but several governments wished the article to stand. In any case the article was quite innocuous. He proposed that it be retained at least for the time being.

45. Mr. TUNKIN said that Mr. Ago had raised a valid point; article 30 would serve some purpose if its intention was to state that the only possible exceptions to the validity and full operation of a treaty were those stated in the draft articles.

46. The idea was important but was connected with the contents of article 55, by virtue of which a “treaty in force”, which must of course be a valid treaty, was “binding upon the parties to it and must be performed by them in good faith”. Perhaps the idea could be included in article 55.

47. He was, however, prepared to accept the suggestion that the Drafting Committee be requested to examine whether article 30 should be retained or its contents included in article 55; the Drafting Committee could also consider whether any other course was open.

48. Mr. AMADO said that article 55 contained two distinct ideas: first, the fundamental maxim *pacta sunt servanda* and, secondly, the rule that treaties should be

⁴ *Research in International Law*, “III, Law of Treaties”; Supplement to the *American Journal of International Law*, Vol. 29, 1935, p. 992.

⁵ *Yearbook of the International Law Commission*, 1963, Vol. I, p. 195, para. 73.

applied in good faith. The second idea did not necessarily flow from the first.

49. Mr. ROSENNE said that he had been impressed by the analysis made by Mr. Ago so far as concerned the limitative function of article 30 regarding invalidity. He would question, however, whether article 30 could perform the same function with regard to the termination of a treaty, the suspension of its operation or the withdrawal of a party from it.

50. He favoured the suggestion to refer the matter to the Drafting Committee, though it would only be able to take a decision in the light of the draft articles as a whole.

51. Mr. YASSEEN said that he had questioned the need for article 30 in so far as it raised a presumption but that, after hearing Mr. Ago's arguments, he realized that the article might have some use as a restrictive rule. But the article as at present drafted stressed the first aspect, the presumption. The Commission should therefore revise the article, if it was intended to lay down a rule of law limiting the grounds for the nullity of treaties. Such a rule would be useful for the certainty and stability of treaties.

52. Without wishing to make a formal proposal, he suggested that, in the light of the concern expressed by Mr. Ago, article 30 be drafted on some such lines as: "A treaty cannot be invalidated or terminated, and its operation cannot be suspended, except by virtue of articles 31 to 51." That wording, however, presupposed that the Commission would have made certain that its draft covered all possible causes of the nullity or the termination of treaties.

53. Mr. AGO, replying to Mr. Rosenne, said that the Commission would no doubt have to redraft article 30, but would not be able to do so until it had looked at and settled the terms of all the articles from 31 to 46.

54. Mr. AMADO said that the discussion had originated from the Special Rapporteur's praiseworthy concern that the comments of governments should be taken into account and that aspect should be given due consideration.

55. The CHAIRMAN, speaking as a member of the Commission, said that article 55 was concerned with validity in the sense of the performance and observance of treaties. The two possible situations were, either that the State had an obligation to perform under the treaty in force, or that it could exercise a right within the limits of a treaty in force. From that point of view, Mr. Ago's analysis was tenable. In his (the Chairman's) view, however, article 30 dealt with an entirely different question, namely, whether a treaty, once in force, remained in force or could be challenged on any grounds.

56. Like Mr. Ago, he thought that article 30 dealt with exceptions, in other words, that it provided that there could be no nullity, withdrawal or suspension except on the grounds specified in the draft articles.

57. He agreed with Mr. Rosenne that other articles might perhaps speak of grounds for invalidity other than those referred to in article 30. He considered, therefore, that the Commission should retain the article, while making it clear that what it stated was not a

presumption but a general rule, to which there might be certain exceptions listed in the draft articles.

58. He could not agree with the suggestion that the idea might be dealt with in the commentary. Commentaries either disappeared or lost their usefulness as an indication of what the original authors had had in mind when challenged by those who denied that *travaux préparatoires* were of any value.

59. Sir Humphrey WALDOCK, Special Rapporteur, said that there appeared to be a measure of agreement on the question whether to delete or to retain article 30, though members might wish to reserve final judgment until they had the whole of the draft articles before them. The majority seemed to be in favour of leaving the article to the Drafting Committee for consideration in the light of the discussion.

60. His own position was very close to that of Mr. Ago; article 30 was necessary in order to emphasize that the normal position was that of the validity of the treaty. The provisions of article 30 would provide a useful bulwark for the stability of treaties, by indicating that any party wishing to invoke grounds of invalidity or termination would have to establish those grounds in accordance with the provisions of the draft articles.

61. Another useful purpose served by article 30 was to make it clear that any State wishing to invoke grounds of invalidity or termination would have to establish those grounds in accordance with the orderly procedure laid down in article 51, one of the more important provisions of part II.

62. The Commission would have to be satisfied that it had not omitted any grounds for invalidity. As indicated by Mr. Rosenne, there could well be some other grounds, such as obsolescence or desuetude. That question had so far been treated as covered either by the provisions on tacit agreement to terminate a treaty, or by those on fundamental change of circumstances. His own view was that it was tacit agreement which covered them. He was inclined to agree that unless all the grounds for invalidity and termination were covered, the residuary rule embodied in article 30 could become a danger rather than a safeguard.

63. In his opinion, the provisions of article 30 should not be amalgamated with those of article 55. The two sets of provisions served different purposes. Article 55 dealt with a treaty with respect to which neither validity nor termination was in discussion.

64. He suggested that all the useful drafting suggestions made during the discussion be referred to the Drafting Committee. He favoured, in particular, Mr. Rosenne's suggestion to widen the reference in the concluding words so as to cover all the draft articles. It was essential to ensure that none of the draft articles which contained provisions for suspension or termination was overlooked.

65. The CHAIRMAN said that, if there were no objections, he would consider that the Commission agreed to refer article 30 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁶

⁶ For resumption of discussion, see 841st meeting, paras. 21-41.

ORDER OF DISCUSSION OF THE DRAFT ARTICLES (*resumed from the previous meeting*)

66. The CHAIRMAN invited the Commission to resume its discussion of the order in which it would take the draft articles.
67. Sir Humphrey WALDOCK, Special Rapporteur, said that it did not matter very much in what order the Commission discussed the articles contained in part II, provided it came to a clear decision on the best way of dealing with the general provisions that were applicable to a number of articles concerning invalidity, termination and suspension. He had transferred those general provisions to the beginning of section I in order to indicate which were the rules regulating the conditions for invoking invalidity and termination, but he was aware that the material could be arranged differently, as had been done in the 1963 draft.
68. He was uncertain whether, at its fifteenth session, the Commission had been right in formulating the provisions concerning separability always in the form of an option, leaving it to the State concerned to decide whether or not to invoke invalidity or termination in respect of only certain clauses in the treaty or of the treaty as a whole.
69. Certainly in cases of fraud, which fundamentally affected confidence between two parties, the defrauded party should have the option to invoke the termination of the whole treaty, or only those parts to which the fraud particularly related. But, in cases of error or *rebus sic stantibus*, it was by no means so clear that it should be a matter of choice. If the conditions for separability existed, it was arguable that the effects should be limited to particular clauses.
70. Although it might be convenient to discuss the articles in the order he had suggested in his fifth report, as Special Rapporteur he would have no objection to taking them in the order of the 1963 draft.
71. Mr. TUNKIN said that to some extent the Commission had already considered the problem of how the material should be arranged, and he doubted whether at the present juncture it was in a position to make any final decision on the matter. The Drafting Committee should be asked to consider first the scheme of the whole draft and to make proposals on the subject to the Commission. In the meantime, the Commission itself should discuss the articles in the order in which they appeared in the 1963 draft.
72. The CHAIRMAN said that he would be inclined to advise the Commission not to take a decision for the time being on the final order of the articles. It had not been disputed that some changes would have to be made in the 1963 order; the Special Rapporteur would be discussing the question of the structure of the articles with the Drafting Committee.
73. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission could not afford to be too cavalier about the question of the order of the articles, because it would affect their actual drafting and members ought soon to have a fairly clear idea of the general arrangement of the articles. He was particularly concerned at the possibility of the Commission having over-
- looked the fact that the provisions concerning separability were also applicable to cases when a party lost the right to allege the nullity of a treaty.
74. He would have no objection to the Commission discussing the articles in the order adopted in 1963, though he had not been convinced by Mr. Ago's scientific arguments in favour of that order, because at its fifteenth session the Commission had deliberately decided to deal in part II with the grounds on which invalidity or termination could be invoked and not with conditions of validity.⁷ The difference was one of approach.
75. If the Drafting Committee were to decide that it would be preferable, for scientific reasons, to separate conditions of validity from the grounds for terminating a treaty, the drafting of the actual articles might have to be substantially modified.
76. Mr. TUNKIN said that inevitably the final structure of the whole draft would have to be determined during the final stages of the discussion, but until that moment was reached, the Drafting Committee could still usefully consider what rearrangement might be needed in part II.
77. Mr. AGO said he was anxious that the Commission should not, without due reflection, change the order of the articles in a manner which would have the effect of amending the text. The simplest plan was to ask the Drafting Committee to take up the problem at once. While awaiting the Drafting Committee's decision on what would be the best arrangement, the Commission could continue to consider the articles in their 1963 order.
78. Sir Humphrey WALDOCK, Special Rapporteur, said that even if the new order he was proposing for the articles in part II found favour, that would not involve the Commission in taking any final decision. He was personally quite sure that changes in the order of individual articles would have to be made until late in the eighteenth session, but the general problem of order could not be postponed indefinitely. The Commission was reaching a point when it must obtain a fairly clear idea of the general structure, and that would certainly greatly assist him in his task as Special Rapporteur.
79. The CHAIRMAN suggested that the Drafting Committee be asked to examine the provisional order of the articles as soon as possible. Meanwhile, the Commission would continue its consideration of the articles in the order in which they appeared in document A/CN.4/L.107.

It was so agreed.

ARTICLE 31 (Provisions of internal law regarding competence to enter into treaties)

Article 31

Provisions of internal law regarding competence to enter into treaties

When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 5 to be furnished with the necessary

⁷ *Yearbook of the International Law Commission, 1963, Vol. II, pp. 188-9, para. 11.*

authority, the fact that a provision of the internal law of the State regarding competence to enter into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree. (A/CN.4/L.107, p. 31)

80. The CHAIRMAN invited the Commission to consider article 31, for which the Special Rapporteur had proposed a new title and text reading:

Violation of internal law

The fact that a treaty has been concluded in violation of its internal law may be invoked by a State as invalidating its consent to be bound by the treaty only if the violation of its internal law was known to the other States concerned or was so evident that they must be considered as having notice of it. (A/CN.4/177/Add.2, p. 18)

81. Sir Humphrey WALDOCK, Special Rapporteur, said that a number of governments had commented on article 31 and most of them had accepted, as the best compromise possible on a difficult problem, the fundamental thesis that any failure to comply with the provisions of internal law did not in principle affect the validity of the treaty, and that its invalidity could only be invoked when that failure had been manifest.

82. He had proposed a new and shorter version of the article. One important change was the omission of the cross-reference to article 4 which dealt with evidence of authority to represent the State in the conclusion of a treaty. During the first part of the seventeenth session, article 4 had been extensively revised and he had come to the conclusion that it was relevant to article 32, but not to article 31.

83. Governments had criticised the proviso "unless the violation of its internal law was manifest" in the Commission's text of article 31, on the grounds that it was obscure and that it was not clear to whom the violation should be manifest. He had taken that objection into account and had redrafted the clause on the lines proposed by the Netherlands Government.

84. Mr. ELIAS said that, in general, the Special Rapporteur's new text for article 31 was an improvement and was acceptable. At the fifteenth session his main objection to the earlier version had been to the use of the word "manifest", particularly when qualified by the word "absolutely".⁸

85. He agreed that the cross-reference to article 4 should be dropped as it had no particular relevance to article 31, in which it was important to stress that consent, when not properly expressed, could be a ground for invalidity.

86. Mr. BRIGGS said that, at the fifteenth session, he had abstained from voting on article 31 for the only reason that he objected to the exception stated at the end of the article.

87. The new text was in certain respects an improvement. The word "known" was certainly preferable to

the word "manifest", but it would be better to refer to "the other parties" rather than to "the other States concerned".

88. Possibly the Special Rapporteur had gone a little too far in accepting the drafting suggestions of certain governments and he considered that the words "or was so evident that they must be considered as having notice of it", which unduly broadened the provision, should be dropped. He did not favour the change to the permissive form: the original text had laid down a prohibition according to which a party could not invoke the violation of internal law as invalidating its consent to be bound.

89. He doubted whether the Special Rapporteur was right to speak of "the fact" that a treaty had been concluded in violation of internal law, when what was meant was a claim, or an allegation, that that had occurred. Reference should be made to the "ground for invalidating, terminating, withdrawing from or suspending" or to the "ground of invalidity, termination, withdrawal from or suspension", as had been done in the Special Rapporteur's new texts of articles 46, 47 and 49, paragraph 1. Similar wording had been used in articles 34, 42, 43, 44 and 51 of the 1963 draft.

90. He was uncertain whether the reference to internal law was sufficiently precise. In reality the article was concerned with the competence to conclude treaties under internal law, and perhaps that ought to be made clearer so as to remove the objections raised by the Governments of Luxembourg and Panama (A/CN.4/177/Add.2, pp. 9 and 12).

91. He was not in favour of referring in the article to a "violation" of internal law, because a claim that internal law had not been complied with was not necessarily a claim that it had been violated.

92. He proposed that the article be redrafted to read:

"Non-compliance with internal law"

"Non-compliance with a provision of its internal law regarding competence to conclude treaties may not be invoked by a State as a ground for invalidating its consent to be bound by a treaty when that consent has been expressed by a person considered as representing that State within the meaning of article 4 of these articles, unless the non-compliance with its internal law was known by the other parties to the treaty."

93. He had reinserted the reference to article 4, which was perhaps not strictly necessary, in order to strengthen the article.

94. Mr. ROSENNE said that, in general, the Special Rapporteur's new text was acceptable, particularly with the omission of the cross-reference to article 4 which more properly belonged to article 32.

95. He agreed with Mr. Briggs that mention of "violation" should be avoided because it was ambiguous, tendentious, pejorative and open to misinterpretation.

96. The CHAIRMAN, speaking as a member of the Commission, said that he preferred the new text which, while more elegant and more concise, did not omit any of the ideas contained in the earlier draft.

⁸ Yearbook of the International Law Commission, 1963, Vol. I, p. 207, para. 62.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that the reservations expressed by Mr. Briggs were understandable, as his standpoint was quite different from that adopted by the Special Rapporteur and, indeed, by the Commission itself at its fifteenth session.

98. He agreed that the word "violation" was not particularly well-chosen but considered that in other respects the new version of the article proposed in his fifth report was both more elegant and more faithfully reflected the Commission's decision at its fifteenth session.

99. Mr. AMADO pointed out that article 31 as reformulated did not contain the notion of the consent of a State expressed by its representative, which appeared in articles 32, 34 and 35. Could that notion be dropped from one article and retained in others? It had also appeared in the former version of article 31, the last sentence of which read "Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree".

100. Mr. CASTRÉN said that, in principle, he approved the substance of the article, and its form had been greatly improved in the new version. Nevertheless, the reference to "its" internal law was not very clear, and he therefore suggested that the opening words of the article read "A State may not invoke the fact that a treaty has been concluded in violation of its internal law as invalidating its consent . . .".

101. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would have to bear in mind the comment made by some governments that the Commission had failed to make clear that the provisions concerning separability also applied to article 31. One possibility would be to specify in article 47 the articles to which the provisions about separability were applicable.

102. In his opinion, article 31 could now be referred to the Drafting Committee in the light of the discussion.

103. The CHAIRMAN, speaking as a member of the Commission, said that from the point of view of the violation of internal law, the question of separability was very complex. It was a delicate matter to distinguish between a rule which a negotiator could accept because it did not violate his State's internal law, and a rule which did violate that law, and he doubted whether the Drafting Committee would be able to find a satisfactory solution.

104. Speaking as Chairman, he suggested that article 31 be referred to the Drafting Committee.

*It was so agreed.*⁹

105. The CHAIRMAN, noting that both Vice-Chairmen were absent, suggested that Mr. Elias, the General Rapporteur, be asked to take the Chair in the Drafting Committee, and that Mr. Cadieux be appointed a member of that Committee, pending the arrival of Mr. Reuter.

It was so agreed.

The meeting rose at 1 p.m.

⁹ For resumption of discussion, see 841st meeting, paras. 42-56.

824th MEETING

Wednesday, 5 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/177 and Add.1-2, A/CN.4/183 and Add.1-2, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 32 (Lack of authority to bind the State)

Article 32

Lack of authority to bind the State

1. If the representative of a State, who cannot be considered under the provisions of article 4 as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty has been made subject to particular restrictions, his omission to observe those restrictions shall not invalidate the consent to the treaty expressed by him in the name of his State, unless the restrictions upon his authority had been brought to the notice of the other contracting States. (A/CN.4/L.107, p. 32)

1. The CHAIRMAN invited the Commission to consider article 32, for which the Special Rapporteur, in his fourth report (A/CN.4/177/Add.2, p. 21), had proposed a new title and text which read:

Unauthorized act of a representative

1. Where a representative, who is not considered under article 4 as representing his State for the purpose or as furnished with the necessary authority, purports to express the consent of his State to be bound by a treaty, his lack of authority may be invoked as invalidating such consent unless this has afterwards been confirmed, expressly or impliedly, by his State.

2. Where the authority of a representative to express the consent of his State to be bound by a treaty has been made subject to a particular restriction, his omission to observe that restriction may be invoked as invalidating the consent only after the restriction was brought to the notice of the other contracting States prior to his expressing such consent.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 32 dealt with the lack of authority to

express a State's consent to be bound by a treaty, not by reason of internal constitutional provisions but because the representative had not been furnished with the necessary authority. The article was closely connected with the provisions of article 4, to which a cross-reference must be made, and when redrafting the article he had of course had in mind the modifications introduced at the fifteenth session in article 4. He had also tried to take account of certain drafting points made by governments.

3. In paragraph 1, the wording "invalidating such expression of consent unless the consent has afterwards" should be substituted for "invalidating such consent unless this has afterwards"; that would make the meaning much clearer.

4. Mr. AMADO, noting that the title of the article, previously "Lack of authority to bind the State", had become "Unauthorized act of a representative", said he found it regrettable that the words "*compétence*" and "*pouvoir*" ("authority" and "power") had become practically interchangeable. He preferred the term "*compétence*" ("authority") and hoped it would be maintained in the title. In the new version of the article there was a slight change of emphasis: instead of looking at the act of the representative, one now had to consider the person of that representative. It was an example of how a series of seemingly pure drafting changes could ultimately lead to alterations that might have legal consequences.

5. Mr. CASTRÉN said that he approved both the new title and the new formulation. He questioned, however, whether the words "representing his State for the purpose" were necessary; the other condition, expressed by the words "furnished with the necessary authority" might suffice. The previous text had referred only to "authority".

6. Mr. AGO, referring to paragraph 1, said that, since 1963, the Commission had radically amended article 4, which was now concerned only with full powers. It was doubtful whether the words "or as furnished with the necessary authority" could be used without giving article 4 a significance which it no longer had.

7. Paragraph 2 dealt with one of the most delicate points in the whole draft. It spoke of a "restriction" on the authority of a representative, which was rather vague, since it might mean a restriction on the full powers in a particular case, but it could also mean a general restriction of a constitutional character, and that would change the entire scope of the article. Was the fact that a restriction had been brought to the notice of the other contracting States to be regarded as sufficient grounds for invoking it as invalidating the expression of consent? If the restriction was of a constitutional character, if for example it limited the power of the head of State to express the State's consent in cases where he was not authorized by Parliament for that purpose, would it be sufficient for a State to have sent the text of its constitution to all the other States in order to be able thereafter, when concluding a treaty, to invoke that restriction as invalidating its consent if it had been given in disregard of such restriction? What he wished to prevent was that the paragraph should lead to the adoption of an idea which was certainly not that of the Commission as a whole.

8. Mr. ELIAS said that in paragraph 1 he disliked the introduction of the words "for the purpose", which were unnecessary and made for imprecision. The change from "who cannot be considered" to "who is not considered" was hardly an improvement, and the same applied to the change of tense in the final proviso.

9. In paragraph 2, the words "disregard of" would be better than "omission to observe".

10. Mr. AMADO said that he found the text rather odd, especially the English version which used such expressions as "for the purpose", "furnished" and "omission to observe".

11. With regard to Mr. Ago's remarks, he too thought that there was a danger that paragraph 2 might create difficulties, particularly in circumstances where frequent changes of government might occur. The Drafting Committee would have to consider the matter very carefully.

12. Mr. YASSEEN said that he had difficulty in accepting the new formulation of paragraph 1, which spoke of invalidating "consent". His view was that the State's consent could not be presumed to have been expressed in cases where the representative of the State had exceeded his authority. He preferred the former version which had referred to the "act" of the representative.

13. On the other hand, he found paragraph 2 logical and acceptable; it did not raise the constitutional issue, which was dealt with in another article, and also seemed to have some practical value. Cases occurred where a State restricted the authority of its representative; if the representative disregarded the restrictions placed upon him, the State concerned could not be held responsible for his acts. To the extent that he failed to respect those restrictions, he could not be regarded as a representative of his State. In order that those restrictions should take effect, it was of course logical to require that they should be brought to the notice of the other contracting States.

14. Mr. BRIGGS said that article 32 dealt with an agent's competence to bind the State rather than with the invalidity of a State's purported consent. If the article was needed at all—and at the fifteenth session about half the Commission's members had thought it was not—it either belonged to article 4 or should be placed immediately after it. Article 4, as revised at the first part of the seventeenth session, specified the categories of persons authorized to negotiate and conclude treaties. It followed that a representative not so authorized under the terms of that article could not express consent which could be regarded as valid, unless his act was subsequently confirmed. In paragraph 1, therefore, it would be more accurate to refer to "such act" than to "such consent".

15. He was not certain that a provision of the kind contained in the Special Rapporteur's new text of article 32, paragraph 2, was required at all.

16. Mr. AGO said that, according to Mr. Yasseen, paragraph 2 was harmless because it referred only to the case where a representative had exceeded his instructions; actually, both the new and the old versions of the article

seemed to go further and to cover even cases where the head of State or the minister was involved.

17. In fact, the problem which had been settled in article 31 was again before the Commission. To invalidate its consent, was all that was necessary that it should have brought some restriction or other to the notice of the other State? If the intention was to limit the scope of the paragraph to cases where full powers contained restrictions for a particular case, the provision should say so clearly.

18. Mr. TUNKIN said that he was of much the same opinion as Mr. Briggs. But the question of the placing of article 32, which had been discussed at the fifteenth session, was of great significance.

19. In his opinion the content of article 32 should be transferred to article 4 or immediately following it. The Special Rapporteur's new text was unnecessarily circuitous and failed to state as plainly as did the 1963 draft that the act of a person not duly authorized to represent the State could have no legal effect. He therefore favoured the earlier draft.

20. Mr. ROSENNE said that, at the outset, article 32 had appeared to him to present no difficulties, but after hearing the discussion he had become aware that it dealt with two entirely different topics, one the act of an unauthorized person and the other an unauthorized act of a representative, the latter being described in article 4.

21. Paragraph 1 would need to be refashioned so as to bring out more clearly its connexion with article 4, and probably be re-placed in part I.

22. As paragraph 2 dealt with the validity or invalidity of consent to be bound, it certainly belonged to part II, but its wording should be made uniform with that of other provisions concerned with the grounds upon which invalidity could be invoked.

23. Mr. YASSEEN said that the drafting of paragraph 2 was sufficiently clear to avoid the consequences which Mr. Ago apprehended. The text referred to "a particular restriction" and provided that it must be brought to the notice of the other parties. Possibly the representative's authority was limited and he was empowered to sign *ad referendum* only. Say, for instance, the negotiations had covered two questions; later on, the State might decide to limit the authority of its representative, and authorize him to express its consent on only one of the two questions.

24. Mr. CADIEUX said that, in his view, article 32 had certain positive features and should form part of the system of rules to be submitted to governments. At that stage it was difficult to say definitely whether the article should be in part II, or whether it should be regarded as a modification of article 4; but on the whole he was inclined to share the Special Rapporteur's view. The article was really concerned with the validity of an international instrument and with the circumstances in which that validity could be disputed.

25. Like Mr. Briggs, he had had some hesitation about the drafting of the last part of paragraph 1, but the Special Rapporteur's suggestion on that point had fully satisfied him.

26. His view on paragraph 2 was the same as Mr.

Yasseen's. The question of the authority of those authorized *ex officio* to bind the State was covered by article 31; paragraph 2 applied only to the case of persons duly authorized to bind the State. It might even be applicable to ministers for foreign affairs and heads of State, who did not always have unrestricted authority to bind a State. The situation contemplated in the paragraph was not one where ratification was imperfect or where there were constitutional limitations, but one where there was a particular restriction which might limit the authority of a person who would normally be authorized to bind a State.

27. It seemed to him, therefore, that paragraph 2 was useful and its drafting acceptable. In order to cover the problem raised by Mr. Ago, the commentary should refer to the special circumstances envisaged in the paragraph.

28. Sir Humphrey WALDOCK, Special Rapporteur, said he realized that article 32 dealt with two different matters, but at its fifteenth session the Commission had decided that it would be convenient to deal in one article both with the unauthorized act of a representative of a State and with the act of a person who was not a representative for purposes of concluding a treaty.

29. His new draft had been criticized by Mr. Tunkin for not using wording similar to that approved in 1963. His purpose in modifying the wording had been to achieve some degree of uniformity of language in the various provisions concerned with invalidity.

30. Furthermore, it was not, strictly speaking, correct to say that the act of an unauthorized representative had no legal effect, because it might be subsequently confirmed by his State. That point would have to be taken into account if the content of paragraph 1 were transferred to article 4 or to a new article immediately following it. The question would then arise as to whether a provision would need to be included in part II so as to cover the invalidity aspect. He was not clear what was the general opinion on that point.

31. Of course, in practice, cases of unauthorized persons negotiating treaties were uncommon. One example which came to mind was that of a British Resident in the Persian Gulf who had purported to conclude an agreement with a Persian Minister without instructions from the British Government, which had disavowed his action.¹

32. The Drafting Committee should have no difficulty in revising paragraph 2, if the Commission decided to retain it, so as to make clear that the intention was to refer to restrictions on a representative with regard to a particular treaty, and not to restrictions resulting from internal constitutional provisions. Mr. Ago's preoccupation would then be met.

33. It was reassuring that no government or delegation had misunderstood the purpose of the text.

34. The CHAIRMAN asked members to indicate whether they considered that article 32 should be referred

¹ Treaty of Shiraz, August 30, 1822, signed by Mirza Mahommed Zaki Khan, the Minister of Fars, and Captain William Bruce, British Resident at Bushire. See Adamiyat F., *Bahrein Islands, A Legal and Diplomatic Study of the British-Iranian Controversy*, New York, 1955, pp. 106-111.

to the Drafting Committee with instructions to redraft paragraph 1, and decide whether it should be retained in part II or whether it should be placed in or after article 4.

35. Mr. ELIAS proposed that article 32 be referred to the Drafting Committee.

36. Mr. CASTRÉN said he agreed that the article should be referred to the Drafting Committee, though after listening to the Special Rapporteur's explanations, he still considered that the new text was an improvement on the earlier draft because it left the injured party with several possible courses of action. He would also prefer that the article should remain where it now was. Like Mr. Cadieux, he considered that its main subject was not representation but the representative's lack of authority, which might have the consequence of invalidating the treaty.

37. Mr. AGO said that his views on paragraph 1 were the same as Mr. Rosenne's; the provision dealt with the act of a person who was not considered as the representative of a State within the meaning of article 4, in other words, with an act which did not express the consent of the State and did not produce legal effects. Such a provision was, however, unnecessary since the case was covered by article 4.

38. The Commission ought rather to consider whether it should not widen the scope of the provision somewhat and say that, notwithstanding the restrictions set out in article 4, cases might occur where a person who was not considered as the representative of the State had performed an act which had ultimately expressed the State's consent because it had been confirmed later.

39. It would then be sufficient to add a paragraph stating that, where a person who was not considered as the State's representative in the particular case acted to express the consent of that State, that unauthorized expression of consent could later be confirmed by a duly authorized representative. The right place for such a paragraph would be after article 4 rather than in article 32, which referred to validity. In such a case, validity was not in issue; no consent had been expressed, consequently there was no treaty until confirmation was forthcoming.

40. If article 32 were to consist only of paragraph 2, it should state clearly that the restriction mentioned was one that applied to a particular case and not a general restriction; the latter case would be covered by article 31.

41. Mr. ROSENNE said he supported Mr. Elias's proposal that article 32 be referred to the Drafting Committee.

42. It was essential to retain the words "expressly or impliedly" in paragraph 1, which represented the important element in the rule laid down in article 32.

43. Mr. BRIGGS said he also agreed that the article should be referred to the Drafting Committee.

44. However, since the Special Rapporteur was anxious to ascertain the view of the Commission, he felt bound to say that, in his opinion, if the content of paragraph 1 were transferred to article 4, there was no need to restate the principle in part II as well, because the article was not concerned with the question of invalidity but with the competence of the agent and with an act performed

without authority. His opinion was reinforced by the fact that the Commission had not sought to cover all problems of invalidity in part II.

45. He doubted whether there was any need to retain the substance of paragraph 2 in article 32, but that was a point that could safely be left to the Drafting Committee.

46. Mr. TUNKIN said that paragraph 1 should be transferred to article 4 or to a new article 4 (*bis*). Paragraph 2, being concerned with validity as such, should remain in part II.

47. Mr. YASSEEN said that he was still convinced that the original version of paragraph 1 was preferable, because it was realistic. A representative could express the consent of his State only if he was authorized to do so, either specially or generally, in accordance with international law. The object was to confirm not the consent but the act itself. The question of the retrospective effect of the confirmation might then arise. There was nothing to prevent a State from confirming retrospectively an act performed by its representative who had exceeded his authority.

48. Mr. AMADO suggested that the well-known formula, "authority of a representative to express validly . . .", might be used with advantage.

49. Mr. CASTRÉN, replying to Mr. Yasseen, pointed out that paragraph 1 did not speak of the case where a representative "expresses the consent" but of the case where he "purports to express the consent"; moreover, the paragraph specifically referred to "lack of authority".

50. The CHAIRMAN, speaking as a member of the Commission, said that, although he had no objection to article 32 and the problems arising out of it being referred to the Drafting Committee, he would prefer paragraph 1 to be associated with article 4, either as part of that article or as an article 4 *bis*. An instance of the seriousness of the problem was the Pilja case of 1939, in which the Deputy Minister for Foreign Affairs of Yugoslavia had been accused of acting *ultra vires*.

51. Speaking as Chairman, he suggested that article 32 and the questions arising out of it be referred to the Drafting Committee.

*It was so agreed.*²

ARTICLE 33 (Fraud)

Article 33

Fraud

1. If a State has been induced to enter into a treaty by the fraudulent conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty.

2. Under the conditions specified in article 46, the State in question may invoke the fraud as invalidating its consent only with respect to the particular clauses of the treaty to which the fraud relates. (A/CN.4/L.107, p. 32)

52. The CHAIRMAN invited the Commission to consider article 33, for which a new text had been

² For resumption of discussion, see 840th meeting, paras. 1-13.

proposed by the Special Rapporteur, in his fifth report (A/CN.4/183, p. 29), which read :

If a State has been induced to enter into a treaty by the fraudulent act or conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that a few governments had opposed the idea of separate articles on fraud and error but the majority had neither comments nor objections to offer. The two questions were essentially different and the effects of fraud were more serious, because they destroyed the confidence between the parties.

54. He found acceptable the suggestion by the Government of Israel to reverse the order of the two articles, because fraud was both graver in its consequences and also closer to coercion.

55. Some governments had suggested that it was not enough to refer to fraudulent conduct and that mention should also be made of fraudulent acts. He had no objection to such a change, though he doubted its necessity.

56. Some governments had commented on the difficulty of defining fraud and on the fact that there was no exact correlation between the English term and the French "*dol*".

57. He had not included paragraph 2 of article 33 in his new version, on the assumption that the draft would contain a general provision on separability that would cover all the articles to which that principle applied. It might be more convenient to examine the question of separability as a whole, and then decide to which individual articles it applied. He accordingly suggested that, for the time being, consideration of paragraph 2 be deferred.

58. One government had suggested laying a time-limit on the right to invoke fraud as a ground of invalidity, but that was a point that should be taken up in connexion with article 47.

59. Mr. AGO said he agreed with all that the Special Rapporteur had said. It would be meaningless to deal in one and the same article with two notions as different from each other as fraud and error; yet it would be desirable to reverse the order of the two articles dealing with those two ideas, in order to establish a gradation in the seriousness of the grounds for nullity. The question of the order of the articles might in any case not be settled until later.

60. What he particularly agreed with was the Special Rapporteur's proposal that paragraph 2 of the article as adopted in 1963 be omitted, since the entire question of the separability of treaties was to be reconsidered by the Commission. He had had serious misgivings about paragraph 2. A treaty sometimes consisted of several seemingly independent parts which were, however, the outcome of reciprocal concessions and hung together. Conceivably, a State might have accepted a particular clause of a treaty for the sole reason that, in its opinion, another clause in the treaty offset the first; it would be wrong if, in such a case, the State were obliged to remain bound by the one if the other became void from lack of

consent. Even in dealing with the case of error, the Commission would have to study the question with the utmost care.

61. Mr. ELIAS said he supported the Special Rapporteur's new formulation, which contained all that was required.

62. He also favoured dropping paragraph 2 and dealing with it as part of the general problem of separability. Notwithstanding the suggestions made by some of them for improvements in the wording, it was clear that governments hesitated to accept the severance of clauses vitiated by fraud from others that were not so vitiated.

63. Mr. CASTRÉN said that article 33 should be retained; it might follow the article concerning error, for the reasons given by the Government of Israel and accepted by the Special Rapporteur.

64. He could accept the redraft proposed by the Special Rapporteur, which was not materially different from the previous draft. The addition of the word " act " in paragraph 1 seemed to be justified.

65. He could also accept the Special Rapporteur's proposal that paragraph 2 be omitted, since he had already accepted his proposal for redrafting article 46 and for inserting it before the series of articles now being considered.

66. The Commission had been right to refrain, in 1963, from attempting a definition of the meaning of the word " fraud ", and there was no need to revert to that point.

67. In the opinion of a few governments, the right to plead fraud should be exercised within a specified time-limit; but, like the Special Rapporteur, he considered that in that respect article 47 offered sufficient guarantees against possible malpractice.

68. Mr. YASSEEN said that article 33, as redrafted by the Special Rapporteur, should be retained. The addition of the word " act " was an improvement.

69. In view of the trend of the debate on article 30 at the previous meeting, from which it was apparent that the Commission was proposing to draft restrictively all the provisions concerning possible grounds for the nullity of a treaty, an article on the subject of fraud was indispensable.

70. Clearly, paragraph 2 should be left in suspense for the time being since, as proposed by the Special Rapporteur, the Commission would consider the entire question of the separability of treaties as a whole.

71. Mr. CADIEUX said that he accepted the text proposed by the Special Rapporteur, which was an improvement.

72. After the close of the discussion on that article, however, the Special Rapporteur might perhaps give his opinion on the United Kingdom Government's suggestion that provision be made for independent adjudication on the interpretation and the application of the article in the event of dispute; a similar idea seemed to have been in the mind of the Government of the United States. It was not perhaps necessary to deal with that question in connexion with article 33, but the Commission should consider it at some point and express a judgment on it.

73. Mr. BEDJAOUÏ said he had studied the comments by governments, in particular those opposed to both article 33 and article 34, and his personal view was that both articles were necessary, even if the cases where a treaty was invalidated by reason of fraud or error were not very frequent. He regretted, however, that the Commission should have singled out only those two grounds, fraud and error; he would have liked it to consider also the effect of material injury (*lésion*).

74. Inasmuch as Algeria's colonial history had begun with a fraud—the conclusion of the treaty of Tafna in 1837 between Emir Abd-El-Kader and Marshal Bugeaud³—he was particularly pleased to see an article on fraud in the Commission's draft.

75. The redraft proposed by the Special Rapporteur was very satisfactory. The reversal of the order of articles 33 and 34 would be an improvement and the addition of the word "act" would dispel all doubt. Furthermore, it was right to omit paragraph 2, for fraud destroyed all confidence and vitiated the treaty altogether.

76. Mr. TUNKIN said that he was in complete agreement with the Special Rapporteur's proposals for paragraph 1.

77. With regard to paragraph 2, he would hesitate at that stage to support its deletion; the Commission should suspend its decision on the paragraph and revert to it and to the corresponding paragraphs of other articles when it discussed 46. The discussion might then show that a paragraph 2 in some form was necessary in article 33.

78. Mr. ROSENNE said he was glad to have the support of the Special Rapporteur and other members for his Government's proposal to reverse the order of articles 33 and 34.

79. With regard to paragraph 1, he had a doubt which was rather fundamental in character. He would put forward the tentative suggestion to drop the adjective "contracting" before the word "State"; as the text now stood, it would require the fraud to have been induced by a contracting party, and he asked what would be the position if it had been the result of the action of another State.

80. With regard to paragraph 2, he understood the position to be that the question of separability was completely reserved; when the Commission discussed the substantive article on separability, it would consider its application to each individual article.

81. Mr. AMADO asked whether, after the addition of the word "act" in the Special Rapporteur's new text, it was sufficiently clear that the word "fraudulent" qualified also the word "conduct".

82. Mr. BRIGGS said he supported the suggestion by Mr. Cadieux that note should be taken of the United Kingdom Government comment that provision should be made for independent adjudication on the interpretation and application of article 33 (A/CN.4/183, p. 26). The United States Government had also suggested that it would be highly desirable to include a requirement that the fraud should be determined judicially. No change was of course required in the language of article 33: the

matter could be dealt with when the Commission examined article 51.

83. He also supported the suggestion by the Government of Israel for the reversal of the order of articles 33 and 34.

84. With regard to paragraph 2, he agreed that it should be taken up in connexion with article 46 and he supported the Special Rapporteur's suggestion that, for the time being, the Commission suspend its decision on that paragraph.

85. He favoured the Special Rapporteur's rewording of paragraph 1, but suggested the insertion of the words "a ground for" before the words "invalidating its consent". That would emphasize that the mere fact of invoking fraud did not automatically invalidate consent. The expression "invoke as a ground for invalidating" was to be found in the Special Rapporteur's redrafts of articles 46, 47 and 49 (A/CN.4/183). A similar expression was used in some of the articles adopted by the Commission at its fifteenth and sixteenth sessions.

86. Mr. PESSOU said he supported Mr. Briggs's remarks and also attached a great deal of value to Mr. Ago's comments. From the point of view of method, while whatever provisions could be grouped together should be so grouped, provisions dealing with independent matters should be kept separate.

87. With reference to Mr. Bedjaoui's suggestion, even in the light of the historical reference by which the suggestion had been accompanied, it was hardly possible to introduce the private-law notion of injury (*lésion*) without coming back to the *actio pauliana* of Roman Law.

88. The CHAIRMAN, speaking as a member of the Commission, said he would be ready to agree to the suggestion that the discussion should for the moment disregard the question of the separability of treaties, which was dealt with in the original paragraph 2 and could be discussed later. On that point he agreed with Mr. Ago, not only because the different clauses of a treaty were the result of a compromise but also because some of the provisions of a treaty were subordinate to the principal clause.

89. With regard to the order of the articles concerning fraud and error, no doubt fraud was a narrower concept than error, but since international practice attached more importance to fraud, he would prefer articles 33 and 34 to remain in the existing order. He would, however, be prepared to leave that point to the Drafting Committee.

90. If the addition of the word "act" removed the misgivings of some governments, he would not object to its insertion, even though he considered that the idea of an isolated act would be covered by the term "conduct".

91. With regard to Mr. Rosenne's suggestion that not only the fraudulent conduct of a contracting State but also that of other States should be capable of being invoked, he considered that a provision to that effect should appear rather in the article concerning error, or that a suitable passage should be included in the commentary to that article, even though theoretically it was

³ de Clerq, *Recueil des traités de la France*, Vol. IV, p. 375, Paris, 1880.

conceivable that there might be fraud through the behaviour of another State.

92. Mr. Briggs's proposal created some difficulty, since if the English word "ground" were translated in French by "*motif*", the term might be ambiguous, for the "*motif*" was what decisively affected the formation of the will and not what gave the right to perform the act.

93. He could accept the Special Rapporteur's proposal and the article could be referred to the Drafting Committee.

94. Mr. AGO said that the Chairman had raised some questions which should be most carefully considered by the Drafting Committee.

95. At least so far as the French text was concerned, he was reluctant to agree to the addition of the word "act" (*acte*), for it might convey the idea of a juridical act or deed. The word "conduct" would cover any isolated act or series of acts, or even an omission, and consequently would suffice.

96. The difficulty created by the English term "ground" and the French "*motif*" might perhaps derive from a difference of approach between the legal systems descended from Roman law and the others. The French expression "*viciant son consentement*" expressed all that was meant. The difference which had given rise to the difficulty had been present already in the 1963 draft.

97. Mr. YASSEEN said he disagreed with Mr. Ago's interpretation of the meaning of the word "conduct", which he took to suggest a certain continuity, and continuity could not consist of a single act. That was why some States had taken the view that article 33 should provide expressly that fraud could consist of a single act. The addition of the word "act" was accordingly of some value.

98. The CHAIRMAN, speaking as a member of the Commission, said that to his mind "conduct" could be either an isolated act or a continuous series of acts. According to the opinions of learned writers, fraud did not necessarily consist of a number of acts.

99. Mr. AMADO said that the interpretation of a term like "conduct" should be left to those responsible for interpreting the text.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that he personally shared the view that the term "conduct" was broad enough to cover both a single act and a series of acts; he had discussed the point in paragraph 3 of his observations on article 33 (A/CN.4/183, p. 28). He had, however, no objection to the insertion of the words "act or" before "conduct" in order to take into account a number of government comments. The question could be left to the Drafting Committee.

101. With regard to Mr. Amado's remarks, he felt that, in English, the adjective "fraudulent", covered both "act" and "conduct", especially since the following operative statement, "may invoke the fraud", threw the adjective to both expressions. However, that point could also be left to the Drafting Committee.

102. With regard to Mr. Briggs's suggestion to introduce the words "a ground for", the Commission had used that phrase in other articles, especially those on termination. The question had been discussed in 1963 in connexion with the effect of the draft articles on the stability of treaties. The aim was to stress that the rules embodied in the various articles did not authorize a State to pronounce unilaterally the invalidity of a treaty. The use of the expression was also intended to emphasize that the various articles in question were covered by the provisions on the procedure for invoking grounds for invalidity. In the articles on fraud and error, however, the Commission had used the same expression as was used in the French text. The Drafting Committee could examine the matter, bearing in mind the Commission's concern with the stability of treaties.

103. Mr. Rosenne had suggested deleting the word "contracting" before "State" so as to cover the possibility of fraud being committed by another State. The Chairman had answered that point: if the fraud was committed by another State, it did not constitute grounds for invalidating consent *vis-à-vis* a contracting State which was not responsible for that fraud. Of course, the matter would be different in the event of complicity, which would extend the effect to the contracting State benefiting from the fraud.

104. With regard to paragraph 2, he had not suggested its deletion, but only that the question should be examined in connexion with article 46; the problem of separability should be considered in connexion with each article in order to ascertain whether any distinction should be drawn between the various articles.

105. The question of independent adjudication, to which attention had been drawn by Mr. Cadieux, arose in connexion with many of the articles of the draft. The matter had been discussed at length in 1963 and had been raised by governments in connexion with numerous articles. He did not feel that it was necessary to take it up in connexion with article 33, which could now be referred to the Drafting Committee for consideration in the light of the discussion.

106. Mr. ROSENNE said that he accepted the Chairman's explanation, which had been endorsed by the Special Rapporteur, of the reasons for the retention of the word "contracting" before "State".

107. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 33 to the Drafting Committee, on the understanding that paragraph 2 would be reserved for consideration with the article on separability.

*It was so agreed.*⁴

The meeting rose at 1 p.m.

⁴ For resumption of discussion, see 840th meeting, paras. 14-18.

825th MEETING

Thursday, 6 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-2, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 34 (Error)

Article 34

Error

1. A state may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.
2. Paragraph 1 above shall not apply if the State in question contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.
3. Under the conditions specified in article 46, an error which relates only to particular clauses of a treaty may be invoked as a ground for invalidating the consent of the State in question with respect to those clauses alone.
4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and articles 26 and 27 then apply. (A/CN.4/L.107, p. 33)

1. The CHAIRMAN invited the Commission to consider article 34, for which the Special Rapporteur, in his fifth report (A/CN.4/183, p. 36), had proposed a new text which read:

Error

1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.
2. Paragraph 1 above shall not apply if the State in question contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.
3. When there is no error as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and articles 26 and 27 then apply.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 34 raised two questions which were already under consideration by the Drafting Commission in connexion with article 33, dealing with fraud. The first was the suggestion by Mr. Briggs to replace the reference to invalidating a State's consent by the wording "grounds for invalidating consent". The second was the important question of separability; in his own rewording, he had omitted the former paragraph 3, which dealt with that question, on the assumption that the whole matter would be covered by the general article on separability.

3. Government comments on the article were analysed on pages 32 and 33 of his report (A/CN.4/183), and he drew attention to the reasons he had given for not accepting certain suggestions put forward by the Government of Israel.

4. A number of governments had suggested that provision be made for mistakes of law as well as mistakes of fact. His own impression was that, during the Commission's 1963 discussion, the great majority of members had wished to confine the provisions of article 34 to mistakes of fact. It was of course realized that a mistake of law could in some measure contribute to a mistake of fact, and in that respect he drew attention to paragraph 7 of the Commission's commentary to the article, an extract from which was quoted in his report. His conclusion on that question was that no change should be made in the text of the article.

5. The Government of Thailand had expressed the view that the scope of the exception provided for in paragraph 2 was too wide and could have the effect of rendering paragraph 1 ineffective. That view was, of course, based on its experience in the Temple of Preah Vihear case.¹ Paragraph 2 did in fact provide for a rather sweeping exception to paragraph 1 and, unless restrictively interpreted, could deprive that paragraph of much of its substance. However, it repeated the language used by the International Court of Justice, albeit in relation to a special case, and the Commission might prefer to leave it unchanged, on the basis that it must be given a reasonable interpretation.

6. Mr. YASSEEN said that the Special Rapporteur proposed no other amendment than the deletion of the paragraph concerning the separability of a treaty. He would accept the article, as he had accepted the 1963 text.

7. In his opinion, the error dealt with in the article could only be an error as to facts. At an earlier stage, the Commission had discussed the possibility of taking into consideration errors of law as well. As an example of such an error, some members had spoken of an error concerning a particular rule of international law as between States, some of which recognized a rule as a rule of law whereas others did not; such an error could be regarded as an error as to fact. A possible error as to internal law should manifestly not be taken into account as an error of law for the purposes of international law. Consequently, it was evident from an analysis of the earlier debates in the Commission that the cases mentioned had always been errors as to fact, or as to a mixture of law and fact. In the latter case, it would be sufficient

¹ I.C.J. Reports 1962, p. 6.

that there should be some slight error as to fact for the machinery of the article to be brought into operation.

8. Mr. ROSENNE said that he agreed with the Special Rapporteur that it was essential to maintain in the draft articles an article on error, especially after the distinction which had been made by the Chairman and the Special Rapporteur himself between fraud committed by a contracting State and error induced by a third party.

9. He found it difficult to accept the analysis given by the Special Rapporteur in his fifth report (A/CN.4/183, p. 33) of the views expressed during the 1963 discussion. The question of errors of fact and errors of law had been discussed at length by the Commission, particularly at its 679th and 680th meetings, and he drew attention to a passage in the record of Mr. Amado's statement during that discussion: "In addition, the error must exist in fact, for the state of international law was such that there could, unfortunately, be no inquiry into the parties' intentions. The parties' intentions, which were a key factor in private law, could not carry equal weight in international law."²

10. That statement contained two distinct elements; the first was that the error must exist in fact; the second was that the rule could not be dependent on a possible inquiry into the intention of the parties, but must be dependent on an objective appreciation of the error. The impossibility of examining the psychological factors motivating the conduct of a State had been upheld by the International Court of Justice in a number of decisions, such as its advisory opinion in the Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) case in 1948,³ and its judgment in the Asylum case in 1950.⁴ He therefore suggested that the Commission refrain from introducing into article 34 any subtle distinctions drawn from private law, and from requiring any investigation into the state of mind of a State.

11. Nevertheless, he agreed with the Special Rapporteur's decision to leave the text of the article untouched, but urged that the commentary be carefully reviewed.

12. In the English text of the new paragraph 3, the word "mistake" had been replaced by the word "error". He suggested that the Drafting Committee, perhaps with the help of the translation services of the United Nations, be asked to examine the terminology used, for the express purpose of trying to maintain a linguistic differentiation between errors of substance and mistakes of transcription, such distinction to be expressed, of course, in each of the Commission's three working languages and in the official languages of the United Nations.

13. When, at the first part of the present session, the Commission had discussed and adopted article 26, members had been unanimous in not wishing to give undue prominence to error, in the interests of the stability of treaties. The Drafting Committee and the Commission itself should also now examine the question whether paragraph 3 should be transferred to article 26, since

it dealt not with a question of invalidity but rather with the effects of a mistake in transcription after it had been corrected.

14. On the point raised by the Government of Thailand, he had been impressed during the debates in the Sixth Committee of the twentieth General Assembly by the sensitivity of that Government with regard to some of the reasoning employed by the International Court of Justice in its decision in the Temple of Preah Vihear case.⁵ It was of course proper for the Commission, and obligatory under its Statute, to make full use of relevant rulings of the Court, but he would urge that in the commentary, particularly where it referred to the rulings of the Court on error and estoppel in that case, the Commission should refrain from giving them undue prominence.

15. Mr. CASTRÉN said that the article was useful and should stand. In his opinion, the Special Rapporteur had rightly refrained from acting on proposals made by governments for the amendment of the article.

16. For the reasons he had given earlier in connexion with article 33, he supported the Special Rapporteur's proposal that paragraph 3 of the 1963 draft be omitted for the time being.

17. So far as error as to law was concerned, he shared the opinion of previous speakers; perhaps the commentary on that point should be revised.

18. The Commission might, as Mr. Rosenne proposed, remove the last paragraph of the article and incorporate its substance in another article; in any case the essence of the paragraph was its cross-reference to other articles.

19. Mr. ELIAS said he supported article 34 as proposed by the Special Rapporteur. The concluding words of paragraph 3, "and articles 26 and 27 then apply", should, however, be corrected, since in 1965 the Commission had merged article 27 with article 26; the reference should therefore be to article 26 only.

20. Sir Humphrey WALDOCK, Special Rapporteur, thanking Mr. Elias for drawing attention to the need for that correction, said that his rewording of article 34 had been prepared before the Commission had taken its decision on articles 26 and 27.

21. Mr. PESSOU said that Mr. Rosenne had expressed a very pertinent warning about the use of decisions of the International Court of Justice. Those decisions always consisted of two parts: a legal part, in which the Court stated the law, and a philosophical part, in which the Court explained the import of its judgment. If it endorsed the less specifically legal part of those judgments, the Commission might add to the confusion instead of diminishing it.

22. He was not sure whether the word "error" had the same meaning in all legal systems; in some cases at least, the Commission should define in unambiguous language the terms it used.

23. He suggested that first two paragraphs be amended slightly to read:

"1. Any State may invoke an error respecting the substance or object of a treaty if the error relates to a

² *Yearbook of the International Law Commission, 1963, Vol. I, p. 43, para. 56.*

³ *I.C.J. Reports 1948, p. 57.*

⁴ *I.C.J. Reports 1950, p. 266.*

⁵ *I.C.J. Reports 1962, p. 6.*

fact existing at the time of the conclusion of the treaty.

“2. Nevertheless, paragraph 1 above shall not apply if the State concerned gives its consent to be bound by the treaty though aware of the existence of that error.”

24. The error referred to in paragraph 3 was one concerning the text, and consequently different in nature from the error dealt with in the previous two paragraphs. Paragraph 3 should therefore be either linked to article 26 or amended to form a homogeneous part of article 34.

25. Mr. BEDJAOUI said he supported the Special Rapporteur's revised text for article 34, but regretted that it did not expressly allow for an error as to law to be invoked. Admittedly, from the point of view of international law, internal law could not be regarded otherwise than as a fact and, since some learned authors likewise considered regional international law to be a fact, the scope of the provision concerning error as to law was very narrow. But if it disregarded error as to law altogether, the Commission would be forcing future interpreters, learned writers and the International Court of Justice to dress up errors of law as errors of fact. No doubt the commentary would explain that error as to law was not excluded from the scope of the article, but that did not mean that errors of law would be covered. Besides, commentaries were soon forgotten.

26. The reason why he thought that the article should be expanded to cover errors of law was that the newly independent States had not yet acquired the skill and experience to protect themselves against that kind of error. The intention was not, of course, to enable the States to evade the legal consequences of their own free acts, nor to compromise the stability of treaties or the continuity of the international legal order; the object was to recognize the scope of error as to law, because such errors could exist in the pure state.

27. In looking at the text, he had at one time thought that the rather vague expression “*erreur portant sur un état de choses*” might connote error as to law. Unfortunately, the English text, “error relating to a state of facts”, did not apparently admit that interpretation.

28. If it should be impossible to alter the text in the manner he had indicated, he would support the general opinion.

29. Mr. TUNKIN said he noted that paragraphs 1 and 2 were identical with the 1963 text and that there was only a very slight drafting change in the new paragraph 3, which corresponded to the former paragraph 4. He accepted that text, on the understanding that no decision was to be taken at the present stage on the former paragraph 3: the matter would be left open, to be dealt with by the Commission when it discussed article 46.

30. Mr. ROSENNE said that Mr. Pessou's remarks had drawn his attention to the awkward and ambiguous wording used in paragraph 1 “at the time when the treaty was entered into”. He suggested that the Drafting Committee be invited to re-examine that wording in the light of the Commission's decisions in 1965 on the articles of part I.

31. The CHAIRMAN, speaking as a member of the Commission, said he wished to make a few observations on the problem of error of fact and error of law. What was the “law” in international law? In his opinion, the law was drawn from the sources consulted by the International Court of Justice which were referred to in Article 38 of the Statute of the Court. The enumeration given in that article was clear enough: but were all the States in agreement concerning the content of the sources mentioned?

32. International conventions, whether general or particular, were known to the parties; and thanks to the practice of open diplomacy, to the registration of treaties and to the publication of treaties, either by the Secretariat of the United Nations or by the parties, those conventions were also known to other States. But there were special cases, in particular that of the operation of the most-favoured-nation clause, where a convention made between certain States produces effects on other States. Should an error concerning the existence of the law, as embodied in a most-favoured-nation clause, be held to be excusable?

33. The second source mentioned in Article 38 of the Statute of the Court—custom—raised an even thornier question. At what point could a general practice be said to have been accepted as law?

34. The third source consisted of the general principles of law. With regard to that source, there was controversy as to what formed and what did not form part of those principles, and learned authors were hesitant in distinguishing between general principles of law and general principles of international law.

35. He was by no means sure that the possibility of invoking an error respecting a rule of law should be rigidly and absolutely excluded. He agreed in principle that an error as to law should not be admitted except in serious cases, if States had some excuse for having fallen into the error—and by that remark he meant not only newly independent States but also States which possessed a diplomatic tradition and a sound knowledge of international law. Without wishing to be too categorical, he hoped that the Commission would reconsider the question.

36. Mr. BRIGGS said that he found the Special Rapporteur's text provided a satisfactory solution for the problems which had been raised during the 1963 discussion and in the comments made by governments. He would therefore suggest no change in the English text, except the insertion in paragraph 1 of the words “grounds for” before “invalidating its consent”, a suggestion which was already under consideration by the Drafting Committee.

37. The point raised by Mr. Rosenne regarding the words “when the treaty was entered into” could perhaps be solved by adopting language similar to that used in the French: “when the treaty was concluded”.

38. With regard to the use of phraseology from International Court of Justice decisions, he must point out that when the Court decided a case there was always one dissatisfied party. The sensitivity of the party that had lost a case should not cause the Commission to

refrain from using wording drawn from rulings of the Court.

39. Mr. AGO, referring to the question raised by Mr. Bedjaoui—the possible enlargement of article 34 to cover error as to law, by which was meant, of course, only an error of international law—said he must warn the Commission of the very serious danger of introducing into the draft a provision which would make it only too easy to call in question the existence of treaties. If, for example, an arbitral award defined a rule in a slightly different fashion from that in which it had been understood by a State when concluding the treaty, that would be sufficient to enable the State to raise the question, invoke its error and withdraw from participation in the treaty.

40. The Commission should not worry too much about the temporary difficulties at present being experienced by newly independent States; those difficulties would have largely disappeared by the time the convention being drafted by the Commission was adopted. Besides, article 34 as it stood offered a safeguard against flagrant and truly exceptional cases of the kind mentioned by Mr. Bedjaoui.

41. The French text of the article should be corrected. The expressions “*erreur sur la substance*” and “*sur la rédaction*” in paragraphs 1 and 3 gave the impression that the error in question was one of interpretation of the treaty and not an error made by a party at the time of the conclusion of the treaty. He suggested that the two expressions be replaced by “*erreur de substance*” and “*erreur de rédaction*”, respectively, or perhaps “*erreur dans la substance*” and “*erreur dans la rédaction*”.

42. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Ago, said that the English text had the same implications as the French. He suggested that the Drafting Committee consider the suggestion to use the expression “error in the substance of a treaty”.

43. On the delicate matter of errors of law, he agreed that in 1963 some members had contemplated such errors as possible grounds for invalidating consent. However, his impression was that the majority of the Commission had felt that a party to a treaty was entitled to invoke only an error of fact as grounds for invalidating its consent. The Commission realized that errors of law could be involved in errors of fact and the commentary covered that point to some extent; the commentary would be carefully reviewed.

44. He strongly opposed any amendment of the statement of the rule in paragraph 1, because he shared Mr. Ago’s concern that it would be very dangerous to open the door to reliance on an error of law as grounds for invalidating consent. A number of suggestions had been made to cover the question of errors of law, but no clear-cut proposal had been made which would achieve that purpose without involving the dangers to which Mr. Ago had drawn attention.

45. In paragraph 2, he had found it convenient to use the language of the International Court of Justice, which constituted a recent statement of the rule in the matter. However, he sympathized with the view expressed by the Thai Government that the statement in the

opening words of that paragraph was somewhat sweeping; there were few errors in the conclusion of treaties to which some kind of contribution would not be made by both parties. Therefore, while accepting the substance of paragraph 2, he suggested that the Drafting Committee be asked to examine whether the language was sufficiently tight to avoid inadmissible interpretations.

46. With regard to paragraph 3, he appreciated the point made by Mr. Rosenne and agreed that the Drafting Committee should consider whether there was any advantage in trying to draw a distinction between a mistake of the type envisaged in article 26 and “error” in article 33. The point was on the whole a psychological one, since there would be no confusion in the minds of lawyers as to what the two sets of provisions were intended to cover.

47. With regard to the question whether paragraph 3 should be retained in article 33 or its substance transferred to article 26, he did not have any strong feelings, but felt that there was some advantage in keeping the cross-reference in article 33, to indicate the clear distinction between the effect of error in the two cases. The point could safely be left to the Drafting Committee.

48. The CHAIRMAN said he noted that no member had formally proposed that the article deal expressly with errors of law, though one had asked the meaning of the expression “state of facts” (*état de choses*).

49. Sir Humphrey WALDOCK, Special Rapporteur, said that all the suggestions made during the discussion would be taken into consideration by the Drafting Committee. On the subject of errors of law, however, no clear proposal had been made for the inclusion of that notion with sufficient precision to avoid the very grave dangers involved.

50. The CHAIRMAN said that if there were no objection, he would consider that the Commission agreed to refer article 34 to the Drafting Committee for consideration in the light of the comments made during the discussion, the question of separability being reserved.⁶

It was so agreed.

ARTICLE 35 (Personal coercion of representatives of States)

Article 35

Personal coercion of representatives of States

1. If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect.

2. Under the conditions specified in article 46, the State whose representative has been coerced may invoke the coercion as invalidating its consent only with respect to the particular clauses of the treaty to which the coercion relates. (A/CN.4/L.107, p. 34)

51. The CHAIRMAN invited the Commission to consider article 35, for which the Special Rapporteur, in

⁶ For resumption of discussion, see 840th meeting, paras. 19-44.

his fifth report (A/CN.4/183, p. 39), had proposed a revised text which read :

If the signature of a representative of a State to a treaty has been procured by coercion, through acts or threats directed against him in his personal capacity, the State may invoke such coercion as invalidating its consent to be bound by the treaty.

52. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 35, said that the few government comments on that article were analysed in his report. The main point which had been raised was whether, in the event of coercion, the expression of consent should be regarded as "without any legal effect", as stated in paragraph 1 of the 1963 text, or whether it should simply give the injured State a right to invoke the coercion as grounds for invalidating its consent.

53. During the 1963 discussion, the Commission had had very much in mind the historical instances of coercion against high officers of State of foreign countries by the Hitler régime. It should, however, be borne in mind that article 36 dealt with coercion of a State by the threat or use of force; that article declared that any treaty procured by such coercion "shall be void".

54. The circumstances envisaged in article 35 were different; the case was one of coercion or blackmail against an individual representative, and it might well be that the State concerned would prefer to maintain the treaty while objecting to the coercion. In that event, the State would be ratifying the act of its representative. He had therefore, in his fifth report, suggested a rewording of article 35 which brought the language close to that of article 33, dealing with fraud.

55. As with the previous articles, the question of separability, previously dealt with in paragraph 2, would be reserved.

56. Mr. BRIGGS said that the Special Rapporteur had been somewhat misled by the comment of the United Kingdom Government that "it is not clear whether paragraph 1 would cover the case of signature of a treaty which is subject to ratification and, if so, whether a signature procured by coercion is capable of being ratified" (A/CN.4/183, p. 37). In fact, it was not the signature to a treaty which was ratified, but the treaty itself, as was clear from the text of article 12 adopted by the Commission in 1965.

57. The problem contemplated by the United Kingdom Government could not arise. The signature of a treaty subject to ratification was not binding. The State concerned could proceed or not to express its consent by ratification or otherwise. The situation envisaged in article 35 was that of personal coercion of the representative of a State when that representative expressed the consent of his State. That consent could be given in the form of a signature not subject to ratification, but it could also be given in the form of accession, approval, acceptance, or ratification.

58. For those reasons, he urged the retention of the language used in 1963, which referred to representatives being coerced "into expressing the consent of the State to be bound by a treaty", instead of replacing it by the Special Rapporteur's rewording "if the signature of a

representative of a State to a treaty has been procured by coercion".

59. With regard to the concluding phrase, he agreed with the Special Rapporteur's proposal to replace the system of absolute nullity, embodied in the words "shall be without any legal effect", by a system which would give the State concerned the right to invoke coercion as grounds for invalidating consent. However, he did not agree with the Special Rapporteur's idea of going so far as to make the provision identical with that which related to fraud. As far as the language was concerned, however, he preferred the formula suggested by the Government of Israel (A/CN.4/183, p. 36), "the State whose representative has been coerced may invoke the coercion as invalidating its consent to be bound by the treaty".

60. Mr. YASSEEN said that the Special Rapporteur's remarks concerning the similarity between fraud and a certain type of coercion had failed to convince him. To his (Mr. Yasseen's) mind, fraud—a concealed violation—was of course reprehensible, but coercion was even more so; it was a flagrant violation and a defiance of the international legal order. He could not accept the Special Rapporteur's new formulation; he would prefer the Commission to return to the 1963 approach and to state that an expression of consent obtained by coercion was without any legal effect. Every form of international brigandage should be severely repressed.

61. It was better to refer to consent to bind the State than to signature, for what was involved was not the signature but an act which bound the State. It was precisely because it compelled a representative to perform an act which bound his State that coercion could be regarded as vitiating the treaty. In that connexion, the French text of the redraft was open to criticism: surely, a State whose representative had signed as a result of coercion was not really a "*partie à un traité*".

62. Admittedly it might be to the interests of the State to adopt a treaty concluded in such conditions, but that must not affect in any way the consequences of the coercion. It certainly could not justify pushing the fiction so far as to permit the confirmation of consent which was non-existent and could by no manner of means be attributed to the State. If the State considered that the treaty might be to its interests, it could always conclude a fresh treaty similar to the one procured by coercion.

63. Mr. AGO said that, in his view, the crucial question posed by the coercion of the representative of the State was: should the coercion automatically nullify the treaty, or should the party concerned be left free to decide whether to claim that its consent was invalid or to confirm the treaty? The question was rather of academic interest, for instances of such coercion were happily infrequent, and a State was hardly likely to confirm a treaty signed under duress without requiring fresh negotiations.

64. It was for the Commission to decide where it wished to draw a distinction: between coercion and fraud, or between the personal coercion of representatives of States and the coercion of States referred to in article 36? The Special Rapporteur had preferred the second

approach, and he (Mr. Ago) was ready to support the Special Rapporteur's proposal if the majority did.

65. On the question of signature, he took the same view as Mr. Briggs and Mr. Yasseen; what the Special Rapporteur had clearly had in mind was not "signature" in the technical sense, but either the signature which expressed the definitive consent of the State or that given in the form of ratification. In order to forestall any ambiguity, however, it would be better to speak of the expression of the consent of the State.

66. He proposed that the article read;

"If the representative of the State was coerced by acts or threats directed against him in his personal capacity into expressing the consent of the State to be bound by a treaty, the State may invoke the coercion as invalidating its consent to be bound by the treaty".

If, however, the Commission preferred the idea of absolute nullity, then the article should end with the 1963 wording.

67. Mr. TUNKIN said that he could not accept the Special Rapporteur's new draft for article 35, which was inferior to the text drawn up at the fifteenth session.

68. There was, moreover, a legal difference between the two texts. The purport of the earlier one was that, if a representative of the State was coerced into expressing its consent to a treaty, no consent had been given because it had been vitiated by an illegal act of another party. That was a correct statement of the law. By contrast, the new text seemed to imply that a consent was given, but that the injured State could subsequently invoke the circumstances in which that consent had been given as grounds for invalidating it.

69. In the first sentence of paragraph (1) and in paragraph (3) of the commentary prepared at the fifteenth session, the Commission had explained its reasons for drafting article 35 in the form chosen and no new facts had been advanced by the Special Rapporteur to justify any change. It was surely not the Commission's opinion that an act of coercion was closely analogous to fraud.

70. The old international law had recognized the right of States to use force in international relations and many treaties obtained by force had not been regarded as null. The new international law prohibited the use of force and held States responsible for acts of aggression. The Special Rapporteur's new formula was at variance with the law as it now stood and did not correspond to its general line of development.

71. He agreed with Mr. Briggs that the new text proposed by the Special Rapporteur was unduly restrictive in referring only to a signature procured by coercion, whereas the earlier one had dealt with any act expressing consent to be bound. Indeed it would be preferable to revise the earlier text so as to mention only an act intended to bind the State, and not to speak of consent, since there could be none when coercion had taken place.

72. Mr. CASTRÉN said he noted that, in the light of the comments of governments, the Special Rapporteur was proposing quite far-reaching changes in the substance of article 35, which would greatly weaken the legal

effects of the personal coercion of representatives of States.

73. The new version was more flexible than the previous one, inasmuch as it gave the aggrieved State a choice of several courses of action, but it might be wiser not to change the 1963 text, for the new wording might be criticized by certain governments.

74. With respect to the other points raised, he preferred the 1963 text, for the reasons given by previous speakers.

75. Mr. PESSOU said that he did not see how a single rule of law could encompass all the types of coercion exerted on representatives of States; coercion took many forms and was becoming increasingly subtle. Whatever the text proposed by the Drafting Committee, a representative of a State, conscious of his human dignity, was an independent being and must have the courage to resist any pressure to which he might be subjected and to reject intimidation and threats. A further risk he might run was that of being disavowed by his own Government as the result of other kinds of pressure, when its true nature was concealed by bad faith.

76. Mr. de LUNA said that the general theory of internal law on obligations could not be applied automatically to international law. What were the legal effects of coercion directed against the person of representatives of States? There might be three different kinds of case, as had been made abundantly clear, not only in the pleadings but in the award and the opinions in the Case concerning the Arbitral Award made by the King of Spain between Honduras and Nicaragua which had been brought before the International Court of Justice.⁷ The legal act, whether unilateral or bilateral, might be non-existent; or it might be null and void; or else it might be voidable. The first could be disregarded, but the second case and the third should be differentiated.

77. If a representative had been subjected to blackmail and, lacking the courage of which Mr. Pessou had spoken, had yielded, what would be the consequences? So long as the blackmail remained secret, the act would have all the appearances of validity and would seem to give rise to valid obligations. The distinction appeared when the fact that he had been blackmailed was discovered. If in such a case the act was held to be void, it would not produce any effects. If, however, it was merely voidable, there would be no retrospective effects but there would be many other effects which would have to be accepted. The importance of the problem from the point of view of international law, and of international politics which were founded on international law, became immediately apparent.

78. Although he accepted some of the aspects of the Special Rapporteur's redraft, he preferred the 1963 version, which was less ambiguous. His view was that, if the coercion directed against the person of the representative of the State induced him to express his State's consent to be bound by a treaty, the discovery of the coercion produced only one effect, the nullity of the act.

79. Mr. AMADO said that at the 681st meeting he had stated that coercion was precisely the contrary of

⁷ *I.C.J. Reports 1960*, p. 192.

fraud. So far from being characterized by trickery or concealment, coercion was an open, outright threat, a forcible display of power having the object of compelling the partner to yield to a stronger will and of preventing him from manifesting his own will. It was unquestionable, therefore, that an instrument signed under such conditions was void. A representative subjected to coercion could not be said to have a will of his own.⁸ Consequently, it was inconceivable that coercion should be invoked as a reason for invalidating consent: coercion simply rendered the treaty void.

80. He therefore firmly supported the 1963 text. The modern world was governed by the United Nations Charter, and international law had undergone great changes. Force and coercion in international relations were relics of the past, and the time had come for an unambiguous statement that an act obtained through coercion had no legal effect.

81. Mr. AGO said that, at the beginning of the discussion, he had had no preference; but since the Commission seemed inclined to favour the view that the effect of coercion was absolute nullity of the act in question, he was prepared to accept that view.

82. Nevertheless, there were some notions which seemed to him to be mistaken, notably the idea that the legal position in cases of fraud and error differed from that in cases of coercion. Admittedly, coercion might be regarded as more serious, but he could not agree that error or fraud resulted in voidability, whereas coercion would result in nullity. In all cases the result was a nullity. Voidability was a concept that was applicable only in the context of internal law, where one could apply to an authority with power to void an instrument. Even in cases of fraud, the consent was not a genuine consent; if it was vitiated, it did not exist, and if the State concerned claimed that its consent was invalid, the nullity operated *ex tunc* and not *ex nunc*.

83. The real problem was different: was it intended that nullity should be absolute? Or was it to be left to the State concerned to decide either to plead nullity or to make good the act, whether by a subsequent declaration or by its silence?

84. Mr. ROSENNE said that he was unable to support the text of article 35 as adopted at the fifteenth session. Its two paragraphs contradicted each other and the purport of the article as a whole was ambiguous, especially when it was juxtaposed with articles 36 and 37.

85. Mr. AGO had put the matter in its right perspective when pointing out that the choice lay between relative and absolute nullity. It would be more prudent to adopt the view that personal coercion would lead to the relative nullity of a treaty and to leave absolute nullity to be a consequence of coercion of a State, in accordance with article 36, or conflict with a peremptory norm of international law, in accordance with article 37, as it was undesirable to allow too many reasons of absolute nullity *ab initio*.

86. He agreed with Mr. Briggs that the new text proposed by the Special Rapporteur should be amplified

so as to cover all forms of act expressing consent to be bound, as it was incorrect to confine the provision to signature.

87. Mr. ELIAS said that he was in favour of retaining the text approved at the fifteenth session, though some drafting changes would be necessary in order to state the principle as clearly as possible. On that occasion the Commission had rightly condemned the use of force, either by means of moral pressure or by physical threats, for the purpose of obtaining consent to a treaty. The old rule of customary law, that even treaties concluded at pistol point should be upheld, could no longer be accepted. The provision whereby the effect of coercion would be to render the treaty null was a progressive one and he hoped the Commission would not re-open the discussion on the main issue of principle. Adoption of the 1963 text should make for better international relations.

The meeting rose at 1 p.m.

826th MEETING

Friday, 7 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A.CN.4/183 and Add.1-2, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

1. The CHAIRMAN said that a letter had been received from Mr. Pal regretting that, for health reasons, he was unlikely to be able to attend the present session. He suggested that the Commission send a telegram to Mr. Pal, wishing him a speedy and complete recovery.

It was so agreed.

2. He invited the Commission to continue its consideration of article 35.

ARTICLE 35 (Personal coercion of representatives of States) (continued)¹

3. Mr. CADIEUX said that he was inclined to favour the Special Rapporteur's new formulation, with the slight changes suggested by Mr. Briggs; it was an improvement on the previous version, mainly because it was more flexible and provided for the voidability of the instrument accepted by the representative under coercion, instead

⁸ Yearbook of the International Law Commission, 1963, Vol. I, p. 50.

¹ See 825th meeting, preceding para. 51, and para. 51.

of for its nullity *ab initio*. The Commission should offer to the international community a rule that was better suited to its requirements; there was no intention of setting contemporary against traditional law, or of encouraging reprehensible practices.

4. Pressure brought to bear on the representative of a State was usually of a clandestine nature and could only be proved long after the event. So far as the injured State and third parties were concerned, quite a long period might elapse between accession to the treaty and the time when the grounds for invalidating the consent could be invoked. *De facto* situations and interests might have been created in good faith. Consequently, it would be imprudent not to give to those concerned a chance to consider the situation with care before they applied the necessary remedy, and it would be inadvisable to stipulate that, in all such cases, the treaty would be void. It was true that the injured State could ask to be relieved of its obligations, but why should it be compelled to do so? Surely it was better to leave it free to choose between annulling the treaty and proposing, or even demanding, some other form of compensation.

5. Furthermore, the Commission should take into account the complexity and delicacy of the circumstances. When it had finally been proved that the representative's will had been coerced, the injured State might not always deem it desirable to give the case a great deal of publicity, since that might damage the good name of the representative concerned and render political relations with the guilty State difficult, or even jeopardize them. Such a course might not always be consonant with the interests of the injured State, or even with those of the international community.

6. A comparable problem arose when a diplomatic agent was guilty of behaviour that was incompatible with his status. The receiving State could declare him *persona non grata* and require him to leave the country, but it would realize that such action would have political repercussions. Alternatively, it could act more discreetly; it could transmit its complaint through the diplomatic channel and ask the other State to withdraw the official concerned. In his opinion, a less categorical approach of that kind was better adapted to the needs of diplomacy.

7. He had no intention of introducing a political note into the discussion, but he was anxious that the Commission should not take up a position which some persons might find rather too dogmatic and unrealistic. It might well happen that the injured State was not entirely guiltless. Naturally, the Commission was bound to condemn the use of coercion; but it should prefer the simpler, wiser and more effective formula it had adopted in 1963.

8. It was also necessary to examine with care by what independent means, judicial or other, it would be possible to determine whether the rule applied in particular cases. If the Commission allowed States to repudiate their contractual obligations by unilaterally claiming that their representatives had been subjected to pressure, it would open the way to so many abuses that, in the absence of some kind of objective control, the whole edifice it was constructing would be extremely fragile.

9. Mr. BEDJAOUI said that on the whole he preferred the 1963 text to the Special Rapporteur's new formulation.

10. He agreed with Mr. Briggs that the reference to signature *stricto sensu* gave the new text too narrow a meaning. What troubled him, however, was the question of nullity. Ever since the beginning of the session, the Commission had wavered between absolute nullity and voidability. It had been said that the discussion was purely academic and that instances of the personal coercion of representatives of States were rare. While that was true, the Commission, which would not wish to create difficulties for States in daily practice, should not abandon the principle itself: if the result was absolute nullity, it should say so, instead of producing a vaguely-defined rule which made it impossible to picture the problem clearly.

11. Even so, he was not entirely satisfied with the article adopted in 1963. It was paradoxical to say that an act without any legal effect could regain legal effect simply by being confirmed. An act void *ab initio* should be regarded as such: a fresh legal transaction was required to revive the act.

12. The Commission should therefore revert to the 1963 text, paragraph 1 of which was self-sufficient. It would perhaps be inadvisable to retain paragraph 2, which gave the injured State an opportunity to cure the defect of the consent.

13. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had no doubt wished to contribute to the stability of treaties by providing that the treaty, even one procured by force or threats, could be restored to life. His personal view of the principle of the stability of treaties was different, perhaps because he was a strong partisan of the traditional theory of will and of the new trends enshrined in the United Nations Charter.

14. His view was that the will of a body corporate, such as a State, could not be expressed except by an individual. Where force had been threatened, there might perhaps have been an expression of will, but in fact no real will had existed, since it had not been expressed in freedom. A false expression of will was invalid *ab initio*, and the act had no existence: it was impossible to confirm or validate such an act.

15. Furthermore, the Charter contained new positive rules of international law. Where there had been coercion, there was a clearly defined separation between the will expressed by the representative and the will of the State. Coercion of the representative of the State was an unlawful interference in the internal organization of that State. The use of coercion could not possibly be regarded as admissible in international law. Merely because it wished to promote the stability of treaties, the Commission could not maintain that there was no such thing in international law as the stability of the freedom of the individual and of the State. It was the Commission's duty to try to ensure stability in international relations, of which treaties were merely the instruments. The Commission should accordingly revert to the 1963 text.

16. Mr. de LUNA said that there was a big difference between the Special Rapporteur's new formulation and the article as adopted in 1963.

17. Admittedly, international law had developed through the ages, but it had also developed so far as

concerned the effects and defects of will and consent; the Croft case of 1856² was typical of a distressing period in the history of international law, when the notion of defective consent had been unknown and when might had been right. The development to which he had referred had started under the League of Nations, had expanded under the rule of the United Nations Charter, and would continue. Every day it brought out more clearly the effects of coercion on the consent of States.

18. He was not unaware of the dangers to which some speakers had drawn attention. The principle of the stability of treaties conflicted not only with the nullity but also with the voidability of an international legal act. There had been references in the discussion to relative nullity and absolute nullity; such notions probably belonged to English law and were difficult for a continental jurist to understand. It seemed to him that the difference was merely that absolute nullity could be invoked by anyone and could be declared *ex officio* by a judge, whereas relative nullity could be invoked only at the request of the injured party.

19. Although cases of nullity were exceptional, they nevertheless existed; an instance was the Treaty of Madrid forced upon the French king, Francis I, in 1526, which French jurists, anticipating the provisions of article 35, had rightly held to be void.

20. Mr. TUNKIN said that he was unable to agree with Mr. Rosenne that the Commission should be careful before providing that absolute nullity would ensue from the personal coercion of a representative, since the aim should be to set up legal barriers against international brigandage.

21. He had also been surprised to hear from Mr. Cadieux that the Special Rapporteur's new text was better adapted to the needs of contemporary diplomacy. It was not correct to argue, as had been done by some supporters of the new draft, that if a treaty secured by personal coercion were regarded as an absolute nullity, the injured State would be deprived of the possibility of accepting the treaty. As jurists, the first duty of members of the Commission was to state the legal consequence of personal coercion, which was the absolute nullity of the resulting treaty, but that did not mean that the injured State could not sign a new instrument drafted in precisely the same terms. A perusal of the third, fourth and fifth sentences of paragraph (6) of the commentary to article 36, as approved at the fifteenth session, would reveal that such had been the Commission's opinion at that time.³

22. Mr. ROSENNE said that the reason why he considered the Special Rapporteur's new approach to article 35 preferable to that adopted in 1963 was that a provision on the lines he was now suggesting would diminish the possibility of charges and counter-charges concerning personal coercion which, in the absence of an established system for the objective determination of the dispute, might result in exacerbating rather than reducing international tension. He shared the Chairman's view that the question at issue was stability in inter-

national relations rather than merely the stability of treaties.

23. He was uncertain whether in fact there would be any need for an article in the form apparently desired by many members and providing for absolute nullity *ab initio* of the treaty. Even if the internal contradiction between the two paragraphs of article 35 and the contradiction between article 35 and articles 36 and 37 were eliminated, any case of the kind contemplated would in fact be indistinguishable from that covered by article 36.

24. Mr. CADIEUX, referring to Mr. Tunkin's remarks, said that the difference in practice between the two possible consequences of coercion—the nullity or the voidability of the treaty—should not be exaggerated. Even if article 35 provided that any treaty obtained by coercion of a representative was void, the nullity would only take effect if the injured State demonstrated that coercion had been applied. Actually, the State would do that only if it wanted to, if it considered it in its interests to do so. If, in article 35, the Commission confined itself to the statement that it was open to the injured State to invoke such coercion as invalidating its consent to be bound by the treaty, it would be saying all that could usefully be said.

25. The CHAIRMAN, speaking as a member of the Commission, said he strongly opposed Mr. Cadieux's reasoning. If article 35 stated that the treaty obtained under the conditions mentioned was void, then the parties would not be able to rely on any right or insist on the performance of any obligation under that treaty, and non-performance of the treaty could not give rise to any international action. A treaty obtained under such conditions was void absolutely, and nothing had to be done to declare it so. Consequently, the point was of great importance not only in theory but also in practice.

26. Mr. AMADO said that he entirely agreed with the Chairman. In drafting article 35 in non-categorical language, the Special Rapporteur had no doubt had in mind the case of fraud. In paragraph 2 of his observations on the article, the Special Rapporteur said that "the State whose representative had been subjected to personal coercion should have the option to accept the treaty as valid, or to reject it as invalidated by the coercion or, in appropriate cases, to regard as invalid only the particular clauses to which the coercion relates" (A/CN.4/183, p. 39). Such delicate distinctions were quite unacceptable. A treaty where the expression of the will of the State was not genuine, where another will was substituted for the will of the State, was not a treaty at all and could not produce any effects in law. Such a treaty could not be anything else but void.

27. Sir Humphrey WALDOCK, Special Rapporteur, said that the real problem dealt with in article 35 had perhaps not been seen in proper perspective because not enough attention had been given to the existence of article 36.

28. The Chairman had not been quite right in saying that, as Special Rapporteur, his primary concern in the present instance had been to safeguard the stability of treaties. Although he certainly attached great importance to safeguarding the security and stability of treaties, in the present instance his chief object had been to set out

² A. de Lapradelle et N. Politis, *Recueil des arbitrages internationaux*, Vol. II, pp. 1-37.

³ *Yearbook of the International Law Commission*, 1963, Vol. II, p. 198.

the law as accurately as possible and to draw a distinction between the personal coercion of a representative and the coercion of a State.

29. At the fifteenth session, the Commission had been fully aware that article 35 might cover the same ground as article 36 and had realized that most of the historic examples of the coercion of representatives, some of which had been mentioned in paragraph (1) of the commentary to article 35,⁴ would in fact fall under the provisions of article 36 unless the latter were interpreted in a very restrictive sense.

30. Coercion of an individual could take different forms, especially if the individual were a diplomatic representative residing in the country where the negotiations were taking place. He had always been, and he remained, of the opinion that there was no substantial difference between bribery and undermining the resistance of an agent by recourse to drugs or blackmail, all of which seemed to him to have much in common with fraud; such acts were, however, materially different from coercion directed against the State itself.

31. Like certain governments, he felt that the Commission should re-examine article 35 in order to decide whether it had been right in imposing the sanction of absolute nullity in those cases as a matter of public order. The result then would be a clean slate with both parties beginning any new negotiations from the same position. The question was whether an option should not be given to the injured State to uphold the treaty.

32. He did not fully share Mr. Amado's views about paragraph 2 of the text approved in 1963. The Commission had inserted the paragraph precisely because the coercion might relate only to particular clauses.

33. It was arguable that the sanction contemplated in the new draft was more severe than that imposed in the early draft, because it gave the injured State an option.

34. If the early draft were retained, the contradiction resulting from the element of option which had crept into paragraph 2 would have to be removed.

35. He agreed that not signature but the expression of consent was the focal point of the article. It was nevertheless conceivable that a signature would be subject to ratification and that a State might ratify in good faith only to discover later that coercion had taken place. Surely it ought then to have the right to declare the treaty a nullity. Yet such a case would not fall under an article such as had been adopted in 1963 and was now advocated by members of the Commission, because the coercion would relate not to the expression of consent but to the negotiation.

36. In reality, the article was not of great moment because the main issue—coercion of the State—was covered in article 36. The reason why instances of personal coercion had received prominence in the textbooks probably was that they had occurred at a time when coercion of a State was not a ground in international law for nullifying a treaty.

37. As there was some division of opinion about the proper approach to adopt, the Commission should define its position so as to give the Drafting Committee adequate guidance.

38. The CHAIRMAN, speaking as a member of the Commission, said he wished to comment on the two questions asked by the Special Rapporteur.

39. The first was to what extent article 35 was useful, and the Special Rapporteur had intimated that the subject could perhaps be dealt with in article 36. But in his (the Chairman's) opinion, article 35 should not be deleted.

40. The relationship between article 35 and article 36 had been discussed in 1963. Cases were by no means rare where entirely private factors, touching the person of a representative of the State, had been used to influence the expression of the will of the State, independently of any question concerning the State's own interests. There was a big difference between blackmailing a plenipotentiary by threatening to disclose details of his private life, and threatening to bomb cities. For example, Austria-Hungary had threatened certain measures against the personal property of King Milan of Serbia in order to influence him to sign a secret convention whereby Austria-Hungary had secured recognition of its right to intervene in Serbia's internal affairs.

41. With regard to the second question—whether, instead of the complete disappearance of the treaty, some possibility should be left of maintaining the treaty—that approach, although the easier one, should be rejected, for it would be tantamount to accepting the situation created by the coercion, and endorsing the action of the State which had violated the international public order. Instead of showing an indulgence which would be contrary to the principles adopted in San Francisco, the Commission should condemn, at least morally, whoever was responsible for such flagrant misconduct.

42. Sir Humphrey WALDOCK, Special Rapporteur, said that as far as article 36 was concerned, it was important to ensure that the injured State wishing to negotiate afresh should do so from a position of complete equality with the other State. The situation in regard to article 35 was different, because it was concerned with the case where an individual had been coerced but not the State. Because of the disgrace to the State guilty of coercion and of having indulged in reprehensible procedures, the injured State might indeed be able to extract concessions once it had discovered that coercion had occurred and that the treaty was invalid.

43. He had not been particularly impressed by certain observations concerning sanctions as he believed that the forms of personal coercion were analogous to bribery and corruption, all of which were highly disreputable acts, and he was unable to see why they should give rise to different kinds of sanctions.

44. The CHAIRMAN, speaking as a member of the Commission, said that after the Second World War some States had on several occasions tried to induce ambassadors to sign certain arrangements without their governments' authority, and for that purpose had threatened to publish compromising documents; in

⁴ *Yearbook of the International Law Commission, 1963*, Vol. II, p. 197.

return, they had promised to give the ambassadors political asylum once the arrangements had been signed. He asked whether the Special Rapporteur would consider such machinations as a case of serious personal coercion.

45. Sir Humphrey WALDOCK, Special Rapporteur, replied in the affirmative.

46. Mr. ELIAS said that the Commission must give a firm directive to the Drafting Committee either to provide in article 35, paragraph 1, for the absolute nullity of a treaty obtained by any form of coercion of a representative, or to reconsider the whole question on the lines of the Special Rapporteur's new text or of that proposed by the Government of Israel.

47. His personal opinion was that the injured State should be firmly advised against ratifying any treaty procured by coercion, whether of a representative or of a State, as the use of force was equally reprehensible in either case.

48. Mr. ROSENNE said that, as the majority view had emerged fairly clearly, there was no need for any formal decision at that stage and the article should be referred to the Drafting Committee in the light of the discussion.

49. Mr. BRIGGS said he agreed with Mr. Rosenne. It was the Commission's custom to refer any issue as a whole to the Drafting Committee, and in the present instance it would be preferable to defer the vote until a new text had been circulated.

50. Mr. TUNKIN said he had no objection to the article being referred to the Drafting Committee, on the understanding that a clear majority had pronounced itself in favour of providing for the absolute nullity of a treaty secured by the personal coercion of representatives.

51. Sir Humphrey WALDOCK, Special Rapporteur said that in the circumstances he would propose a new text to the Drafting Committee based on that approved at the fifteenth session. He hoped that the question of article 35 could be referred in general terms to the Drafting Committee, as it was important to eliminate from the 1963 text the element of contradiction.

52. The CHAIRMAN said he noted that at most five members of the Commission, if Mr. Ago were included, had expressed support for the new text, whereas nine had expressed a preference for the earlier text.

53. Mr. YASSEEN said he would not object if article 35 were referred to the Drafting Committee without precise instructions as to the drafting problems which had been raised. On the other hand, the Commission should itself settle the fundamental problem of the choice between the view that the coercion referred to in article 35 had the effect of voiding the treaty *ab initio*, and the view that such coercion should have the effect only of making the treaty voidable. Since the majority favoured the former view, the Commission should ask the Drafting Committee to revise the article accordingly.

54. The CHAIRMAN said that the proposals before the Committee—that of the Special Rapporteur, and that of Mr. Elias which was supported by Mr. Yasseen—were not irreconcilable, since the majority view had

crystallized in the course of debate and the Drafting Committee would certainly take that view into account.

55. Sir Humphrey WALDOCK, Special Rapporteur, said that at its fifteenth session, by providing in article 47 for the possibility of a waiver of the right to allege nullity in the circumstances covered by article 35, the Commission had failed to give full effect to the principle of absolute nullity in article 35. It had also decided that the principle of separability could apply in cases of personal coercion, but not in cases of coercion against a State. If the principle of absolute nullity were now to be adopted, the Drafting Committee would have to examine the implications of those decisions.

56. The CHAIRMAN said that in 1963 the Commission had accepted the principle of the separability of treaties for the purposes of article 35; he consequently saw no reason why the Special Rapporteur should not submit his comments on that point to the Drafting Committee.

57. Mr. de LUNA said that the Drafting Committee should standardize the terminology of the articles dealing with related matters and providing for analogous consequences. For example, if the Commission wished to provide that, in the case contemplated in article 35, the treaty was void, it might employ the phraseology of article 36 as adopted in 1963: "Any treaty . . . shall be void".

58. The CHAIRMAN suggested that article 35 be referred to the Drafting Committee.

*It was so agreed.*⁵

ARTICLE 36 (Coercion of a State by the threat or use of force)

Article 36

Coercion of a State by the threat or use of force

Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void. (A/CN.4/L.107, p. 34)

59. The CHAIRMAN invited the Commission to consider article 36, for which the Special Rapporteur had proposed the following rewording:

Any treaty and any act expressing the consent of a State to be bound by a treaty which is procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void. (A/CN.4/183/Add.1, p. 14)

60. Sir Humphrey WALDOCK, Special Rapporteur, said that his rewording of article 36 took into account a small but valid drafting point raised by the Government of Israel.

61. Some governments had suggested in their comments that there should be some further definition of the notion of coercion so as to cover, for example, cases of economic coercion. He had dealt with those comments in paragraphs 1 to 5 of his observations (A/CN.4/183/Add.1), where he had recalled the Commission's conclusion in 1963 that the precise scope of the acts covered

⁵ For resumption of discussion, see 840th meeting, paras. 45-83.

by the words "threat or use of force in violation of the principles of the Charter" should be left to be determined in practice by interpretation of the relevant provisions of the Charter.

62. As he had pointed out in paragraph 5 of his observations, the formulation of the article was, as it were, "open-ended": any interpretation of the principle that States must refrain from the threat or use of force which became generally accepted as authoritative would automatically have its effects on the scope of the rule laid down in article 36. The text thus did not exclude any developments in United Nations practice in the matter. Since 1963, the principle had been remitted by the General Assembly to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which had studied it at its session in Mexico City in November 1964 but had not been able to arrive at any definite conclusion. The item was, however, still on the agenda of the Special Committee and it would therefore not be appropriate for the Commission to take it up. In the circumstances, the best course was to retain the 1963 text.

63. Some governments had raised the interesting legal point of the temporal application of the rule in article 36. As he had pointed out in his observations, the Commission had already to a large extent taken the time element into account in the context of article 37, by laying down two separate rules: first, the rule covering conflict with an existing rule of *jus cogens*, embodied in article 37 and, secondly, the rule covering invalidity resulting from a new rule of *jus cogens*, contained in article 45. The present article, in any event, concerned the formation of the treaty, and the validity of the consent must be governed by the law in force at the time of the treaty's conclusion.

64. The United States Government had specifically raised the point whether it ought not to be provided that the rule in the present article should only become operative as from the time when the draft articles were finally adopted (A/CN.4/183/Add.1, p. 5). Personally, he felt that it would be illogical to formulate a rule which was of *jus cogens* character on the basis that it was an existing rule and at the same time to say that it would operate only from some future date. He would urge, therefore, that no change be made in article 36, but that the Commission bear the matter in mind when it came to consider the related questions dealt with in article 52, dealing with the legal consequences of the nullity of a treaty, and article 53, dealing with the legal consequences of the termination of a treaty.

65. The CHAIRMAN said that, during earlier discussions in the Commission, Mr. Paredes had spoken at length on the subject of economic coercion, but although several members would have preferred that the draft mention that kind of coercion, the Commission had not accepted the idea.

66. In his opinion, the difference between article 36 and article 37 was that, in the case contemplated by article 36, the treaty was void because the will of the State had been expressed under a coercion consisting of the threat or use of force in violation of the principles of the Charter, whereas in the case contemplated by

article 37, the treaty was void by reason of its actual substance, where it conflicted with *jus cogens*.

67. Mr. TUNKIN asked what was the implication of the replacement of the words "was procured" by the words "is procured" in the Special Rapporteur's new formulation.

68. He also asked whether the 1963 formulation would not cover the case, contemplated by the Government of Israel, of participation in an existing treaty procured by the threat or use of force in violation of the principles of the Charter.

69. Sir Humphrey WALDOCK, Special Rapporteur, replied that the change in the tense of the auxiliary verb was not intended to alter the meaning in any way. From the point of view of legal drafting, it was more normal and more correct to use the present tense. The rule as thus expressed would cover any treaty procured in the manner described, regardless of the time at which it was concluded.

70. On the second point, the case envisaged by the Government of Israel was that of illegitimate pressure being brought on a particular State to accede to an existing treaty which had been validly concluded previously. A liberal interpretation of the 1963 text would probably cover the point, but an improvement in the wording was advisable in order to make the position absolutely clear.

71. Mr. BRIGGS said that, on reflection, he was very much concerned at the effect of the system of absolute nullity embodied in articles 36 and 37, which made certain categories of treaties void and not merely voidable.

72. All members of the Commission were agreed in condemning certain objectionable practices, but it was not the Commission's function to issue a resounding manifesto in favour of righteousness; its function was to formulate precise legal rules that were capable of being applied through the appropriate procedures. In 1963, the Special Rapporteur had proposed an article which would have enabled the injured State to invoke coercion as a ground of invalidity. However, the Commission had preferred to adopt the system of absolute nullity on the mistaken assumption that absolute nullity need not be invoked. In fact, a subjective claim still needed to be made: a State wishing to be released from its treaty obligations must put forward a claim to that effect; that result did not occur by itself.

73. In 1963, he had stressed the necessity of a forum for the determination of what constituted a "threat or use of force in violation of the principles of the Charter", so as not to leave the matter to the subjective judgment of each individual State.⁶ He had examined with care the proceedings of the Special Committee at its Mexico City session in 1964, and those of the Sixth Committee at the twentieth session of the General Assembly, and the conclusion was forced upon him that there was perhaps even less agreement today on the scope and the precise meaning of that expression than there had been in 1963 when the Commission had drafted article 36.

74. In the circumstances, adoption of the proposed

⁶ *Yearbook of the International Law Commission, 1963, Vol. I, p. 54, paras. 16 and 17.*

wording would be tantamount to signing a blank cheque. The content of the rule of law would be left to be determined by the future votes of shifting majorities in a political body. Article 36 would declare void certain unspecified categories of treaties, leaving open the real content of the rule. In the absence of any machinery for the impartial determination of what constituted coercion and for applying the consequences of nullity or invalidity, the proposed provisions would involve a serious risk of the instability of treaties.

75. There were two ways of avoiding that result. The first was to adopt some such wording as:

“Any treaty the conclusion of which is found by an international judicial tribunal to have been procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void.”

A formula of that type represented the most desirable way of dealing with the problem and the reasons given against such a proposal did not seem to him at all convincing.

76. There was, however, a second possibility: instead of proclaiming the automatic invalidity of treaties for vague reasons which it was unable to make precise, the Commission could adopt the same approach as it had adopted in other articles of the draft and say:

“Where a treaty or any act expressing the consent of a State to be bound by a treaty has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations, a State claiming injury may invoke such a ground of invalidity in accordance with article 51 of these articles.”

77. Mr. ELIAS said that he found the 1963 formulation of article 36 more satisfactory than the one now proposed by the Special Rapporteur. The change of wording introduced in order to meet the point raised by the Government of Israel would create more problems than it would solve. Perhaps the Drafting Committee should consider whether the point could not be met by inserting, after the words “was procured”, some such wording as “or subsequent participation in which was procured”. He felt, however, that the 1963 draft was adequate to cover the point and that it would be sufficient to deal with the matter by means of an explanation in the commentary.

78. He was not in favour of introducing into article 36 any direct reference to article 51, or of mentioning the question of judicial adjudication. If such a change were made in article 36, it would also have to be made in such articles as article 32, on lack of authority to bind the State, article 33, on fraud, and article 34, on error, thereby rendering the whole draft more cumbersome.

79. He had assumed throughout the Commission's discussions on the draft articles on the law of treaties that any dispute regarding the correct interpretation of the articles would be submitted to adjudication by an international tribunal. The interpretation of the expression “threat or use of force in violation of the principles of the Charter” should therefore be left to a judicial body of that kind. The Commission could not make

provision for every contingency of litigation that might arise under any of the draft articles.

80. It was true that the discussions of the Special Committee at its Mexico City session had not produced agreement on the definition of the expression “threat or use of force”, but that did not mean that the International Court of Justice, or any other judicial body, would be unable to give a definition of the rule laid down in Article 2 (4) of the Charter. The expression “threat or use of force in violation of the principles of the Charter” was not as imprecise as some thought, since it was taken from the Charter itself. It would remain to some extent imprecise only until it was interpreted by a Court.

81. He supported the Special Rapporteur's proposal to retain the 1963 text as the best way of dealing with the matter.

The meeting rose at 1 p.m.

827th MEETING

Monday, 10 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Co-operation with Other Bodies

[Item 7 of the agenda]

1. The CHAIRMAN said that the Secretary-General of the United Nations had received from the Secretary-General of the Council of Europe a letter, dated 16 December 1965, concerning the European Committee on Legal Co-operation, which read:

“I have the honour to draw your attention to the fact that the Council of Europe set up in 1963 a special body for the purpose of dealing with co-operation of Member States in the legal field. This body, the European Committee on Legal Co-operation, whose statutory rules are enclosed herewith [Resolution (63) 29 of the Committee of Ministers] is at present composed of delegations of all the 18 Member States of the Council of Europe and of three delegates of the Consultative Assembly of the Council of Europe. Observers from Finland and Spain also attend the meetings and participate in the work of the Committee.

“The Committee has at present various items under consideration which appear to be connected with the work of the International Law Commission. Examples are: the Immunity of States, Consular Functions, and Reservations to International Treaties.

“In carrying out its work on these questions—as indeed on all other matters coming within its mandate—

the European Committee on Legal Co-operation has constant regard to the work undertaken by the International Law Commission. At the suggestion of Professor Monaco, Chairman of the European Committee on Legal Co-operation, I have the honour to put forward the idea of establishing a co-operative relationship between the International Law Commission and the European Committee on Legal Co-operation, along the lines of the agreements already existing between the Commission and the juridical body of the Organization of American States as well as the Asian-African Legal Consultative Committee.

“ In the light of the above, I have instructed Dr. Golsong, Legal Director of the Council of Europe, to be present at Monte Carlo from 10th to 16th January 1966, during the next session of the I.L.C., to place himself at the disposal of the Commission in order to examine further details of such an arrangement and also to inform the Commission of the present work of the European Committee on Legal Co-operation in the field of public international law.

“ Would you be kind enough to give instructions that any further correspondence regarding this question should be addressed to Dr. Golsong at the Council of Europe ?”

2. If there were no objection, he would take it that the Commission agreed to establish relations of co-operation with the European Committee on Legal Co-operation under article 26 of the Commission's Statute and to receive an observer for that Committee.

It was so agreed.

3. The CHAIRMAN said that a letter had been received from Mr. Elias, the General Rapporteur, informing the Commission that he had been called urgently to Lagos for the Commonwealth Conference on the Rhodesian question but would return as soon as possible to resume his work on the Commission.

4. He accordingly proposed that Mr. Ago be asked to preside over the Drafting Committee in the absence of the two Vice-Chairmen and the General Rapporteur.

It was so decided.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 36 (Coercion of a State by the threat or use of force) (*continued*).¹

5. The CHAIRMAN invited the Commission to continue its consideration of article 36.

6. Mr. de LUNA said that, up to the First World War, positive international law had not taken cognizance of the coercion of States. Then, on 16 March 1921, the Russian Soviet Federal Socialist Republic and Turkey had concluded a treaty² by which each party had under-

taken not to recognize as valid any peace treaty or other international obligation imposed on the other by force, and thus, for the first time, the principle that the illegitimate use of force could not be the source of an international obligation had been recognized. In the Free Zones case,³ which had arisen out of the treaties of 1815, the Permanent Court of International Justice had still stated the law as it had existed at the time—namely, that a treaty procured by coercion was in no way invalidated thereby. The United States, however, in application of the Stimson Doctrine, had declared in its famous note of 7 January 1932⁴ that it would not recognize a situation which resulted from a treaty concluded under the effects of coercion. From 1945, the date of the United Nations Charter, the principle had become accepted that a treaty procured by the use of force was void. That principle had been incorporated in the Geneva Conventions of 1949, which had laid it down that no derogation from their provisions should be made by special agreements between Powers, one of which was restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power was occupied.⁵

7. Nevertheless, although the principle was easy to state, it met with much resistance in practice. In their written comments and in the Sixth Committee, certain States had expressed the fear that its acceptance as a new principle of *lex lata* might create uncertainties in international relations. They were afraid that anarchy might result, since the international community was still organized according to a system of co-ordination and not of subordination: there was not as yet any executive or judicial authority set above the parties.

8. With regard to the type of coercion involved, he could see no difference between a threat to use the atomic bomb and a threat to starve the inhabitants of a country. Whatever form it took, such pressure was contrary to the spirit of the Charter. But the principle was so recent that it would be better not to be too specific, but to use a formulation that was objective and prudent. Much would already have been gained if it were accepted that a principle of the Charter had the force of an obligation. Moreover, the General Assembly had established a Special Committee to study the principle that States should refrain in their international relations from the threat or use of force, and that Committee had considered whether the obligation embraced economic, political and other forms of pressure. The Commission should therefore declare itself in favour of a flexible formula and leave it to the Special Committee, a political body, to decide how it was to be interpreted in practice.

9. The suggestion by the Government of Israel (A/CN.4/183/Add.1, p. 3) was interesting, but it would be sufficient to mention in the commentary that article 36 covered cases where participation in a treaty had been obtained by means of coercion. There was no need to introduce the idea of an “act” expressing the consent of

³ P.C.I.J., Series A, No. 22.

⁴ *Foreign Relations of the United States*, Diplomatic Papers, 1932, Vol. III, The Far East, p. 7.

⁵ Article 10 of Conventions relating to armed forces and article 11 of Convention relating to civilians.

¹ See 826th meeting, preceding para. 59, and para. 59.

² *British and Foreign State Papers*, 1923, Part II, Vol. CXVIII, p. 990.

a State to be bound; first, the expression was not clear, and secondly, since it dealt with a unilateral legal transaction, it was out of place in a convention on the law of treaties, which was concerned with bilateral legal transactions.

10. Mr. YASSEEN said that article 36, while reflecting the development of international law, did not unfortunately reflect it completely. Whereas the intention should be to condemn coercion as vitiating consent, the article did no more than condemn the threat or use of force in violation of the principles of the Charter; thus it condemned only one form of coercion—the threat or use of force—whereas coercion could take other forms, such as economic or political pressure.

11. There was a difference in drafting between article 35 and article 36. Whereas article 35, which dealt with coercion of representatives of States, treated coercion as a general notion, article 36, which dealt with coercion of a State, regarded it in a particular manner only. The reason for the distinction was obscure. The Commission should not just state that Article 2 of the Charter was applicable in the law of treaties, it should formulate a general theory condemning coercion in all its forms.

12. It had been said that the word “force” in Article 2, paragraph 4, of the Charter, did not connote economic or political pressure and meant only armed force. Such a narrow interpretation was inconsistent with the spirit of the Charter. Even if “force” meant only armed force, it could hardly be argued that, under the other principles of the Charter, such as that of the sovereign equality of States or that of non-intervention in the domestic affairs of States, economic or political pressure was lawful. Actually, those principles were incompatible with any kind of pressure capable of affecting the will of a State and of obliging it to express something at variance with its will.

13. In his observations, the Special Rapporteur referred to the proceedings of the Special Committee appointed by the General Assembly, which had met at Mexico City. It was true that, according to that Committee’s report, its members had been unable to agree that force, in the sense in which the term was used in Article 2, paragraph 4, of the Charter, included also the notion of economic and political pressure; but the Committee certainly had not said that according to the principles of the Charter, such pressure was permitted in international law. Consequently, it could not be argued from that Committee’s failure that the definition of coercion of a State meant only the use of force in the narrow sense, which was the interpretation upheld by some States.

14. To an ever-increasing extent, economic and political pressure was incurring the censure of the modern international legal order. Many authors held that such pressure was reprehensible under the principles of international law, such as those of the sovereign equality of States and non-intervention. Official opinion was likewise moving in the same direction. About forty States which had attended the Conference of Non-aligned States held at Cairo in 1964 had condemned economic and political pressure and had made it quite clear that, in their opinion, the term “force” used in the Charter also covered such pressure. In their written comments and

through the statements made by their delegations in the Sixth Committee, many States had similarly supported that interpretation.

15. Even if the force referred to in Article 2, paragraph 4, of the Charter meant only armed force, it could be said that the development of the law supported the interpretation which broadened the scope of the term to include economic and political pressure. For the purposes of the progressive development of international law and of establishing international relations and conventional law on a sound basis, it was indispensable that such forms of pressure should likewise be condemned.

16. Mr. ROSENNE said he endorsed the Special Rapporteur’s approach to article 36 and agreed with the observations in his commentary, which were consistent with the Commission’s frequently repeated decision not to attempt an interpretation of the United Nations Charter. Indeed it was neither required nor competent to define what kind of force or threat of force would bring a transaction within the scope of article 36. The Commission’s function was to state the existing law, taking fully into account the principles laid down in the Charter. That would inevitably result in what the Special Rapporteur had described as an “open-ended” article, of which there were other examples in the draft where the Commission had found it necessary to note the impact on the law of treaties of some principle belonging to another branch of international law, without entering into the details of that other branch of the law.

17. The inclusion of an open-ended provision of that kind was not the same thing as giving a blank cheque to the vote of a shifting majority in a political body. Legislation in all democratic assemblies was, after all, the result of such a vote, and the Legal Committee at the San Francisco Conference had deliberately decided that interpretation of the Charter should not be exclusively by judicial means.

18. Several governments had indicated that article 36, and some others, would only be acceptable if made subject to what was called independent adjudication. He did not find that expression entirely clear but presumed it meant determination by a third party, although not necessarily judicial in character. Those who equated such determination with judicial settlement should not forget the serious lesson of the Customs Régime between Germany and Austria Case of 1931 in the Permanent Court of International Justice⁶ and the Council of the League of Nations. Matters of high political moment, such as would underlie a case coming within article 36, could not easily or appropriately be referred to judicial settlement, and on that issue he remained of the opinion that he had expressed at the 682nd meeting,⁷ that a regular procedure to establish that a treaty was void was essential, without that necessarily being a judicial procedure. The provision in article 51 was probably the maximum attainable for the purpose.

19. On the question of the drafting of article 36, he questioned whether the opening words “Any treaty and”, of the Special Rapporteur’s new text, were necessary,

⁶ *P.C.I.J.*, Series A/B, No. 41.

⁷ *Yearbook of the International Law Commission, 1963*, Vol. I, pp. 54-56, paras. 18-31.

since he interpreted the following words "any act" in the sense given to an international act in the revised version of article 1, paragraph 1(d), as one whereby a State established on the international plane its consent to be bound by a treaty.

20. At its fifteenth session, the Commission had taken an imaginative step forward when it had drafted article 36, which had been described by the Sixth Committee in its report to the General Assembly (A/5601) as an important achievement of the international community which had received general endorsement; he could see no justification for retreating from that position.

21. Mr. CASTRÉN said it was evident from the great interest which governments attached to article 36 in their written comments and through the statements made by their representatives in the Sixth Committee, that the article was of capital importance.

22. The Special Rapporteur had commented on it very fully and had analysed it very clearly. Of the suggestions for the amendment of the 1963 text of the article, he had accepted only those put forward by the Government of Israel. He (Mr. Castrén) accepted the Special Rapporteur's conclusions and his revised text. Several speakers had questioned the amendment proposed by Israel; his personal opinion was that it was based on a correct notion, would usefully supplement the article, and did not present any risks. It did not matter greatly whether the article used the expression "treaty and any act" or "treaty or any act"; that was a point which could be settled by the Drafting Committee.

23. At the same time, however, acceptance of the amendment proposed by Israel would perhaps necessitate an analogous addition to other articles in the section concerning the invalidity of treaties, notably article 33. Notwithstanding the proposals made by some governments, the Commission should keep the general language of article 36, without attempting to interpret or to develop the principles of the Charter of the United Nations referred to in the article; that would hardly be desirable at a time when another United Nations body had been asked to deal with the matter, which was still on the General Assembly's agenda.

24. The question of the time element in the operation of article 36, which had been raised by some governments, should also be left aside, for the reasons given by the Special Rapporteur.

25. Mr. VERDROSS said that he approved the Special Rapporteur's proposed formulation. The fact that all States had accepted the basic principle stated in the article showed what great changes had taken place in international law. In the past, up to the First World War, a distinction had been drawn between a treaty imposed on a State and a treaty imposed on the organ of a State; even a treaty procured by force had been regarded as valid, because the use of force had been accepted. The use of force having become unlawful, it followed that a treaty procured by force could not be lawful and was therefore void.

26. He could understand Mr. Yasseen's hesitations, but the Special Rapporteur's proposed formulation was very flexible in that it referred, not to Article 2, paragraph 4, of the Charter, but to "the principles of the Charter".

As a national of a small State, he was naturally opposed to the use of political and economic pressure as a means of procuring the conclusion of a treaty. But that type of pressure was difficult to define; furthermore, the interpretation of the Charter was evolving. In any case, the Commission could not provide a complete interpretation of all the articles of the Charter.

27. When the Commission had adopted the draft articles on the interpretation of treaties, he had expressed the view that the rules stated in the articles were concerned with interpretation by the International Court of Justice or by a court of arbitration, not with interpretation by a quasi-legislative organ such as the General Assembly.

28. By stating that a treaty procured in violation of the principles of the Charter was void, article 36 left the door open for future developments in the interpretation of the Charter. The language it used could not be clearer, and in the present state of the law, the Commission could go no further.

29. Mr. TUNKIN said that he was in general agreement with the Special Rapporteur's conclusions and had noted with interest his reply to the somewhat troublesome question of the time element raised by the United States and Netherlands Governments.

30. At its fifteenth session, in its commentary to article 36, the Commission had rightly stated that "the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today".⁸ Most governments which had submitted observations on it had not only agreed with the text proposed but had also emphasized the great importance of the rule laid down, which was the direct outcome of the principle of the prohibition of the use of force enshrined in Article 2, paragraph 4, of the Charter. The latter part of article 36, which referred to the use of force in violation of the principles of the Charter, was also of great importance.

31. Recently some West German writers had advanced the idea that any situation obtained by the use of force was illegal and had no legal effect. It was paradoxical that a new rule of international law prohibiting the use of force should be used to defend the actions of an aggressor State.

32. The conclusion stated by the Special Rapporteur in the last sentence of paragraph 6 of his observations was not entirely correct. Surely a peace treaty signed after the establishment of the rule laid down in article 36 would not always be invalidated; for example, when the force was used to impose the treaty on an aggressor State.

33. The second alternative suggested by Mr. Briggs at the previous meeting, to frame the article in such a way that a State might invoke the use of force as a ground of invalidity, would weaken the article. According to contemporary international law, the illegal use of force was not only a violation of law but something much graver, an international crime. The effect of Mr. Briggs's suggestion would be to render the treaty not void but voidable. In other words, as clearly pointed out by Mr. de Luna, in order to render the treaty void some action

⁸ *Yearbook of the International Law Commission, 1963, Vol. II, p. 197.*

would be necessary on the part of the injured party, and thus there might be some advantage to the State which had used force which it would not have if the treaty were regarded as void *ab initio*. The Commission's view, stated in paragraph (6) of the commentary drawn up in 1963, that "The prohibitions on the threat or use of force contained in the Charter are rules of international law the observance of which is legally a matter of concern to every State"⁹ should lead it to reject a provision whereby a treaty procured by force would be merely voidable. Such treaties were objectively void.

34. Some of the comments that had been made about the absence of an international tribunal to adjudicate on any matters falling within the terms of article 36 seemed to be associated with an idea advocated by some authors that the prohibition of the use of force was premature because, with no instance capable of ruling that the use of force had been illegal, the injured State was left without means of redress, and the rules of international law were deprived of such means of enforcement as war. To make acceptance of a substantive rule dependent on some form of compulsory international adjudication would hamper the development of international law.

35. He entirely agreed with the suggestions by governments to mention political and economic pressure in article 36. Alternatively, he would agree to an amendment referring to "force in any form", and if neither of those alternatives was acceptable to the majority of the Commission, he would accept the text drawn up at the fifteenth session, provided it was understood to cover all forms of force in violation of the Charter and that it related to any act expressing consent to be bound by the treaty. The 1963 text was more concise than that now proposed by the Special Rapporteur.

36. He agreed with Mr. Elias that the change of wording proposed by the Government of Israel would create more problems than it would solve.

37. Mr. CADIEUX said that, on the whole, his views on the article were the same as the Special Rapporteur's.

38. So far as the definition of force was concerned, the solution adopted in 1963, and employed again by the Special Rapporteur in his new version, was a step forward in the development of international law and in general had been approved by States. Moreover, as Mr. Verdross had said, it had the advantage of being flexible and of not prejudging the future. Its content would be determined by the international community in accordance with procedures which that community would itself choose. The wording did not in fact rule out what Mr. Yasseen wished it to include; with the development of an international conscience, certain requirements could be given expression in collectively adopted instruments.

39. As to whether article 36 should state that a treaty procured by the threat or use of force was void or voidable, he agreed with the Special Rapporteur that such a treaty was clearly void. Since resort to coercion destroyed or disturbed the public order, it called for the gravest penalties.

40. His view on the relationship between the rule as stated and the procedure for determining the cases in

which it was applicable was the same as that of Mr. Briggs. A rule was strengthened, not weakened, if a procedure for carrying it into effect was indicated. If there was no such indication, the rule might remain nugatory—for whoever had used force to procure a treaty would probably use it again to prevent any change in the result so obtained—and might constitute a danger for small States, which stood in particular need of protection by an independent body. The rule would be more effective if its application were determined objectively, instead of by the most powerful States. He was convinced that there was a connexion between the rules adopted by the Commission and the question of the procedure to be followed in applying them.

41. Mr. AGO said that article 36 was very important and marked a stage in the development of modern international law. The essence of the article was that it declared void treaties procured by the threat or use of force in violation of the law. It was therefore indispensable to specify that the rule laid down was concerned exclusively with cases where coercion was used unlawfully "in violation of the principles of the Charter of the United Nations". The reference to the principles of the Charter was a reference to the fundamental principles which were not only laid down in the Charter, but had become general rules of international law. States not Members of the United Nations should not, therefore, find it difficult to accept such an article. Similarly, if it were objected that there were certain principles of international law which were not laid down in the Charter, he would answer that one of the obligations mentioned in the Charter was the obligation to respect the rules of international law. Consequently, the reference to the principles of the Charter was fully adequate.

42. Like Mr. Tunkin, he considered that the coercion referred to in article 36 should be taken to mean coercion in violation of the principles of the Charter and not coercion employed in conformity with the law. Wars of aggression should be distinguished from wars of defence against aggression, and also from enforcement action by Member States against a State which had flagrantly violated the Charter.

43. Another essential point about article 36 was that it voided absolutely treaties concluded in the circumstances described. From the point of view of theory, he did not believe that article 36 conflicted with certain other articles which preceded it, in the sense that it would provide for the nullity of the treaty when concluded in certain circumstances, whereas the other articles provided only for its voidability; in his opinion, each of the articles in the sequence of provisions under discussion dealt with a case of nullity, but in some cases the nullity was absolute while in others some action by the interested party was needed for the nullity to be recognized. In the case contemplated in article 36, the nullity was absolute, and the treaty should be incapable of being retrieved even by some action by the interested party.

44. With regard to the question whether adoption of the rule laid down in article 36 should be made conditional on the existence of clauses indicating the procedure to be followed for the purpose of determining whether the rule did or did not apply to a particular case, he thought that rules of substance and rules of procedure

⁹ *Ibid.*, p. 198.

should be kept separate. It would, admittedly, be desirable to provide some procedure for determining in what cases the important rule of substance laid down in article 36 operated; but much the same could be said of all the rules in the draft. It could even be said that, because article 36 referred to the principles of the Charter, there was rather less need for mention of an appropriate procedure than in other articles. The appropriate United Nations organs would probably have expressed an opinion on the violation of those principles in the particular case, and an objective verdict would then be at least discernible. If, nevertheless, a dispute did arise as to whether or not there had been an unlawful resort to force, the customary modes of settlement would have to be applied. It would be most regrettable if the Commission should hesitate to propose so important a rule of substance for no other reason than that the means of settling legal disputes did not satisfy it entirely.

45. In the opinion of some members, article 36 should be expanded to cover cases of political or economic pressure. Yet, as Mr. Verdross had said, the expression "the threat or use of force in violation of the principles of the Charter" was sufficiently broad to allow ample latitude for interpretation. The introduction of even vaguer notions would jeopardize the existence of a large number of treaties. There were surely very few treaties in the conclusion of which some pressure had not been exerted on one side or the other.

46. The reactions of States to the article as adopted by the Commission in 1963 were very encouraging. It was essential that in view of its novelty, the article should be adopted by a very large majority as a principle of international law. The ideas which some members thought should receive expression in the article would eventually prevail, without any special effort on the part of the Commission to elaborate the article.

47. The amendment proposed by the Special Rapporteur was not perhaps necessary. He hoped that the Commission would not change the text as adopted in 1963, which was lapidary and fully sufficient.

48. Mr. BRIGGS said that nothing could be further from his mind than to suggest any weakening of the rule embodied in article 36. The truth of the matter was that the rule itself was weak; the two alternative suggestions which he had put forward at the previous meeting were calculated to strengthen the rule by introducing a reference to orderly procedures, instead of leaving the whole matter to the subjective appreciation of individual States.

49. The Special Rapporteur had described the rule embodied in article 36 as an "open-ended" rule; personally, he found it far too open-ended. As he had pointed out at the previous meeting, there was even less agreement today than in 1963 on the meaning of the words "threat or use of force in violation of the principles of the Charter". It was therefore desirable that article 36 should state more precisely what the rule meant and his own proposals at the previous meeting had been made with that idea in mind.

50. Mr. BEDJAOUÏ said that article 36 was of fundamental importance and marked a turning point in modern international law.

51. With regard to the drafting, it was unfortunate that the Special Rapporteur's proposed new text was so awkwardly worded; at all events, the French text was almost unintelligible. It might be better to revert to the elegant brevity of the 1963 text; after all, the expression "the conclusion of which was procured" covered every case, including the one which the Special Rapporteur wanted to include. Indeed, the vigorous phraseology used in article 37—"A treaty is void . . ."—might well be used in article 36 also.

52. On the subject of the definition of force, he agreed with Mr. Tunkin and Mr. Yasseen. It was unfortunate that it had not been possible to cover cases other than the threat or use of armed force. It was true, as Mr. Ago had just said, that they would be difficult to define; but he did not think that Mr. Tunkin's proposed text was likely to give rise to serious difficulties and he therefore fully supported the suggestion for the insertion of some such phrase as "in any form whatsoever" or "of whatever nature", which would be the keystone of the whole article.

53. Mr. ROSENNE said that he had been impressed by Mr. Ago's description of the 1963 text as "lapidary". He noted that there was general agreement that the 1963 text of article 36 covered the case of a participation in an existing treaty procured by the threat or use of force in violation of the principles of the Charter. At the same time, there was a general desire not to overload the text by attempting to cover that point more specifically. In the circumstances, he would be content to see the matter dealt with in the commentary.

54. Mr. AMADO said that the Commission was very much aware of the progress made since the days when war had been an accepted method of achieving political aims and when such an article would have been unthinkable. He urged the Commission to accept the article, which was flawless and based on that sacrosanct instrument, the Charter.

55. Economic pressure would ultimately come to be included in the idea of the threat or use of force, but it would be for the practice of States and the jurisprudence of international tribunals to bring that about by means of interpretation.

56. The CHAIRMAN, speaking as a member of the Commission, said he was convinced that article 36, as adopted in 1963, even though it did not cover every situation, stated a general rule which promoted the progressive development of international law.

57. It would no doubt have been desirable to draft a more elaborate provision; but as it stood, the article was in keeping with existing conditions and at the same time allowed for future development. He therefore favoured the retention of the 1963 text unchanged. The spirit of the article had been accepted by States. The Commission could not retreat; but, in attempting to go further, it should beware of involuntarily taking a step backwards.

58. Sir Humphrey WALDOCK, Special Rapporteur, said he noted that the Commission as a whole favoured the 1963 text, which stated the rule in succinct terms. He would therefore withdraw the drafting amendment which he had proposed to meet the point raised by the Government of Israel; the 1963 text, in his view, covered that

point. It was, of course, possible to argue that there was a small legal gap in that text and it was perhaps also possible to argue that the text was too wide, in that it would make a whole treaty void if a subsequent act of participation in it was procured by the threat or use of force.

59. He agreed with Mr. Ago that it was important to obtain maximum support for the article which, as he had stressed, allowed for further development of the law in the United Nations.

60. He agreed with Mr. Tunkin's remarks on the subject of a peace treaty imposed on an aggressor; such a treaty was not in violation of the Charter of the United Nations and was not, therefore, invalid under article 36. That point had been made clear in paragraph 7 of his own commentary to his original proposal for article 36, then numbered article 12 and entitled "Consent to a treaty procured by the illegal use or threat of force", where he had stressed that "There is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor".¹⁰ He suggested that, in the final commentary to article 36, a passage should be included on the same lines.

61. He shared the general views expressed by Mr. Briggs on the subject of independent adjudication, but did not think it was appropriate to take up that question with reference to each individual article. The procedural aspects of all the articles in the section now under discussion were covered in article 51. When the Commission came to consider that article, he would give his own reaction to the government comments thereon. On the whole, he was inclined to the view expressed by Mr. Rosenne, and doubted whether at the present stage it would be possible to go beyond what was said in article 51 as drafted in 1963.

62. He suggested that article 36 be referred to the Drafting Committee with the comments made during the discussion. It was his strong impression that the Commission on the whole wished to adhere to the brief lapidary statement of the very important rule adopted after a lengthy discussion in 1963.

63. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to refer article 36 to the Drafting Committee, on the terms suggested by the Special Rapporteur.

*It was so agreed.*¹¹

The meeting rose at 5.45 p.m.

¹⁰ *Yearbook of the International Law Commission, 1963, Vol. II, p. 52.*

¹¹ For resumption of discussion, see 840th meeting, paras. 84-119.

828th MEETING

Tuesday, 11 January, 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Also present: Mr. Golsong, Observer for the European Committee on Legal Co-operation.

Co-operation with Other Bodies

[Item 7 of the agenda]

(resumed from the previous meeting)

1. The CHAIRMAN invited Mr. Golsong, Observer for the European Committee on Legal Co-operation of the Council of Europe, which was the third regional international organization to enter into a working relationship with the Commission, to address the Commission.

2. Mr. GOLSONG said that, on behalf of the Council of Europe and the European Committee, he wished to thank the Committee for its decision to establish working relations with Strasbourg and for its cordial welcome. He was sure that co-operation between the Commission and the European Committee would contribute to the improvement of the international legal order.¹

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 37 (Treaties conflicting with a peremptory norm of general international law (*ius cogens*))

Article 37

Treaties conflicting with a peremptory norm of general international law (ius cogens)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. (A/CN.4/L.107, p. 34)

3. The CHAIRMAN invited the Commission to consider article 37. It would be seen from paragraph 7 of the Special Rapporteur's observations (A/CN.4/183/Add.1, p. 26) that he was suggesting that the opening phrase be revised to read:

"A treaty is void *ab initio* if at the time of its conclusion it conflicts . . .".

¹ For Mr. Golsong's address to the Commission, see 830th meeting.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that article 37 had attracted a considerable amount of attention from governments, the great majority of which approved of it in principle, though some expressed misgivings about the way in which it would operate in the absence of a system of compulsory, independent adjudication.

5. The principal observations were directed to the problem of the time factor for the application of the article. Of course, it had to be read in conjunction with article 45, which dealt with the subsequent emergence of a rule of *jus cogens*. The United States Government appeared to interpret article 37 as capable of having retroactive effects, but he doubted whether that interpretation was possible if article 45 were borne in mind. In order to emphasize the close connexion between the two articles, he had proposed the insertion in the first line of article 37 of the words "at the time of its conclusion", before the words "it conflicts".

6. He wished to withdraw his suggestion for the insertion of the words "*ab initio*", because on reflection it seemed undesirable to distinguish between one kind of voidance and another.

7. Mr. VERDROSS said that, after the first part of the session, two articles had come to his notice in which Professor Schwarzenberger had sharply attacked the Commission's article 37. To defend the Commission, he (Mr. Verdross) had published an article replying to that attack, in which he made it clear that he was writing on his own responsibility and without having consulted the other members of the Commission.²

8. Professor Schwarzenberger had conceded that norms of *jus cogens* could be created by bilateral or multilateral treaty, but had denied that such norms existed in general international law. He had further denied that such norms were created by the Charter, since it was not a universally binding treaty but only a treaty concluded among a large number of States. Lastly, he had maintained that article 37 could lead to abuse, since there was no authority with international jurisdiction competent to rule whether *jus cogens* existed or did not exist.

9. It was gratifying to note that nearly all the governments had accepted the basic principle of article 37. It might, however, be useful if the Commission were to indicate in the commentary what rules it regarded as *jus cogens* rules. A careful study of the summary records of the discussion during the first reading made it clear that there were some rules of international law that governed the reciprocal interests of States, and others that related to the interests of the international community, in other words, to those of all mankind; the first had the character of *jus dispositivum*, but the second were norms having the character of *jus cogens*.

10. Mr. CASTRÉN said he had been glad to see that nearly all the governments which had commented on article 37 approved the attitude adopted by the Commission towards the concept of *jus cogens*. The doubts expressed by some governments concerning the usefulness and applicability of the article should be dispelled

by the full explanations given by the Special Rapporteur in his report.

11. With regard to the drafting, the point made by the Netherlands Government (A/CN.4/183/Add.1, p. 16) was well taken; the phrase "a peremptory norm of general international law from which no derogation is permitted" was certainly pleonastic. He agreed with the Special Rapporteur that the expression "imperative norm" did not by itself suffice to convey the notion of a rule of a *jus cogens* character. The pleonasm could be avoided simply by omitting the word "imperative" from the body of the article, while keeping it in the title: a norm of general international law from which no derogation was permitted was in fact a peremptory norm.

12. He was not sure that the additions which the Special Rapporteur proposed to make to the 1963 text in order to make it clearer and to meet the wishes of certain governments were either necessary or an improvement. If a treaty was concluded with provisions that were incompatible with *jus cogens*, it was surely obvious that it would be void *ab initio*. That term was superfluous, and he had been glad to hear that the Special Rapporteur now proposed to withdraw it.

13. The words "at the time of its conclusion" gave the impression that the new *jus cogens* rules did not affect the validity of the treaty, an impression which would conflict with the provisions of article 45. He realized that one of the reasons why the Special Rapporteur proposed that change was his desire to emphasize the difference between articles 37 and 45, which should, of course, be taken together; it might be possible, however, to combine those two articles, which dealt with the same topic from different angles, or at all events to make a cross-reference to article 45 in article 37.

14. Mr. AGO said he had noted with satisfaction that most governments endorsed the Commission's text. He was surprised, however, that they should have sometimes expressed opinions and criticisms of the provisions of the article which showed that they had either misread or misunderstood the commentary. The commentary would, of course, eventually disappear but was of great importance at the codification stage.

15. He could not understand how it could be said that the introduction of *jus cogens* would have the effect of introducing the question of the conflict of rules resulting from successive treaties; members had explained in their statements and the Commission had explained in the commentary that a rule of *jus cogens* could only be a rule of general international law. Even if a rule of *jus cogens* had originated in a treaty, it was not from the treaty as such that it derived its character but from the fact that, even though derived from the treaty or when expressed in the treaty, it was already a rule of general international law.

16. That remark also disposed of one of the criticisms made by a writer on the subject, who would hardly have raised his objection with regard to the United Nations Charter if he had carefully perused the commentary and the summary records. It was true that the Charter was a treaty, but the Commission did not consider all the rules contained in the Charter as rules of *jus cogens*. Some had that character because they were rules of

² "*Jus dispositivum and jus cogens in International Law*", *American Journal of International Law*, January 1966, p. 55.

general international law and were therefore valid for both Member States and non-member States.

17. Some governments had complained that the Commission had not given examples of treaties conflicting with rules of *jus cogens*, but in fact it had given three,³ and indicated that they were not to be regarded as exhaustive. Another typical case was that of a treaty of offensive alliance, of which there had been quite a number in the nineteenth century; such an alliance would now be void as a flagrant breach of *jus cogens*.

18. Other governments had asked whether the nullity of a treaty could be invoked only by the parties, or by third States as well. His reply would be that a treaty that was in conflict with *jus cogens* was void and that any State could therefore invoke its absolute nullity.

19. The Commission should again emphasize in its commentary what it had clearly established in 1963. He was grateful to Mr. Verdross for what he had done, although he had been acting in his individual capacity. The 1963 text should be retained. There was no need for the changes proposed by the Special Rapporteur, since if article 37 was read in conjunction with article 45, it would immediately be clear what system the Commission intended to establish.

20. Mr. ROSENNE said that article 37 was the outcome of long and arduous discussion in the Commission and the Drafting Committee, and he had been glad to note that, in the opinion of the Uruguayan delegation to the Sixth Committee, it was of the greatest significance that the Commission, representing jurists from many legal systems, had agreed to include so vital a principle in a multilateral convention on the law of treaties. He was not impressed by the criticism of Schwarzenberger, whose conclusion, given his very controversial point of departure, was inevitable. In the long run, article 37 might prove as important for the development of international law as Article 38 (3) of the Statute of the Permanent Court of International Justice of 1920.⁴

21. He regretted that, at its fifteenth session, the Commission had decided to omit from the commentary any reference to international public order, on the ground that it was a highly controversial issue. He asked whether those members who had held that view would now be prepared to reconsider their attitude and allow at least one reference to be reinstated in the commentary so as to focus attention on what lay behind article 37.

22. Article 37 might be retained in the form approved at the fifteenth session and must be kept as concise as possible. The problem of the time factor in the application of the article could best be dealt with in the commentary.

23. Mr. TUNKIN said that, at its fifteenth session, the Commission had very thoroughly examined the subject of article 37 and had reached the important conclusion that the rules of *jus cogens* formed part of contemporary international law. There was no need to reconsider all

aspects of the problem, particularly as most governments had expressed agreement with the article and had stressed its importance.

24. He more or less shared Mr. Castrén's opinion concerning the change in wording proposed by the Special Rapporteur. The phrase "if at the time of its conclusion" was not an improvement and was unnecessary if, as was essential, article 37 was read in conjunction with article 45. Moreover, if that change were introduced and article 37 were read on its own, the erroneous inference might be drawn that the treaty would only be invalidated if it conflicted with a rule of *jus cogens* existing at the time of its conclusion. There was no doubt in his mind that the original text of article 37 was preferable. The idea that the treaty was void *ab initio* was already implicit in that text.

25. The notion of international public order was a highly controversial one that belonged to the realm of theory rather than practice. Some authors viewed it as a kind of natural law, imposed on States. In his view, rules having the character of *jus cogens* were created by agreement between States, as were all other rules of international law. There was no need to mention in the commentary a matter on which there was so much disagreement.

26. Mr. YASSEEN said that the concept of *jus cogens* in international law was unchallengeable and should not be disputed. No specialist in international law could contest the proposition that no two States could come to an agreement to institute slavery or to permit piracy, or that any formal agreement for either purpose was other than void. Those two examples proved that there was such a thing as *jus cogens* and that States could not derogate from it, even by agreement *inter se*.

27. It was admittedly difficult to discern which rules of international law were rules of *jus cogens*, just as it was difficult in internal law, where the notion of public order was not easy to define, since it was relative in time and space.

28. In order to cast doubt on the utility of article 37, it had been objected that, in the existing international order, there was no international authority capable of ruling on the existence of rules of *jus cogens*. But that objection did not apply only to the *jus cogens* theory; it applied to nearly all international law. A distinction should be drawn between two aspects of the international legal order, the normative aspect and the institutional aspect. The latter was still in its early stages, but that should not affect the development of norms. In preparing a general convention on the law of treaties, the Commission had to bear in mind as a fact that *jus cogens* existed and that there were rules of international law from which States could not derogate.

29. Incompatibility of the treaty with *jus cogens* posed the problem of the hierarchy of the rules in the international legal order. Contrary to what was in principle the case in internal law, the order of that hierarchy could not be determined by some formal criterion which relied on the authority from which the rule of law derived. It was therefore necessary to employ an objective criterion which gave full weight to the substance of the rule and its intrinsic value. In his view, a rule of

³ Yearbook of the International Law Commission, 1963, Vol. II, p. 199.

⁴ "The Court shall apply: . . . (3) the general principles of law recognized by civilized nations;" The corresponding provision of the Statute of the International Court of Justice, article 38, 1(c), reads: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . the general principles of law recognized by civilized nations;"

jus cogens was a general rule, indispensable to international life and rooted in the international conscience.

30. It was interesting to note that those States which had commented on the draft had unanimously accepted the idea on which article 37 was based. He preferred the original text, for the reasons given by previous speakers and because article 37 could only be read in conjunction with article 45, which dealt with another aspect of the same question.

31. Mr. de LUNA said that in no legal order was the freedom of will of its subjects unbounded; if it were, that would be the negation of legal order. For many years the positivists had held that the common weal coincided with the success of the strong at the expense of the weak and had maintained that established rights to exploit others should be respected. At that time there had been no limits to the will of a great Power. But already in the days of the Permanent Court of International Justice, in the Oscar Chinn case⁵ the German jurist Schücking, in a dissenting opinion had expressed the view that the League of Nations would not have embarked on the codification of international law if it were not possible to create a *jus cogens*, the effect of which would be that, once States had agreed on certain rules of law and given an undertaking that those rules might not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void. Lord McNair had said in that connexion "It is difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever to freedom of contract. In every civilized community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements".⁶

32. He himself regarded *jus cogens*, without which there could be no legal order, not as natural law but as positive international law. It was difficult to define in practice, but such difficulties were not peculiar to *jus cogens*: they arose throughout international law.

33. Instances of the limitations of the object of a treaty were total impossibility of performance — for instance, the extradition of a person who had died; impossibility in practice — a State signing a treaty by which it was annexed to another State could not, if it was to remain a State, accept political and economic obligations that were incompatible with the minimum requirements for a State's existence; and legal impossibility, which could be absolute or relative.

34. *Jus cogens* was the indispensable minimum for the existence of the international community; it was positive law created by States, not as individuals but as organs of the international community, in order to safeguard the community's existence. Such positive law was capable of development. An instance was the "*Asiento de Negros*", part of the Treaty of Utrecht of 1713,⁷ by which England had obtained from the King of Spain a monopoly for thirty years of the slave trade with Spanish America. Such a treaty would be impossible nowadays,

when the international community regarded slavery as an illegal institution.

35. He preferred the 1963 text, on the understanding that it was read in conjunction with article 45.

36. Mr. AMADO said it was a profoundly satisfying experience to re-read the summary records of the debates at the Commission's fifteenth session, when many members, notably Mr. Bartoš, Mr. Tunkin and Mr. Ago, had spoken so soundly on the question of *jus cogens*. It was a credit to the Commission that the opinions of such very different authorities coincided. As Mr. de Luna, quoting Mr. Bartoš, had said at the 685th meeting, *jus cogens* was indeed the "minimum framework of law which the international community regarded as essential to its existence at a particular time".⁸

37. He could endorse the comments made by the Brazilian delegation in the Sixth Committee, as set out in the Special Rapporteur's fifth report (A/CN.4/183/Add. 1, p. 18) and for the reason given in those comments he preferred the text of article 37 as adopted in 1963.

38. The CHAIRMAN, speaking as a member of the Commission, said that, like Mr. Ago, he had been glad to note that nearly all governments accepted the principle on which article 37 was based, which concerned the existence of *jus cogens* in international law.

39. What was surprising was that, in the Sixth Committee of the General Assembly, the delegations of some States whose governments had not yet commented should have expressed doubts about the correctness of the principle; those delegations had apparently relied on the notion of the absolute sovereignty of States which, in their opinion, was alone capable of creating a rule of law, inasmuch as treaties were the first of the sources of law mentioned in the Statute of the International Court of Justice.

40. While not opposed to the idea that the sovereignty of States was the basis of the international community, he did not think that sovereignty could be absolute now that the international community had become organized. Already at the time of the League of Nations, Litvinov had said that every treaty was a voluntary restriction on national sovereignty in an organized international community. There was not necessarily a surrender of national sovereignty, but membership of a community required the respect of certain rules. If that were not so, society would remain in the condition of savagery described by the phrase *homo homini lupus*, which had lasted until the First World War and had prevailed almost unchallenged in the inter-war period. By becoming members of the international society, States recognized the existence of a minimum international order, which was none other than *jus cogens*. The abstract notions of absolute freedom and absolute sovereignty were not compatible with the existence of international society.

41. In the light of those remarks, he continued to support the text adopted in 1963, subject to possible improvement by the Drafting Committee.

⁵ P.C.I.J., Series A/B, No. 63, pp. 65-152.

⁶ McNair, *Law of Treaties*, 1961, p. 213.

⁷ *British and Foreign State Papers*, 1812-1814, Vol. I, Part I, p. 611.

⁸ *Yearbook of the International Law Commission*, 1963, Vol. I, p. 77.

42. Mr. BRIGGS said that his objections to the concept of automatic nullity introduced in article 37 were even stronger than they had been to that concept in article 36. He doubted whether there was any agreement, either within the Commission itself or outside it, about the scope and content of the rule laid down concerning treaties conflicting with a peremptory norm of general international law. The Commission made no attempt to define such norms. Indeed, it was puzzling why so many States should have endorsed the article; he presumed one of the reasons was that jurists considered that the notion of international public order appropriately crowned a theoretical structure. It cost States nothing to adopt a high moral tone and to condemn treaties that in any case they were unlikely to conclude, such as those promoting the use of force, traffic in slaves or genocide.
43. His second objection to the article was the same as that put forward by the United States and United Kingdom Governments, namely, that it made no provision for independent adjudication as to whether a peremptory norm had been violated.
44. The idea of a peremptory norm was not unfamiliar to United States citizens, and under the doctrine of judicial review the courts had been required to examine the constitutionality of acts of Congress, not as a moral issue, but as an administrative matter concerning the distribution of powers between the Federal and State Governments. The concept of public order was also one recognized by the courts.
45. The need was not so much for a rule on the lines of that contained in article 37 as for the collective consideration of the problems involved.
46. Mr. PESSOU said he wished to endorse the views expressed by Mr. Yasseen, who had cited some very pertinent examples. He did not think that the objections raised by some States could deprive *jus cogens* of its obligatory character.
47. He also agreed with Mr. Ago that the Commission should follow a certain method; it should consolidate in a single article all the provisions relating to *jus cogens*, which were at the moment contained partly in article 37 and partly in article 45.
48. The Special Rapporteur's revised version of article 37 should perhaps be amended by the addition of the word "obligatory" before the concluding word "character".
49. He did not share Mr. Castrén's view that the word "peremptory" was pleonastic; it meant that *jus cogens* was binding *erga omnes*, on all States. Besides, in some cases it was better to say the same thing twice over than to leave any doubt. On that point, however, he would support the majority view.
50. Mr. CADIEUX said he recognized that the rule laid down in article 37 marked an important stage in the progressive development of international law. It was significant that the Commission had been well-nigh unanimous on the subject of the article and that most governments had considered it acceptable.
51. The rule was not perhaps as precise as might be wished, but it was better to have some rule, even an imperfect rule, than no rule at all.
52. He admitted the distinction that had been drawn between normative development and institutional development, but he still believed that there was a connexion between the two and that the second was indispensable to the first. As Mr. Briggs had said, a normative development that disregarded institutional problems would be fraught with danger, and the Commission would be wrong to gloss over the gaps in its work.
53. With regard to the drafting, the words "*ab initio*" were not perhaps strictly necessary, but the words "at the time of its conclusion" were, because they added a useful detail. If it omitted to define what was definable, the Commission might be encouraging the continuance of undesirable practices.
54. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission was generally agreed that it was both necessary and important to state the concept of the invalidity of a treaty when it conflicted with a rule of *jus cogens*. Governments, in their comments, had expressed agreement on both the reality and the importance of that concept.
55. He appreciated the point made by Mr. Briggs and Mr. Cadieux regarding the possible dangers involved in the general terms in which the rule was couched in article 37. However, he felt that the Commission was justified, at the present stage of international law, in stating the rule as it had done, and leaving its full content to be worked out in practice.
56. He agreed with the remarks of Mr. Verdross and Mr. Yasseen. The examples given by the latter provided particularly good illustrations; the more the international community became integrated, the more its attention would be directed to the position of the individual. Significant *jus cogens* developments could therefore be expected in the direction of the protection of the rights of the individual in the interests of the world community as a whole.
57. He did not believe it would be useful to try to elaborate the detailed content of the rules of *jus cogens*; the terms of article 37 were sufficient for both jurists and governments to understand what the Commission meant.
58. With regard to the wording of the article, he would not press the small drafting amendments which he had put forward in order to take certain government comments into account. In the light of the discussion, he was inclined to agree that those comments were based on a lack of appreciation of the close connexion between articles 37 and 45. If those articles were read together, the 1963 wording of article 37 was quite sufficient and there was no need to introduce the additional words "at the time of its conclusion".
59. The Drafting Committee should be invited to consider the drafting suggestions by Mr. Castrén and Mr. Pessou.
60. Article 37 should be referred to the Drafting Committee for consideration in the light of the discussion, bearing in mind the strong feeling in the Commission in favour of maintaining the 1963 text.

61. Mr. AGO said that, before the Commission concluded its debate on so important a matter, he wished to make two comments prompted by the remarks of Mr. Briggs and Mr. Cadieux.

62. First, in saying that the Commission was working out rules of substance and that the question of determining the content of those rules must not be mixed up with the question of whether or not machinery existed for the settlement of disputes over the application of those rules, he had in no way meant to express opposition to an institutional development of that kind. He had intended to stress that the problem of such development was important in relation to the rules of substance as a whole rather than in relation to such and such a problem. Indeed, he was convinced that the progress made in the development of the rules of substance would very soon demonstrate the absolute need for institutional development with regard to the means for the settlement of disputes over their application in a specific case.

63. Secondly, the Commission had been criticized for failing to draw up a list of the rules of *jus cogens*. In his opinion, the time when it was laying down the rule that a treaty was void if it derogated from *jus cogens* was not the right moment for drawing up such a list. Rules of *jus cogens* could be found in the various branches of international law: that on diplomatic relations, the law of the sea, the law concerning State responsibility, and others. Consequently, the Commission should, in its future work on the codification of international law, bear in mind at all times the rule laid down in article 37 of its draft, but it could not settle in advance which were the rules from which no derogation would be permitted, and that applied to all the various branches of international law. Perhaps his views could be recorded in the commentary to article 37.

64. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 37 to the Drafting Committee.

*It was so agreed.*⁹

ARTICLE 38 (Termination of treaties through the operation of their own provisions)

Article 38

Termination of treaties through the operation of their own provisions

1. A treaty terminates through the operation of one of its provisions:

- (a) On such date or on the expiry of such period as may be fixed in the treaty;
- (b) On the taking effect of a resolutive condition laid down in the treaty;
- (c) On the occurrence of any other event specified in the treaty as bringing it to an end.

2. When a party has denounced a bilateral treaty in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

3. (a) When a party has denounced or withdrawn from a multilateral treaty in conformity with the terms of the treaty, the treaty ceases to apply to that party as from the date upon which the denunciation takes effect.

(b) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force. It does not, however, terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force. (A/CN.4/L.107, p. 35)

65. The CHAIRMAN invited the Commission to consider article 38, for which the Special Rapporteur had proposed a new title and text reading:

Termination or suspension of the operation of a treaty under its own provisions

1. A treaty terminates or its operation is suspended or the withdrawal of a party from a treaty takes effect on such date or on the fulfilment of such condition or on the occurrence of such event as may be provided for in the treaty.

2. A multilateral treaty does not terminate by reason only of the fact that the number of parties falls below the number specified in the treaty as necessary for its entry into force. (A/CN.4/183/Add.1, p. 28)

66. Sir Humphrey WALDOCK, Special Rapporteur, said that article 38, which was the first article of section 3 entitled "Termination and suspension of the operation of treaties", had attracted few government comments. Some of those comments, however, were on the same lines as the remarks of several members during the 1963 discussion, to the effect that the contents of much of article 38 were self-evident. Parts of the article seemed to do no more than state that the provisions of the treaty would operate to terminate it in accordance with the intention of the parties. For those reasons, he had abbreviated the text of the article without altering its substance in any way.

67. Paragraph 2 of his redraft reproduced the only provision of substance in the previous version of article 38. It was a common feature of multilateral treaties to lay down a minimum number of ratifications for the purpose of entry into force. It was therefore always possible that, as a result of the withdrawal of one of the parties, the number of ratifications or accessions might fall below the minimum number required. It was accordingly desirable to lay down the rule that the multilateral treaty did not terminate by reason only of that new situation. He drew the Commission's attention, however, to the fact that the rule would also apply in cases falling under article 39, where the right to withdraw was implied rather than expressed in the treaty.

68. The CHAIRMAN, speaking as a member of the Commission, said that if it yielded to the observations of certain governments and omitted anything which, for one reason or another, might be regarded as superfluous, the Commission would eventually leave nothing of the draft articles. Too much pruning would obscure the text. For example, what was the "condition" and what was the "event" referred to in the Special Rapporteur's revised version of article 38? A treaty laid down a large

⁹ For resumption of discussion, see 840th meeting, paras. 120-131 and 841st meeting, paras. 1-4.

number of conditions and made provision for many events that were unconnected with the termination of the treaty.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that he had radically revised the text of article 38, not only in deference to government comments but also because during the 1963 discussion many members had suggested that the article contained much that was self-evident.

70. Mr. ROSENNE said that if paragraph 1 was to be retained, the draft proposed by the Special Rapporteur would represent a considerable improvement. It was, however, purely descriptive and more suitable to a code than to a draft convention. He therefore doubted the need to retain it.

71. Paragraph 2 ought to constitute a separate article. Its provisions did not deal with the termination or suspension of a treaty, but rather laid down a very necessary rule to the effect that a treaty would not be terminated or suspended in certain circumstances. The Special Rapporteur had indicated that the same rule should apply in the circumstances envisaged in article 39; in fact, it could well be applicable to some other provisions on termination. It was accordingly preferable to embody it in a separate article. The rule was a new one but it had received the support of all the governments that had commented on article 38.

72. Mr. YASSEEN said that the history of article 38 was one of a constant striving for brevity and succinctness. The latest text proposed by the Special Rapporteur was evidence of further progress in that direction.

73. Paragraph 1 was well drafted; the condition in question was undoubtedly a condition concerning the termination or suspension of the treaty.

74. The rule laid down in paragraph 2 had from the beginning been regarded by the Commission as a useful rule of positive law. The revised version embodied all that the earlier text had said, but in fewer words and possibly in clearer language. In general, therefore, he supported the redraft, subject to possible improvements by the Drafting Committee.

75. Mr. AGO said that, though less important than the preceding articles, article 38 was by no means unimportant. It did not only contain explanations: it laid down the principle that, where a treaty stipulated a term or resolute condition, or specified some future event for the termination of the treaty, that treaty could not be terminated before the expiry of the term or before the fulfilment of the condition or the occurrence of the event. The rule was justified and the only problem was how to draft it in appropriate terms. To meet the Chairman's point, the word "resolute" should be added before the word "condition".

76. Article 38 as adopted in 1963 had contained two important provisions: paragraph 2 and paragraph 3 (a). Although many treaties made provision for denunciation, most of them also provided that denunciation did not become effective until after the lapse of a certain period; that being so, the treaty itself could not expire, or cease to be applicable to the withdrawing party, until the

denunciation had become effective. It would be wrong to omit those two very useful provisions.

77. Mr. CASTRÉN said that, when the article had been discussed in 1963, he had proposed that it should be dropped, with the exception of paragraph 3 (b), which stated a useful rule of law, whereas the remainder of the article was merely descriptive. He still held the same opinion, which was if anything strengthened by the comments of governments.

78. In keeping with his conciliatory attitude, the Special Rapporteur had made a great concession in his latest redraft by condensing in a single sentence all the descriptive passages previously contained in three paragraphs, but he had not been able to change the nature of those passages. He had added to the article a provision concerning the case of the suspension of the operation of a treaty.

79. He had difficulty in accepting even the revised version of the article, which was still open to criticism. The title, though very long, did not mention the withdrawal of a party to a multilateral treaty, though that was admittedly a minor defect.

80. Paragraph 1 gave the impression — if one disregarded the title, which would perhaps be dropped by the diplomatic conference that would continue the Commission's work — that all treaties contained provisions concerning their termination or the suspension of their operation or, in the case of a multilateral treaty, for the withdrawal of a party, and that the article indicated the only modes of termination, suspension and withdrawal. The draft articles should, of course, be read as a whole; nevertheless, each rule should be drafted in such a manner as to prevent as far as possible any misunderstanding. From that point of view, the earlier text was better.

81. Paragraph 2 should be retained, but a saving clause should be added concerning treaties containing provisions that stipulated otherwise.

82. Mr. de LUNA said he supported Mr. Ago's views. Simplification was a very good thing but it should not be carried too far. In particular, paragraph 3 (a) of the 1963 text had been an important provision. The new redraft ignored the case — which was, after all, very frequent — where the treaty provided that denunciation would not become effective until after the expiry of a certain period and where the party was bound to discharge the obligations stipulated in the treaty up to a certain point in time. In the absence of a rule on that point — and the rule might be a residuary rule — the denunciation of a multilateral treaty would make it too easy for a State to evade its obligations under a multilateral instrument. The problem was probably largely one of drafting.

83. The CHAIRMAN, supporting Mr. de Luna's remarks, said a case in point was the Convention for the Establishment of a European Organization for Nuclear Research, under article 12 of which no Member State might give notice in writing of withdrawal from the Organization until after the Convention had been in force for seven years, a necessary provision in that

particular case to ensure that CERN should be able to amortize its very expensive installations.¹⁰

84. Mr. BRIGGS said that he wished to know what was the relationship between the provisions of article 38 and those of article 40, on the agreement of all the parties to terminate a treaty.

85. The new draft proposed by the Special Rapporteur represented an improvement on the 1963 text but he was not convinced of the need for the article at all.

86. Mr. TUNKIN said that, as he had maintained in 1963, the article did not involve a matter of great importance. Like the former paragraphs 1, 2 and 3 (a), the new paragraph 1 stated a self-evident truth and would do no harm if the Commission as a whole wished to retain it.

87. Paragraph 2 embodied a useful legal rule. The case envisaged therein might arise, although he had not heard of any dispute arising on the point in question.

88. On the whole he preferred the Special Rapporteur's redraft because it was short.

89. Mr. VERDROSS said he agreed with Mr. Tunkin. Paragraph 1 of the article as redrafted was not strictly necessary, since it stated the obvious. Paragraph 2, on the other hand, was necessary because it contained a rule never before formulated in international law. He would not object, however, if the whole of the article proposed by the Special Rapporteur were retained.

90. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Ago, said that it was necessary to bear in mind the provisions of article 53 on the legal consequences of termination. Again, the question of the time at which a treaty terminated upon its denunciation was covered by the new version of paragraph 1, which dealt with the termination of treaties "through the operation of their own provisions"; it was therefore clear that termination would operate in accordance with the provisions of the treaty itself, including those dealing with the giving of notice of termination.

91. He suggested that article 38 be referred to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*¹¹

The meeting rose at 1 p.m.

¹⁰ United Nations *Treaty Series*, Vol. 200, p. 149.

¹¹ For resumption of discussion, see 841st meeting, paras. 5-11, but see also 836th meeting, paras. 53-55.

829th MEETING

Wednesday, 12 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 39 (Treaties containing no provisions regarding their termination)

Article 39

Treaties containing no provisions regarding their termination

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case, a party may denounce or withdraw from the treaty upon giving to the other parties or to the depositary not less than twelve months' notice to that effect. (A/CN.4/L.107, p. 36)

1. The CHAIRMAN invited the Commission to consider article 39, for which the Special Rapporteur had proposed a new title and text which read:

Treaties containing no provisions regarding their termination or the suspension of their operation

1. When a treaty contains no provision regarding its termination and does not provide for termination or withdrawal or for the suspension of its operation, a party may denounce, withdraw from or suspend the operation of the treaty only if it appears from the treaty, from its preparatory work or from the circumstances of its conclusion that the parties intended to admit the possibility of such denunciation, withdrawal or suspension of the treaty's operation.

2. A party shall in every case give not less than twelve months' notice of its intention to denounce, withdraw from or suspend the operation of the treaty under the provisions of paragraph 1. (A/CN.4/183/Add.1, p. 35)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that governments had on the whole accepted the general concept embodied in article 39 and recognized that, where there were indications of an intention to that effect on the part of the States concerned, a treaty could be subject to denunciation or withdrawal even though it did not contain any actual provision on the subject.

3. He had discussed in his own observations a number of suggestions by governments for improving the text and had redrafted the article in the form of two separate paragraphs, which made for a clearer and simpler presentation.

4. In the light of discussions in the Drafting Committee on other articles, the formula "only if" in paragraph 1 might have to be replaced by the negative formulation: "may not denounce, withdraw . . . unless it appears . . .".

5. Mr. YASSEEN said he thought the wording of the article still left room for doubt as to whether the possibility of terminating, suspending or denouncing a treaty under the article was based on the treaty itself or on a tacit agreement of the parties. It must be made absolutely

clear in the article that a tacit agreement of the parties could not form the basis, since the termination of treaties by agreement between the parties was dealt with in another article. The termination with which article 39 was concerned could not therefore be based on anything but the treaty itself, or rather, the meaning of the treaty. But how could the meaning of the treaty be determined if not by the application of the rules of interpretation already contained in the draft?

6. Article 39, however, appeared to be not entirely consistent with the articles concerning interpretation already adopted. Under article 39, recourse to the preparatory work was given the status of an independent procedure for determining the intention of the parties, whereas under article 70 recourse to the preparatory work, and to the circumstances of the conclusion of the treaty, was merely an auxiliary procedure, to be employed only after the means mentioned in article 69 had been exhausted.

7. From the point of view of form, the redraft, which divided the article into two paragraphs, was a real improvement.

8. Mr. VERDROSS said he shared Mr. Yasseen's doubts regarding paragraph 1 of the Special Rapporteur's redraft. Paragraph 1 weakened the principle *pacta sunt servanda*.

9. Furthermore, it contained a contradiction, for if the treaty made no provision for its termination, it could hardly be said that it "appears from the treaty" that parties had intended to admit the possibility of denunciation. At the very least the word "appears" should be dropped and some such wording as "unless the parties had agreed in some other way to admit . . ." should be employed. The expression "the parties intended" was too weak; it must be a requirement that the parties had agreed. Anything else would open the door to arbitrary denunciation.

10. Mr. TUNKIN said that he too had some doubts regarding the proposed new formulation of article 39. He preferred the text adopted by the Commission in 1963, which began by stating clearly the rule that a treaty which contained no provision on termination, denunciation or withdrawal was not subject to denunciation or withdrawal. It then went on to state possible exceptions to that rule, based on the character of the treaty combined with the circumstances of its conclusion or the statements of the parties.

11. The proposed new text seemed to raise the exception to the level of a general rule by stating: "When a treaty contains no provision regarding . . . a party may denounce, withdraw from or suspend the operation of the treaty . . ." A formulation of that kind could open the door to possible violations of the *pacta sunt servanda* principle. For those reasons he was in favour of reinstating the general rule as formulated in the opening clause of the first sentence of the 1963 text.

12. With regard to the second part of the sentence, he agreed with Mr. Verdross that it would be contradictory to say that an intention to admit the possibility of denunciation "appeared" from a treaty which was expressly stated to contain no provision on denunciation. The question was one of interpretation and on that point

he agreed with Mr. Yasseen that the proposed redraft went further than article 70. Indeed, it went too far when it appeared to raise the preparatory work to virtually the same level as the text of the treaty itself.

13. It would be wisest for the Commission to adhere to the more cautious text adopted in 1963.

14. Mr. ROSENNE said that he largely agreed with the views expressed by Mr. Tunkin. In 1963, when the Commission had discussed at its 689th meeting what was then article 17 of the Special Rapporteur's second report, the view had prevailed that, in the words of Mr. Tunkin, "The article should be redrafted so as to state, first, the principle that a treaty could be dissolved only with the consent of the parties, after which the exceptions would follow".¹ That decision by the Commission was reflected in the text adopted in 1963 and no government had seriously questioned it, the only government comments related to drafting details. In the circumstances, he could not accept the new direction given to the article and favoured a text closer to that of 1963.

15. With regard to the drafting, the division into two paragraphs was an improvement. He noted with satisfaction the Special Rapporteur's intention to adopt a negative formulation for article 39, although, in his view, the Commission should not adopt that practice as a matter of general principle; each article should be considered separately. In the particular case of article 39, the negative formulation was the appropriate one.

16. He had failed to find in the Special Rapporteur's observations any explanation of the replacement of the 1963 wording "if it appears from the character of the treaty" by the wording "if it appears from the treaty"; the reference to the character of the treaty had been an essential feature of the 1963 text.

17. On the question of preparatory work, he could not agree with previous speakers. The difficulties to which the Special Rapporteur had referred in paragraph 3 of his observations (A/CN.4/183/Add.1, p. 33) arose from the unfortunate formulation adopted in 1964 by the Commission in article 70, and fully justified the reservations which he (Mr. Rosenne) had himself expressed on that point, especially at the 770th meeting.² In practice, the preparatory work was always used, and must always be used, in establishing the intention of the parties. Wherever the provisions of the draft articles required an investigation of the intention of the parties, the preparatory work would have to be consulted. That remark applied particularly to such provisions as articles 4, 11, 12, 18, 19 and 24. His views on that point found support in the reasoning of the International Court of Justice in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.³ In that case, the Court had tried to discover the intention of the parties precisely by examining the preparatory work and indeed there was no other way in which the Court could have achieved its aim.

18. The question of interpretation could not, however, be dealt with piecemeal; it would have to be examined

¹ *Yearbook of the International Law Commission, 1963, Vol. I, p. 105, para. 67.*

² *Yearbook of the International Law Commission, 1964, Vol. I, p. 317, para. 38.*

³ *I.C.J. Reports 1951, p. 15.*

when the Commission came to consider articles 69 and 70 on second reading.

19. Mr. BRIGGS said he was glad that the Special Rapporteur had dropped the reference to "the character" of the treaty. In 1963 he had voted against the text then adopted, precisely because of the inclusion of that term.

20. He preferred a negative formulation to express the rule that a treaty which contained no provision on termination, denunciation or withdrawal could not be denounced, unless the parties agreed to permit such termination, denunciation or withdrawal.

21. The premise upon which the article was based was that expressed in paragraph (2) of the commentary adopted in 1963⁴ and repeated in paragraph 1 of the Special Rapporteur's observations in his fifth report, (A/CN.4/183/Add.1, p. 32) that the existence of a unilateral right of termination or denunciation of a treaty depended on the intention of the parties in each case. On a treaty entering into force, it became binding and was subject to the *pacta sunt servanda* rule. Since that rule could not be subject to the intention of the parties, article 39 could only mean that the right of termination or denunciation existed only by virtue of the agreement of the parties under the *pacta sunt servanda* rule. Therefore, if the parties made no provision in the treaty for termination or denunciation, the problem became one of interpretation, or of attempting to discover an unexpressed intention of the parties.

22. In 1964, in adopting articles 69 and 70 on the subject of interpretation, the Commission had rejected the thesis that the expectations or intentions of the parties constituted the starting point of interpretation. It had excluded any rules of interpretation based on presumption of intention and had required actual evidence of the common intention of the parties in each case.

23. The 1963 text of article 39 had not followed the wise approach later adopted by the Commission in 1964 for its articles on interpretation, but had directed attention to the presumed intention of the parties based on the pseudo-scientific concept of the "character" of treaties, a classification which referred to the content rather than to the juridical nature of treaties. Unless a time limitation was expressed, or the interpretation of the treaty under article 69 permitted the inference of an agreement on the subject of denunciation, the treaty remained binding under the *pacta sunt servanda* rule.

24. It was a fallacy to approach the subject as though there existed a choice between two presumptions of equal merit: first, that where a treaty was silent on the subject of termination or denunciation, no unilateral right of denunciation existed and, secondly, the contrary presumption, that where a treaty was silent on the point, the right of denunciation existed. In fact, there was no such choice: the rule that a treaty was binding was not a presumption; it was an objective rule of law and it excluded the possibility of unilateral denunciation.

25. For those reasons, he found the new draft acceptable subject to certain drafting improvements, particularly in order to reconcile it with articles 69 and 70. The Drafting Committee should also bear in mind the relationship

between article 39 and article 40, on the termination of a treaty by agreement. He himself would favour a statement that, where the treaty was silent on the point, no right of denunciation existed except by agreement of the parties.

26. Mr. de LUNA said that, like Mr. Verdross, he thought that there was some defective logic in the drafting of article 39.

27. It had been said that the Commission should lay down a residuary rule which was to operate in cases where the treaty was silent on the question of denunciation. Mr. Yasseen considered that that residuary rule should be contained in the provisions of the draft concerning interpretation; Mr. Briggs had said that the principle *pacta sunt servanda* should be paramount.

28. Actually, the case to be covered was rather that where the treaty did not contain any express provisions concerning denunciation. In that case, which was an important one, the Commission should not be expected to make an exception to the rules in its own draft concerning the interpretation of treaties. It could not read something into the treaty that was not there. Either the will of the parties was expressed directly in the treaty, or else that will could be inferred indirectly from the treaty in the light of the rules concerning interpretation.

29. The only residuary rule which the Commission might lay down in article 39 was the rule that, where the possibility of denunciation was not expressly provided for in the treaty but where, according to the rules of interpretation, it appeared that the parties had intended to admit that possibility, the denunciation required twelve months' notice.

30. Mr. CASTRÉN said that, after listening to previous speakers, in particular Mr. Yasseen, Mr. Verdross and Mr. Tunkin, he too felt some reluctance to accept the redraft proposed by the Special Rapporteur. Without wishing to repeat the arguments already advanced, he would support the proposal that the Commission take as a basis the text adopted in 1963 and amend it only, if at all, on certain minor points of drafting.

31. As Mr. Yasseen had pointed out, there was a certain discrepancy, despite the Special Rapporteur's efforts, between article 39 and the articles concerning interpretation.

32. Mr. AMADO said that in 1963 the discussion on the article—at that time numbered 17—had been influenced by the theories of Professor Giraud, who held that multilateral treaties could not be as enduring as bilateral treaties; those theories had been challenged by Mr. Castrén.⁵ His personal opinion was that the Commission should revert to the more emphatic formula adopted in 1963.

33. He did not care very much for the idea of referring to a rule of interpretation in a provision laying down a rule of law, for interpretation was an independent process.

34. Mr. AGO said that, at the fifteenth session, he had urged that article 39 should be drafted in the strictest

⁴ *Yearbook of the International Law Commission, 1963, Vol. II, p. 201.*

⁵ *Yearbook of the International Law Commission, 1963, Vol. I, p. 100.*

possible terms.⁶ He had not changed his mind and accordingly found himself in agreement with previous speakers.

35. It would be going too far to drop the article altogether, for, if it were omitted, whoever studied the Commission's draft might infer that denunciation was always possible, even if the treaty did not contain express provisions concerning denunciation. On the contrary, it was the Commission's duty to say specifically that a treaty not containing such provisions could not be denounced save in exceptional cases, in other words, that it could be denounced only if either the nature and character of the treaty were such that it was necessarily open to denunciation, or it was evident from the circumstances of the conclusion of the treaty that the parties had intended denunciation to be possible, even if they did not expressly say so in the treaty.

36. The 1963 text was perfectly adequate; the Drafting Committee might try to improve it but should not depart too far from it.

37. The CHAIRMAN, speaking as a member of the Commission, said that he did not object to the use of the expression "if it appears from the treaty", which meant that the treaty itself might provide some clue to the intention of the parties.

38. The Commission could very well make an exception in article 39 to the general rules concerning interpretation, though in the case of multilateral treaties, it might be difficult to determine the intention of the parties by reference to the preparatory work. If the article were concerned with bilateral treaties only, it would be sufficient to add a cross-reference to the rules of interpretation in part III of the draft. But the article dealt with all treaties, both bilateral and multilateral. Already in 1963 he had expressed doubts about the reference to the intention of the parties. The latest redraft left an even greater uncertainty.

39. All members were familiar with the process by which the text of a multilateral treaty was worked out. There were invariably some contradictions, as could be seen from a thorough study of the records of meetings. The final report of the body which adopted the text likewise gave only vague and sometimes conflicting indications as to the will of the parties. In most cases the treaty was the outcome of a compromise which did not really satisfy anybody; important provisions were revised at the last moment in a drafting committee, and the reasons for concessions were not always given or recorded, and only rarely were the texts of the instruments accompanied by commentaries. Yet it was undeniable that a whole series of factors eventually caused the majority to approve a text, and that text became the authentic text of the treaty.

40. The Commission should revert to the 1963 text, subject to a slight redrafting, though the negative form of the principal proposition, "is not subject to denunciation . . . unless", should be retained.

41. His remarks related only to paragraph 1 of the Special Rapporteur's redraft which, as Mr. Ago had pointed out, dealt with an important question of sub-

stance and laid down a principle which should appear in the draft.

42. Mr. CADIEUX said that, like Mr. Rosenne, he considered that the division of the article into two paragraphs was an improvement. He further considered that the rule contained in paragraph 1 of the redraft should be retained.

43. The apparent contradiction noted by some speakers in that paragraph raised what was essentially a drafting question. The contradiction would disappear if the provision were divided into two parts: the first would lay down the general rule that a treaty which did not contain a provision concerning denunciation could not be denounced, and the second would state that, where it appeared from the character of the treaty, from the circumstances of its conclusion, or from statements made by the parties, that the parties had intended to admit the possibility of denunciation, the treaty could be denounced.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that the divergence of opinion on article 39 proceeded partly from differences in the approach to substance and partly from the difficulties involved in reconciling with articles 69 and 70, on interpretation, such provisions as article 39, which referred to the intention of the parties.

45. The Commission appeared to be in general agreement on the need to adopt a negative formulation which would state that, where a treaty had no specific provision on the subject of termination or denunciation, no such right existed unless the exceptional circumstances set forth in paragraph 1 obtained. The question was one of drafting, since the use of the words "only if" in his own redraft led to the same result.

46. In expressing the exception to the rule laid down in the opening words of article 39, the use in the 1963 text of the conjunction "and" after the words "the character of the treaty" was significant; in his redraft, he had had no intention of departing in that respect from the substance of the provision adopted in 1963. As pointed out by Lord McNair, such treaties as commercial treaties would, because of their very nature, normally be intended to be subject to denunciation.⁷ However, the provisions of article 39 required not only that the treaty should have that special character, but also that the circumstances of the conclusion of the treaty or the statements of the parties thereto should provide further support for the inference that the parties intended to admit the possibility of denunciation or withdrawal.

47. The reference to the preparatory work was contained in the words "statements of the parties" which, as explained in paragraph (5) of the commentary adopted in 1963, "was not meant by the Commission to refer only to statements forming part of the *travaux préparatoires* of the treaty, but was meant also to cover subsequent statements showing the understanding of the parties as to the possibility of denouncing or withdrawing from the treaty; in other words, it was meant to cover interpretation of the treaty by reference to 'subsequent

⁶ *Ibid.*, p. 104.

⁷ McNair, *Law of Treaties*, 1961, pp. 501-505.

conduct ' as well as by reference to the *travaux préparatoires* ".⁸

48. He was prepared to accept the suggestion to restore the words " the character of " after the words " it appears from " and before the words " the treaty ". The authors of that suggestion felt that the expression " the character of the treaty " indicated more aptly the notion of certain categories of treaties, but personally he found it somewhat narrow. The indication that a treaty was subject to denunciation or termination could emerge from the provisions of the treaty as a whole. Moreover, he did not see how it was possible to determine the character of the treaty without looking for that character in its provisions.

49. With regard to the relationship between article 39 on the one hand and articles 69 and 70 on the other, unless the application of those articles on interpretation were wholly excluded in a particular article of the draft, it must be assumed that both applied *in toto*. The question whether it was desired to set aside the normal rules of interpretation arose in connexion with a number of other articles as well, in particular those dealing with ratification and reservations. Both the Commission and the Drafting Committee would have to take good care to bring the various articles into line with the provisions adopted in articles 69 and 70, and, in particular, to avoid referring to statements of the parties as a basic source for ascertaining their intentions, if it was desired to exclude reference to *travaux préparatoires*.

50. Article 39 should be referred to the Drafting Committee for reconsideration of the text in the light of the discussion, especially the view that the article should be couched in terms as narrow and restrictive as possible.

51. The CHAIRMAN, speaking as a member of the Commission, said that the statements by the parties to a treaty were of two kinds: those made in the general debate during the preparation of the text, and those made at the close of the negotiations, which formed an integral part of the consent expressed by the parties. It was to the latter that the Commission had undoubtedly been referring in 1963.

52. Sir Humphrey WALDOCK, Special Rapporteur, said that the language used in 1963 was admittedly somewhat loose. However, as pointed out in paragraph (5) of the commentary, the term " statements of the parties " was not meant by the Commission to refer only to statements forming part of the *travaux préparatoires* of the treaty, but was meant to cover also " subsequent conduct ".⁹

53. The Commission agreed that the relevance of statements of the parties for purposes of interpretation depended on whether they constituted an indication of common agreement by the parties. Acquiescence by the other parties was essential; unless the statements by parties were an indication of a common intention, their admission as evidence of a right of denunciation or withdrawal would be very dangerous.

54. Mr. de LUNA said that, in saying that a treaty either did or did not contain provisions regarding its

termination or suspension and that, if it did not, the Commission could not make good the deficiency, he had not meant to oppose what had been approved by States. The article would be useful to rebut the alleged presumption that, if a treaty did not contain any provisions concerning denunciation, it could be denounced unilaterally.

55. In the course of his brilliant defence of his text, the Special Rapporteur had suggested a very satisfactory expression, " specific provision ", which was even better than " express provision ". Subject to that change, and on the understanding that paragraph 1 would be subdivided in accordance with Mr. Cadieux's proposal, he fully supported the text.

56. Mr. BRIGGS said that article 39 should make it clear that, where a treaty was silent on the point, no right of denunciation existed unless such a right could be inferred from the intention of the parties. In 1963, he had objected to the expression " the character of the treaty " because it appeared to suggest that a right of denunciation could be presumed from the very class to which the treaty belonged. He had therefore been glad to note the stress placed by the Special Rapporteur on the implications of the use of the conjunction " and ", which was that the " character " of the treaty was not being set up as an individual criterion. However, he would prefer to see any reference to the " character " of the treaty deleted.

57. As rightly pointed out by Mr. Yasseen, the Special Rapporteur's proposed redraft was not compatible with the rules of interpretation laid down in articles 69 and 70, which placed the primary emphasis on the text of the treaty and relegated the preparatory work to a subsidiary rule. Perhaps it was articles 69 and 70 that required to be reconsidered, and that was a point that should be kept in mind when they came to be considered by the Commission in second reading.

58. Mr. AGO said that his understanding was that, in referring to " the statements of the parties ", the Commission had had in mind, not all the statements that might be made during the preparatory work, but those made after it had been concluded, in other words, those made at the time when the consent of the State was finally expressed. What it had intended to say was that sometimes the parties might not include denunciation clauses in the text of the treaty but that, at the time when they expressed their final consent, one party might state that it reserved the right to denounce the treaty and the other might not object. In such a case, there was to all intents and purposes agreement on the possibility of denunciation. In his view, the Commission should make it very plain that in article 39 that was the only situation it dealt with.

59. Mr. YASSEEN said it could be argued that that situation was covered by the other article, which provided for express or tacit agreement. The expression of a like intention by both parties could be regarded as a tacit agreement.

60. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would take into account all the points raised in the discussion.

61. The CHAIRMAN said that, if there were no objection, he would consider that the Commission accepted

⁸ *Yearbook of the International Law Commission, 1963, Vol. II, p. 202.*

⁹ *Ibid.*

the Special Rapporteur's proposal that article 39 be referred to the Drafting Committee for consideration in the light of the discussion, bearing in mind the view expressed by several members that the article should be drafted in terms as narrow and restrictive as possible.

*It was so agreed.*¹⁰

ARTICLE 40 (Termination or suspension of the operation of treaties by agreement)

Article 40

Termination or suspension of the operation of treaties by agreement

1. A treaty may be terminated at any time by agreement of all the parties. Such agreement may be embodied:

(a) In an instrument drawn up in whatever form the parties shall decide;

(b) In communications made by the parties to the depositary or to each other.

2. The termination of a multilateral treaty, unless the treaty itself otherwise prescribes, shall require, in addition to the agreement of all the parties, the consent of not less than two thirds of all the States which drew up the treaty; however, after the expiry of . . . years the agreement only of the States parties to the treaty shall be necessary.

3. The foregoing paragraphs also apply to the suspension of the operation of treaties. (A/CN.4/L.107, p. 36)

62. The CHAIRMAN invited the Commission to consider article 40, for which the Special Rapporteur had proposed a new text reading:

1. A treaty may at any time be terminated or its operation suspended, in whole or in part, by agreement of all the parties, subject to paragraph 2.

2. Until the expiry of six years from the adoption of its text, or such other period as may be specified in the treaty, the termination of a multilateral treaty shall also require the consent of not less than two-thirds of all the States which adopted the text. (A/CN.4/183/Add.2, p. 9)

63. Sir Humphrey WALDOCK, Special Rapporteur, said that the most important observation by a government on article 40 was that by Israel, which had pointed out that the possibility of tacit agreement to terminate a treaty seemed to have been excluded from the 1963 text. That interpretation was certainly a possible one if subparagraphs (a) and (b) in paragraph 1 were regarded as exhaustive. The reason for inserting those two subparagraphs had been to make it clear that it was for the parties to decide what form the agreement to terminate should take. Some authors went so far as to argue that the agreement to terminate must take the same form as the original treaty. But that was not a theory to which the Commission itself had subscribed.

64. In modifying paragraph 1, he had tried to take account of some of the suggestions made by governments and had dropped the subparagraphs contained in the original text, on the ground that it was unnecessary to specify what form the agreement to terminate might take. It seemed reasonable to provide that a treaty might be

terminated in part, as had been suggested by some governments. The issue of separability did not arise, as the parties would themselves decide in such a case which parts of the treaty would be terminated.

65. He had transferred to paragraph 1 the clause concerning suspension, which in the original text appeared in paragraph 3, as that was a matter for decision by the parties and not by all the States taking part in the adoption of the text.

66. When considering the time-limit to be imposed in paragraph 2, he had sought to find a mean between the various suggestions made by governments, having due regard to the need for a reasonable length of time in order to allow for the completion of the constitutional procedures required for ratification, accession, acceptance or approval.

67. The object of paragraph 2 was to protect the interests of States that had taken part in the negotiations against the premature termination of the treaty, particularly in cases where few ratifications were required to bring it into force. It was not easy to devise fully satisfactory wording to describe the States, but he had chosen the phrase "which adopted the text" instead of the phrase "which drew up the treaty".

68. Mr. YASSEEN said that the Special Rapporteur's new text posed a serious problem, since it implied that the agreement between the parties to terminate or suspend a treaty could be oral. Although not a supporter of the theory of the *acte contraire*—the theory that the mode of terminating a treaty had to be the same as the mode of its conclusion—he was reluctant to admit the idea that an instrument which in most cases had been adopted with some ceremony could be terminated by an oral agreement. Nor did he consider that the addition of the words "in whole or in part" was an improvement: since the parties could terminate the whole of a treaty, they could obviously terminate a part of it.

69. Paragraph 2 contained a rule which might be useful in the case of multilateral treaties, as he had said in 1963. A period of ten years seemed to him to be reasonable. The paragraph was unquestionably better arranged in the new version; it was better to mention suspension directly in both paragraphs than to make it the subject of a separate paragraph.

70. Mr. CASTRÉN said that he found the Special Rapporteur's new text satisfactory, and he accepted all the amendments he had proposed to the 1963 text. The Special Rapporteur had rightly omitted all the superfluous detail in paragraph 1, which might have resulted in interpretations not intended by the Commission. It was also right that the article should take the rule of the separability of treaties into account. The words "in whole or in part" were not absolutely necessary, as Mr. Yasseen had pointed out, since, if a treaty could be abrogated *in toto*, it could also be abrogated in part.

71. With regard to paragraph 2, he agreed with the Special Rapporteur that, if it was merely intended to suspend the operation of a treaty, the consent of the parties should be sufficient, and that it was not necessary to obtain, within a particular period, the agreement of a specified number of the States which had drawn up the treaty. So far as the termination of a treaty was con-

¹⁰ For resumption of discussion, see 841st meeting, paras. 12-17.

cerned, he agreed with the Special Rapporteur's proposal relating to the period within which the consent of at least two-thirds of the States which had adopted the text was required; the proposal seemed to be acceptable to most of the States which had commented on the point.

72. Mr. de LUNA said he agreed with Mr. Yasseen that the theory of the *acte contraire* was not applicable in international law. International law was essentially non-formalistic and did not establish any hierarchy of norms or forms. Whatever the manner in which a State had accepted an obligation, whether in writing, orally or by indication, it continued to be bound. There was therefore no need to require a written instrument.

73. It was worth noting that constitutions, which were so careful to lay down the rules concerning the treaty-making capacity, made no reference whatever to the denunciation of treaties. In the course of his diplomatic career, he had known cases where a treaty had been terminated by a mere *note verbale*—a document which, given the atmosphere of mutual trust prevailing in diplomacy, might be typed by anybody and bear illegible initials. Accordingly, both from the point of view of doctrine and in the light of his experience, he fully agreed with the Special Rapporteur.

74. As Mr. Yasseen had rightly said, the words "in whole or in part" were unnecessary, but there was no harm in stating the obvious.

75. Mr. ROSENNE said that, for the time being, the phrase "which adopted the text" could be retained, but it might eventually have to be altered because of a new practice whereby treaties were not adopted by States at all; an example of that was the Convention on the Centre for the Settlement of Investment Disputes. After consideration by a committee of experts appointed by governments, the text of that convention had been adopted and opened for signature by the Board of Governors of the International Bank for Reconstruction and Development. The possibility of such a procedure was perhaps not covered by the new article 3 (*bis*).¹¹

76. Mr. TUNKIN said that paragraph 1 of the Special Rapporteur's new text was certainly an improvement and was acceptable. There had been no justification in the 1963 text for limiting the forms of agreement to terminate to an instrument drawn up by the parties or to communications. The new text would cover a tacit agreement, including the case of desuetude.

77. The question of the time-limit to be laid down in paragraph 2 should be left to be decided by a diplomatic conference.

78. He had misgivings about the phrase "which adopted the text", which seemed to him as imprecise as the wording used in the 1963 version. There was no knowing whether it referred only to the States which had voted in favour of the text of a treaty, or whether it would include all States which had participated in the Conference. The alternative was to cover by that provision only those States which had signed the treaty and had thereby associated themselves more closely with the text of the treaty. The other possible solution would be

to provide that termination could only take place by consent of all the parties; that would be a sufficient safeguard against arbitrary action.

79. Mr. VERDROSS said that he could appreciate the force of Mr. Yasseen's comment on paragraph 1; but since it was one of the governing principles of international law that the parties were free to adopt whatever form they wished for a treaty, he supported the views expressed by Mr. de Luna and Mr. Tunkin.

80. In paragraph 2, the Commission was proposing a new rule for adoption by States as a part of international law; there too it might be best to make use of Mr. Tunkin's suggestion.

81. Mr. BRIGGS said that the new draft of paragraph 1 was acceptable, but he would prefer paragraph 2 to be dropped, as well as the words "subject to paragraph 2" at the end of paragraph 1.

82. He had never understood why there should be so much solicitude for the States participating in the adoption of the text of a treaty which they had not proceeded to accept as binding; nor did he see what legal right that conferred upon them. If some hundred States participated in a conference to draw up a treaty which only required two ratifications to enter into force—as was the case with the Geneva Conventions for the Amelioration of the Condition of the Wounded in Armed Forces in the Field¹²—and the two ratifying States agreed to terminate it before any others had had time to ratify, such a case could be dealt with by a provision reading: "A treaty may be terminated between the parties by agreement of all the parties". Other States which had participated in the drawing up of the treaty could still bring it into force between themselves.

83. Mr. AGO said that the Special Rapporteur's proposed redraft was superior to the earlier text in that it was simpler and less descriptive. Unfortunately, the French version was almost unintelligible and should be redrafted by the Drafting Committee.

84. He wished to deal with the question whether the suspension of the operation of a treaty—the subject of a separate paragraph in the 1963 text—should be governed by the same provision as the termination of a treaty. Even on the assumption that the agreement of all the parties was really necessary for the purpose of the termination of a treaty, could one go so far as to say that some of the parties could not *inter se* suspend the operation of a multilateral treaty without the agreement of all the parties? Was it absolutely essential to treat suspension in the same way as termination? Could not the Commission confine the scope of article 40 to termination? The inclusion of suspension in that context seemed a little odd and, moreover, made for a very clumsy text.

85. With regard to paragraph 2, he realized what had been in the Commission's mind. He could imagine a case where a conference drew up a text—and in that connexion Mr. Tunkin had rightly said that the meaning of the words "all the States which adopted the text" should be explained—and certain States became parties to the treaty. Shortly afterwards, however, just when other States were perhaps planning to ratify the treaty, only

¹¹ *Yearbook of the International Law Commission, 1965, Vol. I, 820th meeting.*

¹² *United Nations Treaty Series, Vol. 75.*

the consent of the first-mentioned States would be needed for the purpose of terminating it. It seemed to him that that was a rather hypothetical situation and that it was perhaps hardly necessary to state such a rule, which would in any case be a complicated one since the terminology used would necessarily be somewhat arbitrary. It was barely conceivable that some States which had become parties to a treaty should be at liberty to terminate it so soon after its adoption, without consulting the other States. Indeed, it was so unlikely that it was probably unnecessary to provide for it. Moreover, difficulties might arise, especially because an arbitrary time-limit would have to be fixed. He would be in favour of deleting paragraph 2.

86. The CHAIRMAN, speaking as a member of the Commission, said the Special Rapporteur had found a more elegant formulation than that of 1963. So far as suspension was concerned, he did not entirely agree with Mr. Ago's view that it was open to the parties at any time to suspend a multilateral treaty without consulting all the other parties; such a procedure might upset the balance required in the application of treaties. The Drafting Committee should ponder the question.

87. Paragraph 2 stated that "the termination of a multilateral treaty shall also require the consent of not less than two-thirds of all the States which adopted the text", without mentioning suspension, whereas paragraph 1 stated that the agreement of all the parties was required to suspend the treaty's operation. The Special Rapporteur had certainly not intended to produce that result, which was the consequence of the omission of paragraph 3 of the 1963 text; if the text was applied literally, the suspension of the treaty would necessitate the consent of all the parties. It would be better to use some such expression as "the termination or the suspension of the operation of a multilateral treaty".

88. He agreed with Mr. Tunkin that there were cases where States accepted a text only because others had also accepted it. It was conceivable that several States, whose consent was unwanted, might formally accept a text for the sole reason that certain other States had accepted it, and that if those certain other States then abandoned the treaty, again for that sole reason the first-named States would then ask to be permitted to withdraw their consent. Without such permission they would then be in a delicate position. Consequently, it might be best to revert to the 1963 text.

89. He was in favour of Mr. Tunkin's suggestion, which had been supported by Mr. Ago. The time-limit should preferably be placed between square brackets; at all events, paragraph 2 of the new text should be drafted in the form of a residuary rule.

90. Sir Humphrey WALDOCK, Special Rapporteur, said the consensus of opinion was that the Commission should maintain the position it had adopted at its fifteenth session, but that no indication need be given in article 40 of the form which the agreement to terminate or suspend might take. It was evidently not in favour of the principle of the *acte contraire*.

91. He entirely agreed with Mr. Tunkin that one of the merits of a simple formula would be that it covered cases of desuetude as well as tacit agreement to terminate.

92. The point raised by Mr. Ago as to whether suspension would require the agreement of all the parties must be considered, otherwise there was a risk of the text not being consistent with articles 66 and 67, on amendment and modification of multilateral treaties. It was important to maintain a distinction between an amendment of a multilateral treaty agreed upon by all the parties, and modifications agreed upon between some parties only. If a parallel distinction were to be made in regard to suspension, it must be made explicit. An alternative procedure would be to lay down a general rule concerning termination and to cover the problem of suspension in article 67. The issue was one to which he had not yet given sufficient thought.

93. Paragraph 2 of his new text, although similar to a paragraph adopted in 1963, had not met with much support in the Commission. Its purpose was to protect for a specified period the legal interest of States which had taken part in the adoption of a general multilateral treaty and had thereby shown an interest in it, even if they had not proceeded to ratify at once. The matter might have some importance, particularly in modern times when technical conventions were apt to get out-of-date quickly and require either termination or modification. His own view was that it would be inadmissible for a few parties only to dispose of such treaties, without some form of consultation with the States that had helped to draw them up. Any such action was so inconsistent with the proper conduct of international relations that it was not perhaps very likely to occur.

94. The issue was not a major one and if the Drafting Committee considered that it would be simpler to exclude paragraph 2, he would accept that conclusion.

95. The CHAIRMAN suggested that article 40 be referred to the Drafting Committee.

*It was so agreed.*¹³

The meeting rose at 12.55 p.m.

¹³ For resumption of discussion, see 841st meeting, paras. 57-90.

830th MEETING

Thursday, 13 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Also present: Mr. Caicedo Castilla, Observer for the Inter-American Juridical Committee; Mr. Golsong, Observer for the European Committee on Legal Co-operation.

Co-operation with Other Bodies

[Item 7 of the agenda]

(resumed from the 828th meeting)

1. The CHAIRMAN invited the observer for the European Committee on Legal Co-operation to address the Commission.
2. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that the Council of Europe had two organs—the Consultative Assembly and the Ministerial Committee—and a Secretary-General. Under its rules, member States were required to give specific undertakings with regard to the recognition and protection of human rights and to the rule of law.
3. The Council's achievements in legal matters were embodied, not in statutory or quasi-statutory instruments, like those of the International Labour Organisation, for instance, but in inter-State treaties, which were prepared within the Council and then concluded between the States members. In no case so far had the States members been required to accede to conventions prepared by the Council, but they were required, within one year of signing a treaty, to initiate the procedure for approval of the treaty by the appropriate national bodies.
4. Some sixty agreements had been prepared by the Council of Europe; they covered a wide range of subjects and included the European Convention on Human Rights, agreements on medical, cultural and social matters and other topics of private international law or criminal law, as well as on questions of public international law. Among the instruments in the last-mentioned category were the European Convention for the Peaceful Settlement of Disputes (1957), the Convention on Extradition (1957), the Convention on Multiple Nationality (1963) and the European Agreement on the Suppression of Radio Broadcasts by Stations outside National Territories (1964). He would be happy to provide each member of the Commission with a list of those Conventions and with a complete collection of the agreements concluded within the Council of Europe.
5. The preparation of multilateral instruments on such a wide range of subjects by expert committees naturally raised delicate questions of treaty law, more especially as, pending the completion of the International Law Commission's work on the subject, there were no general rules governing the conclusion of inter-State treaties. That was one of the reasons why the Ministerial Committee of the Council of Europe, by its resolution (63) 29, had set up in 1964 the European Committee on Legal Cooperation, which had become responsible for the preliminary work on nearly all the legal problems considered by the Council.
6. The Committee on Legal Cooperation, whose present Chairman was Professor Monaco, an Italian jurist, welcomed observers from non-member States and international legal bodies; he hoped that in future the International Law Commission would also give its assistance on matters of common interest and send an observer to the Committee's meetings. He would submit the matter to the next meeting of the European Committee.
7. Several of the matters being studied by the Committee might, he thought, be of particular interest to the Commission. The Committee had almost completed a convention on consular functions, which was expected to be open for signature before the end of 1966. The convention, which was concerned with consular functions and not with consular relations, supplemented the Vienna Convention, as was explained in its preamble. Article 1 reproduced the basic definitions set out in the Vienna Convention, and the new instrument expressly provided that questions that it left unsettled would continue to be governed by customary international law.
8. Another topic under discussion was the problem of immunity of States, which the International Law Commission seemed to have dropped for the time being. The Council of Europe had no intention of setting itself up as a substitute for the Commission; all that it wished to do was to codify the practice to be observed by member States in their relations with one another. Such a code might perhaps be of use to the Commission when it took up the topic again.
9. The Committee had also begun a study of special missions, but had deferred it until the results of the International Law Commission's work were available. It had also decided that, as soon as the Commission's report on the law of treaties was available, it would consider the question of reservations to multilateral treaties. Some years previously the Council of Europe had instituted a system of what were called "negotiated reservations" in connexion with its own treaties, but the problem was extremely complicated. The Council therefore wished to take advantage of the Commission's knowledge and experience, not only where the Council's own treaties were concerned but also in connexion with multilateral treaties drawn up within the United Nations or elsewhere.
10. In 1966 the European Committee on Legal Co-operation proposed to take up two other problems of public international law: the question of the peaceful settlement of disputes, with a view to supplementing and improving the 1957 Convention, and the question of the uniform interpretation of treaties, specifically the interpretation of treaty provisions which were likely to be applied by national courts.
11. The Council's work on treaties was thus not only inspired by the work of the International Law Commission, but was also complementary to it. The same was true of the Council's efforts to ensure that its member States acceded to conventions prepared within the United Nations. The Consultative Assembly had on several occasions adopted recommendations on the subject, and the European Committee on Legal Co-operation regularly reviewed the status of signatures and ratifications of such conventions as the Conventions on the Law of the Sea and the Conventions on Diplomatic and Consular Relations.
12. As in its legal activities the Council of Europe was concerned essentially with the conclusion of treaties, it followed with particular attention the Commission's

work on the codification of the law of treaties. The two meetings which he had attended had shown him how an organization such as the Council of Europe, whose experience in treaty law was not unimportant, could profit by the conclusions reached by the Commission, not only in the drafting of provisions but also on their application. Admittedly, a problem such as that raised by article 40, paragraph 2, had not yet occurred in the practice of the Council of Europe; but there were other rules in the draft articles which were of great practical importance to his Committee, and more particularly to the Secretary-General of the Council of Europe as depositary. Indeed, all the Council of Europe's treaties could be covered by the draft articles, for although they had been drawn up within an international organization, they were "concluded between States" within the meaning of article 1 of the Commission's draft. That remark did not of course apply to the agreements concluded by the Council with other international organizations or with States.

13. The draft articles constituted a most useful guide for the Committee on Legal Co-operation, notably the rules concerning reservations, the application of a treaty in point of time, the correction of errors, the functions of the Secretary-General as depositary, provisional entry into force, the modification of treaties—articles 66 and 67—suspension, accession, obligations for third States, and State succession.

14. The Council's experience had often vindicated the solutions recommended by the Commission on all those points. That was also true of the decision, taken at the first part of the session, to delete article 5 on the negotiation and drawing up of a treaty. In his view, that was a sound decision, since that article would not have covered all the forms used in the Council of Europe for preparing treaties. The Consultative Assembly, a parliamentary and therefore not a governmental body, played an important part in the drawing up of treaties, an arrangement which was not without value when doubts arose later regarding the interpretation of some ambiguous provision. It was therefore a special case which might be borne in mind in connexion with interpretation; indeed, the Commission had made provision for it in draft article 70.

15. He could assure the Commission that, in carrying out its duties in connexion with the codification and progressive development of public international law, which were of world-wide significance, it could always rely on the interest and support of the Council of Europe, which, like the United Nations, had been set up to prevent the recurrence of painful events and to establish the rule of law.

16. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for his statement and for his promise of co-operation. He said the Commission's programme of work was a somewhat ambitious one; the fact that some particular topic was on the programme should not prevent the Council of Europe from tackling forthwith some subject which the Commission would be taking up later, for in that way the Council could gather material that would be useful to the Commission, which had taken all the legal ideas throughout the world into account.

17. Mr. AGO said that he had been struck by a passage in Mr. Golsong's interesting statement which seemed to have particular relevance to the Commission's work—namely, his reference to the efforts of the European Committee on Legal Cooperation to encourage accession to general conventions prepared within the United Nations. The work which the Commission began and which was continued at diplomatic conferences was fruitless unless it resulted in accession and ratification. He hoped, therefore, that the Commission would recommend all regional legal bodies co-operating with it to adopt an attitude similar to that of the Council of Europe.

18. Mr. ROSENNE said he hoped the European Committee on Legal Co-operation would furnish any material relating to the law of treaties as early as possible so that it could be taken into account by the Commission, which was due to complete its work on the subject in the summer.

19. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said he thought that the experience of the Committee in matters of treaty law, and also that of the Secretary-General of the Council of Europe as depositary, might be of interest to the Commission. He would let the Commission have a note on the subject at a very early date.

20. The CHAIRMAN asked Mr. Golsong to be good enough to send a general memorandum to the Secretariat, with enough copies for all the members of the Commission.

21. Sir Humphrey WALDOCK, Special Rapporteur, said he had not yet written his report on part III of the draft, and so would be glad to have an advance copy of any material from the European Committee on Legal Co-operation which might have a bearing on the subject.

22. The CHAIRMAN invited the observer for the Inter-American Juridical Committee to address the Commission.

23. Mr. CAICEDO CASTILLA (Observer for the Inter-American Juridical Committee), replying first to Mr. Ago, said the juridical bodies of the Organization of American States would most certainly urge their member governments to ratify the international conventions which had resulted from the work of the International Law Commission.

24. 1965 had been a year of intense activity for the juridical bodies of the Organization of American States. The Inter-American Council of Jurists had met at San Salvador in February, the Inter-American Juridical Committee at Rio de Janeiro in July, August and September, and the Extraordinary General Conference at Rio de Janeiro in November.

25. The Inter-American Council of Jurists consisted of representatives of all the member governments of the Organization of American States. The Inter-American Juridical Committee, on the other hand, represented the Organization as a whole; its nine members, who held office for six years, acted in their individual capacities and not as representatives of their governments.

26. At its San Salvador meeting the Council had,

among other things, adopted the rules formulated by the Inter-American Juridical Committee on the subject of State responsibility as the expression of Latin American law, and had decided that a statement of North American legal doctrine in the matter should be included in the Committee's report.

27. The Inter-American Juridical Committee had had a particularly fruitful session. It had completed its work on the breadth of the territorial sea, the international responsibility of States, the use of the waters of international rivers and lakes for industry and agriculture, and the differences between intervention and collective action.

28. With regard to the territorial sea, the Committee had put forward a draft convention for adoption by American States, laying down a twelve-mile limit. The Colombian member of the Committee had claimed that the draft convention ought to have mentioned the right of a State, or group of States, to prescribe a zone 200 miles wide for the protection of the living resources of the sea, as had been done by the Pacific Coast States in the Santiago declaration. The Argentine member of the Committee had expressed his agreement with the Colombian member.

29. On the subject of State responsibility, the Committee had drawn attention to the existence of two different positions: that of the Latin American States and that of the North American States. The Latin American States had a tendency to restrict State responsibility and proclaimed the principle of equality of treatment of nationals and aliens, thereby rejecting the privilege of diplomatic protection of aliens; they confined the concept of denial of justice to cases where an alien was refused access to the local judicial authorities, and rejected the notion that mistaken or unjust judgments could constitute a denial of justice; and they both refused to admit the use of force for the recovery of State debts and accepted the validity of the so-called "Calvo clause". The doctrine prevailing in the United States generally diverged from these principles and upheld the right of protection of nationals abroad. The 1965 report of the Committee set out both points of view, with the reasons given in support of each. The Committee's report would be officially transmitted in March 1966 to the International Law Commission by the Secretary-General of the Organization of American States.

30. The Latin American doctrine had emerged from the need of countries of that area to defend their sovereignty and independence against diplomatic claims and armed interventions on the part of European powers and the United States. In the course of the nineteenth century and the early twentieth century, some twenty interventions of that type had taken place, even against countries like Mexico, Argentina and Brazil.

31. The Inter-American Juridical Committee had prepared a draft convention on the use of the waters of international rivers and lakes for industrial and agricultural purposes, which would be considered by an inter-American diplomatic conference in 1966. The matter was of great practical importance, because of the frequent disputes among American States in con-

nexion with the use of international waters. The draft convention defined such controversial terms as "international river", "international lake" and "industrial use". It specified that a State wishing to carry out works connected with the use of water had a duty to notify the other State concerned and to supply plans to that State, in order to obtain its consent. It also provided for the setting up of a joint commission to deal with disputes between States; any dispute which the Commission was unable to solve would be settled by the peaceful means laid down in the Inter-American system, namely, conciliation commissions, inter-American arbitration, or the International Court of Justice where legal disputes were concerned.

32. The report of the Committee on the difference between intervention and collective action was particularly significant at the present time. It upheld non-intervention as a basic principle of the Organization of American States, which arose out of the principle of the juridical equality of States. Without the principle of non-intervention, the regional American organization would lose its meaning and the Committee therefore urged the retention of article 15 of the Bogota Charter,¹ which laid down that no State had the right to intervene, for any reason whatever, in the internal or external affairs of any other State.

33. The Committee agreed that collective action by the Organization itself was legitimate, although in America only one treaty provided for such action, namely the Inter-American Treaty of Reciprocal Assistance,² signed at Rio de Janeiro on 2 September 1947 and since ratified by all the States members of the Organization of American States. That treaty specified that inter-American collective action could take place in three cases: first, in the event of an armed attack against an American State; secondly, in the event of aggression otherwise than by armed attack; thirdly, where collective action had been first endorsed by a two-thirds majority at a meeting of Ministers for Foreign Affairs. The Committee's views had received the support of several Ministers for Foreign Affairs at the Extraordinary Inter-American Conference, which had decided to include, in the so-called Act of Rio de Janeiro, a solemn declaration to the effect that the first part of the Bogota Charter would not be revised. That declaration was to be commended, for the first part of the Bogota Charter set out the very philosophy of the Organization of American States and embodied the main principles which inspired the inter-American juridical community, namely, non-intervention, self-determination, juridical equality of states and peaceful settlement of disputes.

34. The Inter-American Juridical Committee was due to meet in April 1966 to consider whether to submit to the Buenos Aires Conference, to be held in July 1966, a proposal, sponsored by two governments, for the setting up of an Inter-American Peace Council. The proposed Council would consist of Ministers for Foreign Affairs and would be competent to deal with all disputes between American States; it would have authority to prescribe

¹ United Nations *Treaty Series*, Vol. 119, p. 56.

² United Nations *Treaty Series*, Vol. 21, p. 93.

the method to be used for the settlement of a dispute and also power to settle the dispute itself if no positive solution were reached by the means available to the parties. There was as yet no agreement on that proposal, which was only an item for consideration.

35. Mr. de LUNA, after congratulating the observer for the Inter-American Juridical Committee on his interesting statement, asked that all members of the Commission should receive the documents of the juridical bodies of the Organization of American States. It was not enough to send a single copy addressed to the Commission itself, because that would simply remain in the library at Headquarters.

36. Mr. AMADO, also congratulating Mr. Caicedo Castilla on his statement, said he had learned with interest of the results achieved in solving the problem of the utilization of international rivers for the production of electric power. At the great Inter-American Conferences held at Havana in 1928 and at Montevideo in 1933, there had been serious differences of opinion between the representatives of Brazil and of Argentina. He was glad to hear that the efforts of eminent Latin American jurists had at long last been crowned with success.

37. Mr. AGO, speaking as Special Rapporteur on the topic of State responsibility, said he hoped that the Inter-American Juridical Committee would send him advance copies of any documents it might have relating to its work on the topic.

38. Mr. CAICEDO CASTILLA (Observer for the Inter-American Juridical Committee) said he regarded the exchange of documents as an essential part of co-operation between the Commission and inter-American juridical bodies. He would make the necessary arrangements to ensure that important documents of the Committee should reach each member of the Commission, and particularly that documents concerning State responsibility should be supplied to Mr. Ago.

39. The CHAIRMAN, on the Commission's behalf, thanked the observer for the Inter-American Juridical Committee for both his statement and his promise.

Law of Treaties

(A/CN.4/183 and Add.2, A/CN.4/L.107)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 41 (Termination implied from entering into a subsequent treaty)

Article 41

Termination implied from entering into a subsequent treaty

1. A treaty shall be considered as having been impliedly terminated in whole or in part if all the parties to it, either with or without the addition of other States, enter into a further treaty relating to the same subject-matter and either :

(a) The parties in question have indicated their intention that the matter should thereafter be governed by the later treaty; or

(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. However, the earlier treaty shall not be considered as having been terminated where it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty. (A/CN.4/L.107, p. 37)

40. The CHAIRMAN invited the Commission to consider article 41, for which the Special Rapporteur had proposed a new title and text which read :

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

1. A treaty shall be considered as terminated if all the parties to it enter into a further treaty relating to the same subject-matter and :

(a) it appears from the later treaty, from its preparatory work or from the circumstances of its conclusion that the parties intended that the matter should thenceforth be governed exclusively by the later treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. However, the earlier treaty shall be considered as only suspended in operation if it appears from the later treaty, from its preparatory work or from the circumstances of its conclusion that such was the intention of the parties when concluding the later treaty.

3. Under the conditions set out in paragraphs 1 and 2, if the provisions of the later treaty relate only to a part of the earlier treaty and the two treaties are otherwise capable of being applied at the same time, that part alone shall be considered as terminated or suspended in operation. (A/CN.4/183/Add.2, p. 15)

41. Sir Humphrey WALDOCK, Special Rapporteur, said that article 41 was not an easy one to draft. That article and article 63 dealt with the two sides of the same problem. Not many comments had been received from governments. The Israel Government considered that the article contained an inherent contradiction, but the Swedish and United States Governments had found it helpful.

42. In his observations, he had set out the points at issue and had stressed the importance of achieving an exact correlation between the article and article 63.

43. It could be argued that article 41 was concerned with a form of termination by implied agreement, but the case was a special one because the implication arose from the conclusion of a subsequent treaty incompatible with the earlier treaty.

44. In his proposed new text for the article, reference was made both in paragraph 1 (a) and in paragraph 2 to preparatory work. The Commission might prefer it to be dropped, at any rate for the time being, since it was clear that all cases of implied intention in the draft articles would have to be reviewed so as to co-ordinate the provisions in question with articles 69 and 70.

45. Mr. de LUNA said that article 41 dealt essentially with the case where all the parties to a treaty concluded another treaty, the provisions of which conflicted in whole or in part with the provisions of the earlier treaty. In the literature, the problem was covered by the maxim *lex posterior derogat priori*.

46. The Special Rapporteur had said quite rightly that, although a replacement of one treaty by another was the consequence of the exercise of the will of the parties, it raised a special problem which should be dealt with by a separate provision. The Commission should not exaggerate the logical and systematic approach; its principal object should be to propose rules which would work in practice. In that sense, the Special Rapporteur had resolved the problem satisfactorily, and his redraft of article 41 was acceptable, apart from minor drafting changes.

47. Paragraph 1, in particular sub-paragraph (a), laid down a rule which was correct and necessary. But, as Mr. Yasseen has said in connexion with another article, the provisions of that paragraph and of paragraph 2 should be brought into line with the rules concerning interpretation, which would form part of the draft.

48. For paragraph 2, he preferred the 1963 text, which said the same thing in clearer language.

49. Paragraph 3 contained an idea which was correct, but it was badly expressed in the French text, which should be revised.

50. Mr. ROSENNE said that, from the beginning, article 41 had caused him considerable concern, as would be seen from his remarks at the fifteenth session,³ when he had abstained from voting on the article, then numbered 19. At the sixteenth session⁴ he had maintained that reservation when speaking on article 63, then numbered 65. He was now obliged to state his position on the article in the light of the draft as a whole.

51. In the first place it was repetitive, because paragraph 1 stated what had already been clearly laid down in article 40, and as the Special Rapporteur had indicated at the 829th meeting (paras. 63 and 64), the form of termination was immaterial. Article 41 also duplicated article 63, as was apparent from paragraph (1) of the commentary on that article in the form approved at the sixteenth session⁵: from the practical point of view article 63 was adequate. The difficulty of co-ordinating article 41 with article 63 was due to the excessive subtlety underlying the former and he was impressed by the fact that, when discussing article 63 at the sixteenth session, the necessity to amend article 41 had been recognized, whereas now, when re-examining article 41, it was proposed to revise article 63. That indicated the deep confusion that had arisen on the matter.

52. Even if there were a technical difference between the two, it would be desirable, for reasons of legal policy, to omit the former, because it was inappropriate to include in the section on termination an article based exclusively and by definition on an implication derived

from an interpretation to be placed on a series of transactions. That interpretation, moreover, would have to rely in part on the preparatory work and would therefore constitute another exception, as far as the use of that material was concerned. Such a complicated and theoretical ground for termination was unjustifiable and would not contribute to the stability of international relations and the maintenance of peace.

53. Those elements which appeared in article 41 and ought to be retained and were not covered by the new article 40 should be transferred to article 63. He was therefore opposed to retaining article 41, which should not be referred to the Drafting Committee. Alternatively the consideration of article 41 could be postponed until the Commission had reached a conclusion about article 63. He was aware that his view differed from that of his Government which, in its comment in part III, not yet before the Commission, had suggested that suspension should not be dealt with in article 41, but transferred to article 63.

54. The repeated juxtaposition of termination and suspension caused him considerable concern, because the latter created far more complex legal relations between the parties than termination, and to mention them together might cause difficulties by implying that they were alternatives. The Commission should examine far more closely the circumstances in which suspension operated and, if necessary, should formulate a special article on the matter and on its legal consequences.

55. Mr. AGO said that he had been struck by some of Mr. Rosenne's comments. Article 41 covered two possible cases. One was the case where the parties to a treaty concluded another treaty and stated it as their intention that the new treaty should cover the whole subject matter of the earlier treaty; that situation was manifestly identical with that dealt with in article 40. It was immaterial whether the agreement to terminate a treaty was an independent one or was expressed in connexion with the conclusion of another treaty on the same subject.

56. The second case was where the parties had not expressed any intention concerning the termination of the earlier treaty, but where termination was the consequence of the fact that the provisions of the later agreement were incompatible with those of the earlier one. That being so, the question was how the provisions of article 41 were to be coordinated with those of article 63, for it was unnecessary to say the same thing twice over, particularly with regard to the commoner case of partial incompatibility.

57. The Commission should therefore ponder Mr. Rosenne's proposal, review the whole of articles 40, 41 and 63, and try to simplify them and eliminate repetitious matter.

58. So far as the drafting was concerned, the French text of paragraph 2 should be rectified.

59. Mr. VERDROSS said he agreed with the opinion expressed by Mr. Rosenne and Mr. Ago. He would add only, in contrast with the Special Rapporteur's view, that the passages concerning the consultation of preparatory work raised more than a drafting problem; they raised a problem of substance. Preparatory work

³ *Yearbook of the International Law Commission*, 1963, Vol. I, 691st meeting, para. 8, and 709th meeting, para. 74.

⁴ *Ibid.* 1964, Vol. I, 742nd meeting, para. 66, and 755th meeting, para. 20.

⁵ *Ibid.* 1964, Vol. II, p. 185.

could be used only to explain or confirm the meaning of a text; in no case could it make it possible to read into a text something that was not there. The text should at least give some indication in order to justify the consultation of preparatory work. The references to preparatory work in paragraph 1 (a) and paragraph 2 should therefore be omitted.

60. Mr. BRIGGS said that, if article 63 did not adequately cover the matter of suspension, in whole or in part, it could be suitably modified. He was in favour of the deletion of article 41 because he doubted whether there was any need to provide for termination in such cases. The real issue was, which treaty prevailed in a case of conflict, and that issue was fully covered in article 63.

61. Mr. TUNKIN said that cases of the kind contemplated in article 41 were not infrequent and could give rise to difficulties. If there were no express agreement between the parties to abrogate a treaty when a later treaty was concluded that was incompatible with it, the inference was that they had intended to abrogate it. There seemed to be some justification for retaining a separate article on the matter, which was not the same as that dealt with in article 63.

62. Mr. CADIEUX said he agreed with Mr. Tunkin. Article 41 dealt with a delicate problem and proposed a rule that was different from those embodied in article 40 and article 63. Under article 40, the will of the parties operated to terminate the treaty; under article 41, the parties, by stipulating a new rule, expressed the will to terminate a treaty; and under article 63, one treaty was replaced by another without any conscious intention by the parties to terminate the earlier one.

63. Consequently, the rule laid down in paragraph 1 was necessary. No doubt it could be included either in article 40 or in article 63, but it was better to set it out in a separate article because it dealt with a case which was distinct from the others.

64. From the drafting point of view, the Special Rapporteur's reformulation was a great improvement.

65. Mr. CASTRÉN said that, as the Special Rapporteur had remarked, the article had given a great deal of trouble to the Commission, particularly its placing in the draft and its connexion with other articles. His personal opinion was that it was now in its right place.

66. In reformulating article 41, the Special Rapporteur had tried to bring out more clearly in what way the article differed from article 63. The reformulation was satisfactory; though perhaps a little too long, it would be difficult to devise a shorter wording that would be acceptable as to substance.

67. He agreed with Mr. Tunkin that article 41 should be retained and referred to the Drafting Committee.

68. Mr. AGO said he wished to explain that when, in his earlier statement, he had questioned whether it was desirable to keep article 41 as a separate article, he had in no way meant to deny that the situation covered by the article was a very real one. The crux of the matter was whether there really was any difference between the situation covered by article 40 and that covered by article 41. In his opinion there was not. In either case, what

invariably happened—as Mr. Tunkin himself had said—was that one agreement was replaced by another. The new agreement might take any one of three forms; it might either be an autonomous agreement expressly terminating the earlier treaty, or it might be an agreement embodied in another treaty dealing with the same subject-matter, or it might be an implied agreement evidenced precisely by the fact of the conclusion of the new treaty and by its contents. Surely all those three cases could be dealt with in one and the same article.

69. He agreed with those who considered that the article should avoid any reference to problems which were merely problems of interpretation. For the purpose of determining whether the implied agreement had or had not materialized, all the means of interpretation indicated in the articles concerning interpretation would necessarily have to be employed. It was quite unnecessary to indicate in article 41 any special means of interpretation.

70. He agreed with the idea that all matters concerning the suspension of the operation of a treaty should be dealt with separately.

71. In his opinion paragraph 3 was definitely connected with the subject matter of article 63.

72. Mr. de LUNA said he did not object to the idea that the substance of article 41 should be included in another article, but hoped that it would not be included in article 40, particularly if paragraph 1 (a) of article 41 was dropped. Under article 40, the will of the parties—a subjective criterion—entered into operation, whereas paragraph 1 (b) of article 41 relied on an objective criterion—the fact that the two treaties were not capable of being applied at the same time. In article 63 the impossibility of applying two instruments simultaneously was not stated in absolute terms, and paragraph 3 of that article laid down an exception to article 41. It was bad practice to mention the exception in a context so remote from the rule.

73. It remained true, nevertheless, that article 41 laid down a rule for a very real case, that where all the parties to an earlier treaty were parties to a later treaty which was absolutely incompatible with the earlier one. In such an event, the rule was that the second treaty superseded the first.

74. Like Mr. Ago, he was convinced that the article would become clearer if it omitted all reference to the interpretation of the intention of the parties.

75. Mr. TUNKIN said that there seemed to be more or less general agreement on the substance of article 41, and that a provision on the lines proposed by the Special Rapporteur was necessary. The decision as to whether it was preferable to retain a separate article or to combine the content of article 41 with another could be left to the Drafting Committee.

76. He agreed with Mr. de Luna and Mr. Ago that it would be wise to make no mention of interpretation in article 41.

77. At the fifteenth session he had objected to the use of the word “exclusively” to qualify the word “governed” in paragraph 1 (a)⁶ because it might suggest that

⁶ *Yearbook of the International Law Commission, 1963, Vol. I, p. 244, para. 80.*

the provisions of a new treaty excluded the application of a rule of general international law.

78. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Tunkin and Mr. Cadieux. The provisions of article 41 were necessary because they dealt with a separate situation. Consequently, the Commission should hesitate to drop the article without careful reflection and without being sure that all the necessary provisions could be embodied in other articles. Articles 40 and 41 expressed different ideas which could not be grouped together in one and the same article.

79. Furthermore, as he had explained in his remarks concerning another article, he thought it would be dangerous to look into the preparatory work of multi-lateral treaties for the purpose of determining the intention of the parties to those treaties.

80. Mr. YASSEEN said that, if article 41 dealt only with the termination or the suspension of the operation of a treaty by a special tacit or express agreement, the article would not be necessary; its provisions could be incorporated in article 40, which dealt with the termination or suspension of a treaty by subsequent agreement.

81. In fact, however, as Mr. de Luna had said, article 41 dealt also with another problem, that of the objective incompatibility of two treaties. Such incompatibility deserved to form the subject of a separate article, largely because the point could not be covered in article 63, which dealt not with the termination of treaties but with the question which of two treaties prevailed. It would therefore be better to keep article 41 as a separate provision.

82. Mr. AGO said he had some doubt concerning the so-called objective reason for the termination of a treaty. In order to decide whether the provisions of a treaty were incompatible with those of another, both treaties had to be interpreted to enable the intention of the parties to be discussed; in other words, the criterion was still subjective.

83. The CHAIRMAN said it sometimes happened that, without any intention by the parties to terminate the earlier treaty, the actual object of the second treaty conflicted with that of the first. If a conflict of objects appeared in one and the same instrument, that instrument would be void; but if the conflict appeared between successive instruments, it was the later instrument which prevailed, just as in private law the testator's last will prevailed.

84. It was true that, where there were two treaties, both had always to be compared and interpreted for the purpose of determining whether there had been any change in the intention of the parties.

85. Sir Humphrey WALDOCK, Special Rapporteur, suggested that article 41 be referred to the Drafting Committee for general examination in the light of the discussion. His own position was much the same as that of Mr. Tunkin. A close study of articles 41 and 63 would reveal that article 63 did not come into play until it was decided that the treaty had not been terminated under article 41. He doubted whether it would be advisable to amalgamate articles 41 and 40.

86. He subscribed to the view that it would be better not to deal with the application of rules of interpretation, and that it would suffice to refer to the intention of the parties. The circumstances of each case would determine whether a reference to the preparatory work was admissible under articles 69 and 70.

87. He agreed with Mr. Tunkin that the word "exclusively" should be dropped.

88. Mr. ROSENNE said that he would have no objection to the article being referred to the Drafting Committee on the terms proposed by the Special Rapporteur.

89. The CHAIRMAN suggested that article 41 be accordingly referred to the Drafting Committee.

It was so agreed.⁷

The meeting rose at 1 p.m.

⁷ For resumption of discussion, see 841st meeting, paras. 91-100.

831st MEETING

Friday, 14 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey WaldoCK, Mr. Yasseen.

Other Business: Organization of Future Seminars on International Law

[Item 8 of the agenda]

1. The CHAIRMAN said that, during the first part of the Commission's seventeenth session, the European Office of the United Nations had, as an experiment, organized a seminar on international law. During the debates in the Sixth Committee of the General Assembly, several representatives had approved that action and had thanked the members of the Commission for their contribution. The General Assembly had expressed the hope that further seminars would be organized in connexion with the Commission's sessions and, if possible, would be attended by more participants, including a reasonable number of nationals of developing countries. He invited the representative of the Director-General of the United Nations Office at Geneva to make a statement.

2. Mr. RATON (Secretariat), speaking on behalf of the Director-General of the United Nations Office at Geneva, said that the first seminar had been organized on

an *ad hoc* basis by improvised means, without any special financial resources. It had nevertheless been a distinct success, thanks to the contribution of members of the Commission. In conformity with General Assembly resolution 2045(XX) of 8 December 1965, the United Nations Office at Geneva was ready to organize further seminars and to accept responsibility for their administration, while the Commission would be responsible for the academic side. In planning the next seminar, a number of questions would have to be considered, including the date, duration and programme of the seminar, the designation of the lecturers, choice and number of participants, and the question of fellowships.

3. In 1965, the seminar had begun in the second week of the Commission's session. The wish had been expressed that there should be some connexion between the date of the seminar and that of the courses of the *Académie de droit international* at The Hague. For practical reasons, however, the United Nations Office at Geneva would prefer the seminar to begin in the second or third week of the Commission's session, since early in the session the members of the Commission would have more time to devote to the seminar, and that was also the time when the Commission's own proceedings held most interest for participants in the seminar; later on in the session the discussions became more esoteric, particularly for those who had not followed them from the beginning.

4. The 1965 seminar had lasted two weeks. Most of the participants who had sent in comments in writing had expressed the wish that, while the number of lectures should not be increased, the duration of the seminar itself should be longer in order that participants might have more time to work in the library of the Palais des Nations. The idea was probably sound, and perhaps a seminar lasting two or three days longer might be arranged.

5. The programme of the seminar was naturally bound up with the Commission's own work; in 1966 it would again, therefore, deal with the law of treaties and with special missions, though lecturers would be free to deal with more general matters affecting the codification and development of international law, or other specific topics previously dealt with by the Commission.

6. He appealed to all the members of the Commission, in particular to those who had not done so at the first seminar, to agree to lecture to the next seminar. The participation of members of the Commission was obviously essential to the organization of seminars.

7. With regard to the choice of participants, there had been few developments since the summer of 1965. Out of the 18 candidates accepted for that seminar, 16 had actually attended. In order to secure a better geographical distribution of participants, provision would have to be made for a larger number, though 20 or 21 would be a maximum, since participants ought to be able to play an active part and to have personal contacts with the members of the Commission.

8. If participants were to be brought from Africa and Asia, funds would be needed to defray their travel and subsistence expenses. The United Nations Office at Geneva had no funds for that purpose and that was the

weakest point of the scheme. The Governments of Israel and Sweden had announced their intention of granting one fellowship each to enable a national of a developing country to attend the next seminar. He hoped that other governments would follow that example so that in that way three or four persons from developing countries would be able to attend.

9. Mr. PESSOU said it appeared to be difficult to arrange for nationals of developing countries to attend, but countries like the United Kingdom, the United States, the USSR, Austria, France, Israel and others granted large numbers of scholarships for legal and diplomatic studies for African students, and those countries were Members of the United Nations. Similar grants were made by the Carnegie Endowment, the Ford Foundation and others. Surely it should be possible to deal with the problem of coordination.

10. Mr. AMADO, after thanking the United Nations Office at Geneva for its enterprise, which was in keeping with the Commission's function, said that, without wishing to commit himself, he hoped to be able to give some lectures, for he felt in duty bound to help to show the kind of work the Commission was doing.

11. The CHAIRMAN, speaking as a member of the Commission, said that of the six Yugoslav candidates, two had been officially admitted to the first seminar, while three had attended as observers. On his return home he had talked with all five and gathered that they had taken a keen interest in the Commission's work and in the lectures organized for the seminar, and that they had been pleased with the direct contact they had been able to have with members of the Commission. They would have liked other members of the Commission, in addition to the lecturer, to attend the lectures, for in that way it would have been possible to enlarge the debate. Perhaps the Commission might make plans for several of its members to attend some lectures dealing with general topics.

12. So far as the number of participants was concerned, 30 should be the maximum. Since some were bound to drop out and others would be absent from time to time, that would mean that about 20 would participate regularly and actively.

13. He hoped that fellowships would be granted for future seminars, but he realized that the choice of candidates raised a delicate problem. In order to ensure that fellowships were awarded to the best candidates, they should perhaps be chosen by the universities of their countries of origin.

14. Mr. RATON (Secretariat) thanked Mr. Amado for his kind words and, replying to Mr. Pessou's remarks, said that more than a question of coordination was involved, since the countries which offered fellowships generally wished their names to be associated with the fellowships and did not want the awards to be made through an international body.

15. The Chairman's suggestion that the candidates to whom fellowships were awarded should be chosen by universities deserved consideration. Perhaps a small committee could be appointed to study the entire question of the selection of participants.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(*resumed from the previous meeting*)

ARTICLE 42 (Termination or suspension of the operation of a treaty as a consequence of its breach)

Article 42

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

1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) Any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) The other parties by common agreement either:

- (i) To apply to the defaulting State the suspension provided for in sub-paragraph (a) above; or
- (ii) To terminate the treaty or to suspend its operation in whole or in part.

3. For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(a) The unfounded repudiation of the treaty; or

(b) The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The right to invoke a material breach as a ground for terminating or suspending the operation of part only of a treaty, which is provided for in paragraphs 1 and 2 above, is subject to the conditions specified in article 46.

5. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach. (A/CN.4/L.107, p. 38)

16. The CHAIRMAN invited the Commission to consider article 42, for which the Special Rapporteur in his fifth report had proposed a new text which read:

1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) Any other party whose interests are affected by the breach to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) The other parties by unanimous agreement to suspend or terminate the operation of the treaty either

- (i) only in the relations between themselves and the defaulting State or
- (ii) as between all the parties.

2 (*bis*). Notwithstanding paragraph 2, if the provision to which the breach relates is of such a character that its violation by one party frustrates the object and purpose of the treaty generally as between all the parties, any party may suspend the operation of the treaty with respect to itself or withdraw from the treaty.

3. For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(a) The unfounded repudiation of the treaty; or

(b) The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach. (A/CN.4/183/Add.2, p. 26)

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the former paragraph 4, on separability, would be left aside for the time being, as had been done in the case of other articles. He would not, therefore, discuss the Netherlands Government comment on that paragraph.

18. It was particularly significant that no government had raised any difficulty over the rule laid down in paragraph 1 for bilateral treaties, or the crucial paragraph 3, which defined the term "material breach" for the purposes of the article.

19. Government comments (A/CN.4/183/Add.2), had centred on the provisions of paragraph 2. The Netherlands and United States Governments had suggested that the words "Any other party" should be qualified so as to specify that only a party whose rights or obligations were adversely affected by the breach could invoke it as a ground for suspending the operation of the treaty. In his own observations on that point he had pointed out that paragraph 2 (a) had been intended by the Commission to refer primarily to the rights of parties whose own interests were affected. But since in every multilateral treaty there was a certain general interest by all the parties in the observance of the treaty, he personally would hesitate to introduce any qualification. However, in order to enable the Commission to discuss the problem, he had inserted in his redraft of paragraph 2 (a), after the opening words "Any other party", the words "whose interests are affected by the breach".

20. The United States Government had proposed the introduction of a similar qualification in paragraph 2 (b), and in his own observations he had explained the reason why such an amendment seemed to him inadmissible, namely, that it would be contrary to the whole approach adopted by the Commission for paragraph 2 (b). It was significant that the Netherlands Government had not associated itself with that United States proposal.

21. The Government of Canada had suggested that, in the event of the breach of a treaty which required the parties to refrain from some action, an individual party other than the defaulting State should be entitled to suspend the operation of the treaty with regard to all the parties without having first to obtain the agreement of the others. He had some doubts as to the validity of that suggestion, which in any case appeared to go

much too far. He had therefore put forward tentatively an additional paragraph 2 (*bis*), which introduced the proposed exception in somewhat more restrictive terms and would enable the Commission to examine the question.

22. He had redrafted paragraph 2 (*b*) so as to enable the other parties to the treaty not only to suspend, but also to terminate, the treaty in the relations between themselves and the defaulting State. The 1963 text had only made provision for suspension *vis-à-vis* the defaulting State. Yet both the 1963 text and the new text enabled the other parties to suspend or terminate the operation of the treaty as between all the parties.

23. Mr. ROSENNE said that he fully agreed with the Special Rapporteur's statement in paragraph 1 of his observations (A/CN.4/183/Add.2, p. 21) in support of his refusal to make a distinction between contractual and law-making treaties. Any such distinction could only be arbitrary. In the arguments submitted to the International Court of Justice by Sir Hartley Shawcross, Sir Gerald Fitzmaurice, Professor Rousseau and himself in the case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, that Convention had been dissected and extremely divergent opinions expressed as to what parts were normative and what parts contractual. In his view, the expression of those opinions had not facilitated the task of the Court.

24. On the point raised by the United States and Netherlands Governments, he doubted the validity in law of the distinction which those governments attempted to draw, in the case of a multilateral treaty, between an interested party whose rights and obligations were affected by the breach, and other parties to the treaty. It was significant that paragraph (7) of the commentary to article 42 as adopted by the Commission in 1963 used the expression "party affected by the breach".¹

25. The concept of a "legal interest" was extremely ill-defined in international law and the International Court of Justice, in a number of recent major cases, had refused to attempt any general definition of what that term contained.

26. As a matter of principle, he felt strongly that all parties to a multilateral treaty had the same interest with regard to the observance of a treaty, so long as it was in force. It was on that basic philosophy that were based the provisions of Article 63 of the Statute of the International Court of Justice, which gave the right to any party to a multilateral treaty to intervene in a case which involved the construction of the treaty. That absolute right to intervene in a case stood in marked contrast with the qualified right of intervention for which provision was made in Article 62 of the Statute.

27. The Special Rapporteur had put forward a similar view when he had stated in paragraph 3 of his observations: "that the interests of one party may be seriously affected by the violation of the rights of another party; and also that every other party to a multilateral treaty — even a treaty which is essentially bilateral in its appli-

cation — has a certain interest in the observance of the provisions of the treaty by every other party" (A/CN.4/183/Add.2, p. 23). In paragraph 4, the Special Rapporteur mentioned "the right which every party to a multilateral treaty has to the observance of the treaty by every other party".

28. If the qualification requiring a legal interest were introduced into paragraph 2, and a case were submitted to the International Court of Justice under article 51 of the draft and Article 33 of the Charter, the result might well turn out to be in complete contradiction with the terms of Article 63 of the Statute of the Court.

29. A number of examples from the draft articles adopted by the Commission in 1965 could be given in support of that conception of the general interest of all the parties to a multilateral treaty in its observance. Thus article 20, paragraph 1, as adopted at the first part of the session,² required the notification to all the contracting States not only of a reservation but also of the acceptance of, and the objection to, a reservation. In the light of the element of bilateralism which the Commission had adopted on the subject of reservations, such notification of acceptances of and objections to reservations to all the parties was understandable only on the basis that they all had both a right and a legal interest in all that concerned the treaty.

30. Similarly, paragraph 2 of article 29 stated that any difference that might appear between a State and the depositary as to the performance of the latter's functions must be brought "to the attention of the other contracting States". The Commission had thereby recognized that all the contracting States had a legal interest in all that concerned the execution and the application of the treaty.

31. Another strong argument against the introduction of the concept of legal interest into paragraph 2 of article 42 was that it would also have to be introduced into such articles as article 44, on fundamental change of circumstances, a course which he for one would strongly oppose.

32. For those reasons, he shared the Special Rapporteur's hesitations and urged that the amendment proposed by the Netherlands and United States Governments should not be introduced into paragraph 2.

33. He accepted the Special Rapporteur's rewording of paragraph 2 for the purpose of covering both suspension and termination, but felt that the relevant passage should read "to terminate or suspend" rather than "to suspend or terminate".

34. With regard to the Canadian Government's suggestion, he felt that the new paragraph 2 (*bis*) introduced a highly subjective element. The problem raised by the Canadian Government should be covered by the provisions of article 44. In any case, it would not be appropriate to introduce into article 42 the concept of frustration of the object and purpose of the treaty, which had its origin in a ruling introduced by the International Court of Justice on the specific question of the admissibility of a reservation.

¹ Yearbook of the International Law Commission, 1963, Vol. II, p. 205.

² Official Records of the General Assembly, Twentieth Session, Supplement No. 9 (A/6009), p. 8.

35. On the whole, he preferred the 1963 text of article 42, with some necessary drafting changes.

36. Mr. VERDROSS said that, with regard to the drafting, paragraph 1 could be simplified and would be more correct if the words "invoke the breach as a ground for" were omitted, so that the passage then read "... entitles the other to terminate the treaty or suspend its operation ...", for the real reason might be quite different. The State had the right to terminate the treaty or to suspend its operation in whole or in part if the conditions laid down in the article were present. Paragraph 2 (a) should be amended in the same way.

37. With regard to the substance, he agreed with Mr. Rosenne that each of the parties to a multilateral treaty had an interest in the observance of the treaty. A breach of the treaty might affect the rights of one particular party more specifically, but it undoubtedly prejudiced the interests of all the parties. Consequently, the word "interests", in paragraph 2, should be replaced by the word "rights".

38. Paragraph 3 had the merit of being the first attempt to define what was meant by "a material breach" of a treaty, but the expression "unfounded repudiation" did not seem quite right. A breach could hardly be justified, and therefore the word "unfounded" should be omitted.

39. Mr. CASTRÉN said that article 42 dealt with important and delicate questions. Paragraph 2 in particular, which covered the case of a breach of a multilateral treaty, raised some very complex problems. The Special Rapporteur's revised version seemed to take into account the main comments by governments and was a great improvement on the earlier text.

40. The Special Rapporteur proposed that, in paragraph 2 (a), the words "whose interests are affected by the breach" should be added. The addition did not change the meaning of the paragraph to any great extent for, as the Special Rapporteur observed in his report, every party to the treaty had an interest in the observance of the treaty. For the reasons mentioned by other speakers, he (Mr. Castrén) would prefer that the 1963 text should not be amended in that respect.

41. Under paragraph 2 (b) of the redraft, the innocent parties had the right, if in unanimous agreement, to exclude the defaulting State from the treaty, and that was a possibility that should be provided for in the draft. From the drafting point of view he preferred the expression "*d'un commun accord*" ("by common agreement") to the expression "*de façon unanime*" (by unanimous agreement).

42. He was also prepared to accept the new paragraph 2 (*bis*). The provision it contained should satisfy the concern expressed by several governments and which he had himself voiced in 1963. As the Special Rapporteur had observed, the case dealt with by the new paragraph was comparatively rare, but it was conceivable and should therefore be covered in the draft. Unlike Mr. Rosenne, he did not think that the case was covered by the provisions of the article concerning fundamental change of circumstances.

43. With regard to the drafting, the new paragraph 2 (*bis*) raised a difficulty in that it defined the meaning of

"breach" for that particular case, whereas the general definition of breach did not come until the next paragraph. It was hardly likely that the difficulty could be removed by simply reversing the order of the two paragraphs.

44. Mr. Verdross's proposal for paragraph 1 was more than a drafting change; it would involve a change of substance which would prejudice the stability of treaties. That was why he (Mr. Castrén) was reluctant to agree to it.

45. Mr. BRIGGS said he was opposed to Mr. Verdross's suggestion to replace in paragraph 1 the words "to invoke the breach as a ground for terminating" by the words "to terminate". That suggestion was perhaps based to some extent on the inaccurate rendering of the word "ground" by "*motif*" in the French version. In 1963, he himself had abstained from voting on the corresponding provision because of the possible implication of a unilateral right to withdraw from the treaty. If the present wording of paragraph 1 were retained, and the understanding was that there existed not a unilateral right of withdrawal but a right to invoke the breach as a ground for terminating the treaty, he would be prepared to accept it.

46. Incidentally, there was a contradiction in paragraph (6) of the commentary that would have to be remedied. The second sentence correctly stated "that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated", but the fourth and fifth sentences incorrectly went on to state "... the action open to the other party ... is either the termination or the suspension ..." and referred to "the right" to take such action.³

47. He was not in favour of the amendment suggested by the United States Government to paragraph 2 (a) and shared the view of Mr. Rosenne that all the parties to a multilateral treaty had the same interest with regard to any violation of the treaty, although particular interest might vary with the type of treaty — consular, right of passage, disarmament, or law-making.

48. Similarly, in paragraph 2 (b), he was not in favour of introducing language which would limit the application of the paragraph to States whose rights or obligations were adversely affected. The original language, which extended the right to all the other parties, should be retained.

49. The wording of sub-paragraph (i) of the Special Rapporteur's rewording of paragraph 2 (b) was ambiguous, and he suggested as an alternative: "only in their relations with the defaulting State".

50. The provisions of paragraph 2 (*bis*) went much too far and he could not support their inclusion; they appeared to establish a right to suspend the operation of the treaty by unilateral action, not only with the defaulting State but with all parties. It should be noted that paragraph 2 (b) gave the right to suspend or terminate the operation of the treaty to "the other parties by unanimous agreement". Such a right was perfectly

³ *Yearbook of the International Law Commission, 1963, Vol. II, p. 206.*

admissible, since it involved unanimous action by all the parties concerned.

51. Paragraph 2 (*bis*) raised a further difficulty through its reference to "the object and purpose of the treaty". It was difficult to see the difference between that criterion and the one laid down in paragraph 3 (*b*).

52. The provisions of paragraph 3 were still imperfect. Did, for example, mere non-performance constitute a breach of a treaty?

53. He could accept article 42 without paragraph 2 (*bis*), and subject to drafting changes.

54. Mr. YASSEEN said that in his opinion article 42 was fully justified; therefore, since governments had not questioned its presence in the draft, he would confine his comments to the changes proposed by the Special Rapporteur.

55. If a multilateral treaty was violated by any one of the parties, that breach might be said to affect the interests of all the parties, for by being a party to a multilateral treaty a State had an interest in the observance of the treaty by all the parties. Apart from that general interest, however, a party might have a more specific interest in seeing that another party fulfilled towards it the obligations laid down in the treaty. Treaties which, in a multilateral form, regulated what were essentially bilateral relations — for example, the Vienna Convention on Consular Relations — demonstrated both the general interest of the parties in the observance of the treaty, and the particular interest of each party in seeing that its own rights under the treaty were respected. That idea was reflected in paragraph 2 as redrafted, but he hoped that it would be expressed even more clearly.

56. The Special Rapporteur's redraft made provision for the exclusion of the defaulting party, a sanction not contemplated in the earlier text. Possibly, however, the suspension of the operation of the treaty with respect to that party might suffice, in that it would compel that party to reflect and would encourage it to respect its obligations. It was not a desirable step to exclude a party, even if decided upon by common agreement among the parties. And incidentally, even if the expressions "*d'un commun accord*" and "*de façon unanime*" were synonymous, he preferred the former.

57. With regard to paragraph 2 (*bis*), while appreciating the idea underlying the comments of governments, he did not think that provision should be made for so far-reaching a step as withdrawal, even in the circumstances contemplated in the paragraph. It would be sufficient to authorize the State concerned to declare that it was suspending the operation of the treaty so far as it was concerned.

58. In general, he approved the revised draft of paragraph 42.

59. Mr. CADIEUX said that, on the whole, he approved of the revised draft proposed by the Special Rapporteur, which stated a principle that was generally accepted.

60. He agreed with Mr. Yasseen that paragraph 2 (*a*) should distinguish between the general interest of all the parties and the specific and direct interest which might arise out of an adjustment made, within the

general context of the treaty, between two or more parties but not all the parties to a treaty.

61. He supported paragraph 2 (*bis*). The Special Rapporteur had rightly noted that the Canadian Government's proposed amendment had been directed particularly towards possible conventions concerning disarmament. He had also been right to modify in narrower terms the more general formula proposed in 1963. While it was possible to argue, as Mr. Rosenne did, that the case might conceivably be covered by the *clausula rebus sic stantibus*, the specific change in circumstances visualized by the article was the breach of a treaty. There was nothing wrong in defining that more clearly in a provision devoted to the specific problem.

62. The case was not that covered by the terms of paragraph 2 (*b*), where collective action was indicated. In the type of treaty covered by paragraph 2 (*bis*), a treaty concerning the non-proliferation of nuclear weapons, for example, a State which noted that a neighbouring State had violated the treaty would certainly not be disposed to contemplate the annulment of the treaty only if all the other parties agreed.

63. Nor was the case one of material breach covered by paragraph 3, though there was a connexion between paragraph 2 (*bis*) and paragraph 3. It was really a drafting question rather than one of substance. If the Commission accepted the idea that some treaties might be so important for the parties that the violation of such treaties made it impossible for the States which had committed themselves to the treaty to remain parties thereto, it might amend paragraph 2 (*bis*) by adding a reference to the case covered by paragraph 3 or, conversely, redraft paragraph 3 so as to refer to the idea mentioned in paragraph 2 (*bis*).

64. Mr. de LUNA said he fully agreed with the Special Rapporteur's statement of the principle that the material breach of a bilateral or multilateral treaty by one of the parties constituted grounds for terminating or suspending the operation of the treaty. That principle followed not from the law of reprisals but from that of the reciprocity of the rights and duties of the contracting parties, which in turn followed from the overriding principle laid down in the Charter — the sovereign equality of States.

65. It was true that the Permanent Court of International Justice, when asked to decide in the Case concerning certain German Interests in Polish Upper Silesia whether the violation of the Geneva Convention⁴ by Germany authorized Poland to suspend the operation of that treaty, had refrained in its judgment from giving a decision on that point.⁵ However, although there was not much case-law, there were plenty of examples in treaty practice. Under article 35 of the Universal Postal Convention,⁶ which dealt with the transit of mail, if a country violated that multilateral convention by not allowing mail to pass through, the other member-countries were at liberty to suspend the operation of the convention and to discontinue their postal service with that country.

⁴ Convention between Germany and Poland relating to Upper Silesia, 15 May 1922, League of Nations document C.396.M.243.

⁵ P.C.I.J., 1925, Series A, No. 6.

⁶ United Nations Treaty Series, Vol. 364.

66. Mr. Verdross had rightly said that a breach was never justified. It was self-evident that the non-performance of a multilateral treaty in pursuance of economic sanctions under Article 41 of the Charter was not a breach and so did not constitute grounds for the suspension or termination of a treaty. The point might, however, be mentioned in the commentary.

67. With regard to Mr. Rosenne's remark that the *clausula rebus sic stantibus* should operate in cases where article 42 was not applicable, he said that the clause would certainly operate if, through no fault of its own, a State was not applying a treaty by reason of a change of circumstances. Was it right to speak of a material breach by one party if the breach was the consequence of a provocation by another party? In such a case, there was indeed a breach but it could no longer be described as a material breach.

68. With regard to the case of a breach of multilateral treaties envisaged by Sir Gerald Fitzmaurice in his second report,⁷ what he (Mr. de Luna) had in mind was not so much a treaty for the non-proliferation of nuclear weapons, the example already cited, as a multilateral treaty of humanitarian character. Where the treaty was violated, suspension should not be made too easy — and in that respect he agreed with Sir Gerald — for the treaty was necessary to and in the interests of the entire international community.

69. Paragraph 1 should not be simplified quite as radically as Mr. Verdross had suggested. It would be a psychological mistake to encourage States to think that they could denounce an instrument unilaterally.

70. He agreed with Mr. Yasseen's remarks concerning paragraph 2. The word "rights" would be better than the word "interests", for whereas all the parties to a multilateral treaty had an interest, only some had a subjective right deriving from the objective law laid down in the treaty. Besides, even where a multilateral treaty was intended to regulate bilateral relations, it manifestly satisfied a general interest, for if it were not so, there would have been neither an international conference nor a multilateral treaty. To take an example from his own experience, shortly before the opening of the Vienna Conference on Consular Relations, he had taken part in the negotiation of a consular convention with the United Kingdom, which had concluded some 14 treaties of the same nature because it had had a general interest in seeing that certain principles, which had been confirmed at Vienna, should be established by a treaty even before the Conference. That was understandable seeing that the United Kingdom, which had followed a policy of decolonization and had interests throughout the world, now employed more consuls than other countries.

71. He approved paragraph 2 (*bis*), which caused him no anxiety, for the case of a treaty whose object was frustrated by a breach was governed by pure logic. If, for example, there was a treaty regulating passage through a strait and as the result of a nuclear explosion the strait disappeared, then passage ceased to be possible and the object of the treaty was frustrated.

72. Mr. TUNKIN said that, as in 1963, he was concerned about the way in which article 42 would affect general multilateral treaties⁸ as distinct from treaties that were not of a general character. The distinction between contractual and law-making treaties was not relevant to the subject of the article. The practical effect of applying, say, paragraph 2 (*a*) might be to suspend the whole operation of a treaty when only one of its provisions had been violated. That would be the very undesirable result, for example, if a State refused to grant customs privileges to the diplomatic agents of another State, both having ratified the Vienna Convention on Diplomatic Relations. He therefore suggested that the Drafting Committee consider the possibility of stipulating that, in cases of breach of a general multilateral treaty, the suspension might apply only to the provision that had been violated. It seemed to him that some kind of limitation of that kind was definitely needed. Such a limitation would not exclude reprisals whenever authorized by international law.

73. He agreed with what had been said about all the parties having an interest in the observance of a general multilateral treaty; the Special Rapporteur's suggestion to include the words "whose interests are affected" seemed wide enough to cover any kind of interest, including indirect interests. If it were thought preferable to substitute the words "rights" for the words "interests", that should not give rise to any serious objection.

74. He had not had time to study paragraph 2 (*bis*) of the Special Rapporteur's new text with sufficient care, but at first sight it seemed to contain a useful provision concerning contingencies which occurred in real life and to the existence of which the attention of States ought to be drawn.

75. Mr. VERDROSS, referring to comments by members of the Commission on the words "invoke the breach as a ground for terminating . . .", said that in the past the Commission had always clearly distinguished between rules of substance and rules of procedure. If it intended to say that, in the case covered by the provision in question, a certain diplomatic procedure had to precede the declaration terminating the treaty or suspending its operation, then it was mixing up the two types of rules. If such was its intention, it should say so expressly.

76. In reply to Mr. Yasseen, he said that there might be legitimate reasons for repudiating a treaty, but if that was the idea to be conveyed it should be stated in terms by means of some such wording as: "The repudiation of the treaty if not authorized by another provision of this convention".

77. The CHAIRMAN, speaking as a member of the Commission, said that the only point which caused him concern was that of multilateral treaties of general interest, a point which had been stressed by Mr. Tunkin. The question whether, in the event of a material breach, the parties should have the right to withdraw from the treaty altogether had arisen when the Vienna Conference had considered the Commission's draft on diplomatic relations. In the end, the Conference had not recognized

⁷ *Yearbook of the International Law Commission, 1957, Vol. II, pp. 30 and 31, art. 18, para. 3 (a), and art. 19.*

⁸ *Yearbook of the International Law Commission, 1963, Vol. I, p. 245.*

the right of the parties to regard the mistaken application of the Convention as a general violation entitling them to escape from the obligations of the entire convention. There was, of course, a shade of difference between the two cases, but the fundamental idea was the same: to disturb as little as possible the international legal order in cases where it was undoubtedly in the general interest to uphold the established order.

78. If it followed the solution proposed, the Commission would be endorsing André Weiss's theory of "circles" in the application of one and the same convention. Weiss had said that, in time of war, the operation of multilateral treaties and of so-called universal conventions was suspended between the belligerents: there was one circle comprising neutrals, another circle comprising neutrals and belligerents on both sides, and a third circle comprising the belligerents on one side or the other and neutrals. The question had had a practical interest for the purpose of dealing with problems of infringements of trade-marks, patents and artistic and literary rights; it had been introduced into the Treaty of Versailles and other related treaties.

79. In view of the increase in the number of multilateral treaties of general interest, Mr. Tunkin's statement was very pertinent. The Commission should endeavour to work out a solution which would have the effect of mitigating as far as possible the consequences even of a material breach. If the breach was purely bilateral, it was easier to determine at what point reprisals stopped, but the reactions between the two States might prejudice the stability of inter-State relations throughout the world. Consequently, in drafting a convention on the law of treaties which it regarded as a source of general rules, the Commission should endeavour to forestall any possible malpractice and should not admit anything that would allow of a broader interpretation than it intended.

80. Sir Humphrey WALDOCK, Special Rapporteur, said that he would prefer to sum up the discussion on article 42 at the next meeting, as a number of interesting points had been raised and it would be useful to have further time for reflection.

The meeting rose at 1 p.m.

832nd MEETING

Monday, 17 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 42 (Termination or suspension of the operation of a treaty as a consequence of its breach)
(continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 42.

2. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that on paragraph 1, which dealt with the comparatively simple problem of the material breach of a bilateral treaty, the only point raised had been the suggestion by Mr. Verdross that the words "to invoke the breach as a ground for terminating" be replaced by the words "to terminate". Like many members of the Commission, he felt it preferable to retain the wording which had been deliberately chosen in 1963.

3. The important provisions of paragraph 3, which defined the term "material breach", had not attracted much comment. Mr. Verdross had suggested the deletion of the word "unfounded" before "repudiation of the treaty", but the general feeling had been that a qualification of that kind was necessary because, under the draft articles, there could well be some cases of perfectly legitimate repudiation. The Drafting Committee might consider replacing the adjective "unfounded" by some such formula as "not justified by any of the provisions of the present articles".

4. It was paragraph 2 that had attracted the bulk of government comments. The Netherlands and United States Governments had suggested that the words "Any other party" be qualified so as to specify that only a party whose rights or obligations were adversely affected by the breach could invoke it as a ground for suspending the operation of the treaty. In order to give the Commission an opportunity of discussing the problem raised by those two governments, he had introduced into his redraft of paragraph 2 (a) the more general wording "whose interests are affected by the breach", after the words "Any other party". The discussion had shown that many members of the Commission felt that all parties to a multilateral treaty had a general interest in its observance by every other party. At the same time, others considered that parties might have different degrees of interest in a breach committed by a party.

5. On that same paragraph, Mr. Tunkin had raised an important question of substance when he had suggested that, for certain general multilateral treaties, especially such codifying treaties as the two Vienna Conventions of 1961 and 1963, the suspension should relate only to that part of the treaty which had been the subject of the material breach. He hesitated to support that suggestion, although he appreciated the reason which had inspired it. When a State committed a material breach of one of the clauses of a general multilateral treaty, it might be totally unconcerned at the possible suspension

¹ See 831st meeting, after para. 15, and para. 16.

of that particular clause by the other parties. In fact, the only effective remedy that might in many cases be open to the other parties was to suspend, as a sort of reprisal or sanction, the operation of other clauses of the treaty. The defaulting State might have clearly shown that it attached little importance to the clause which it had broken, but the threat to suspend the other clauses might induce it to reconsider its attitude. Article 41 of the Vienna Convention on Diplomatic Relations, for example, laid down the rule that it was the duty of all persons enjoying diplomatic privileges and immunities to respect the laws and regulations of the receiving State. In the event of a breach of that rule, the injured State would have no desire that its diplomats should break the laws of the other State by way of reprisal: for it to suspend the operation of article 41 in its relations with the defaulting State would be no reaction at all. The only effective action would be to suspend other clauses of the Convention to which the defaulting State might attach more importance.

6. Another point had been raised in connexion with paragraph 2, but it affected more generally all the provisions of article 42: it was the question whether provocation should be taken into account. Personally he doubted whether, if there were any provocation on the part of another party, a material breach could properly be said to exist at all. The Drafting Committee should perhaps be asked to consider, in general terms, the question of the complainant State's having by its conduct contributed to bringing about a cause for termination. The problem had already been envisaged by the Commission in article 34, on error, paragraph 2 of which stated that the rule laid down in paragraph 1 of that article did not apply where the complainant State had, by its own conduct, contributed to the error. The Drafting Committee should perhaps examine whether such articles as the present article 42, on supervening impossibility, and article 44, on fundamental change of circumstances, should not also contain a clause to deal with the case where the conduct of the complainant State might have been partly the cause of the ground of termination.

7. In paragraph 2 (*b*), his redraft was intended to cover a gap in the 1963 text. It had not seemed to him logical, in the sphere of unanimous agreement, to limit the right of action to suspension. In most cases the other parties would probably only wish to suspend the treaty in the relations between themselves and the defaulting State, but in the case of a persistent treaty-breaker they might wish to go further and expel the defaulting State from the treaty. He had therefore introduced the possibility of termination as well as suspension. Mr. Rosenne had suggested that the words "suspension or termination" should be reversed. That would undoubtedly be the normal order, but he had reversed it deliberately because, in the case in point, it was hoped that the reaction would be suspension: it was therefore desirable to mention termination as the last resort.

8. On the important point of substance raised by paragraph 2 (*bis*), opinion in the Commission had been divided; there appeared to be some support for including a provision to cover such treaties as disarmament treaties, in which the rights and obligations were so

intimately connected that if one State violated an obligation, the breach would immediately affect all the others. He suggested that the proposed paragraph be referred to the Drafting Committee for reconsideration in the light of the discussion, in particular the suggestion by Mr. Yasseen that it was sufficient to allow an injured party to suspend the operation of the treaty, and that it was unnecessary to provide for a right of termination.

9. Mr. TUNKIN said that at the previous meeting he had raised the question of the application of article 42 to a new type of treaty, namely, general multilateral treaties such as the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations, none of which contained any provision for withdrawal, though they did contain provisions for revision. Treaties of that type were intended to become universal, and it was for that reason that no withdrawal clause had been included in them, although multilateral treaties as a rule contained such a clause. If the provisions of article 42 were made applicable to such treaties, the very purpose not only of the conferences of plenipotentiaries which had adopted them, but also of the Commission itself which had drafted them, would be hampered.

10. Mr. ROSENNE said that he was in general agreement with the Special Rapporteur's conclusions, though his remarks on paragraph 2 (*b*) had not fully covered the point which he (Mr. Rosenne) had raised at the previous meeting. In 1963, the Commission had been careful to use the wording "to suspend the operation of a treaty" and equally careful to avoid any reference to "terminating" the operation of a treaty. He suggested that the Drafting Committee be asked to reword the passage in question accordingly.

11. With regard to general multilateral treaties, as he had indicated in 1963,² a convincing case had been made by Mr. Tunkin for special treatment in the draft articles. The point had, however, since been partly covered by the provisions of article 62, which the Commission had adopted in 1964. The principle therein stated to be applicable to articles 58 to 60 corresponded exactly to Mr. Tunkin's idea; article 62 should perhaps be reworded in broader terms so that its operation was not confined to those three articles.

12. With regard to the order of the paragraphs, it might be more elegant to place paragraph 3 at the commencement of the article, since it defined the term "material breach".

13. Sir Humphrey WALDOCK, Special Rapporteur, said that the point now raised again by Mr. Tunkin had been very largely taken into account by the Commission in 1963. It was precisely for that reason that paragraph 2 (*a*) limited the right of suspension to the relations between the party invoking the breach and the defaulting State, and that the rule in paragraph 2 (*b*) was more restrictive than that generally understood by lawyers: it stated that termination and denunciation would require the common agreement of all the parties.

14. With regard to paragraph 2 (*bis*), it was intended to meet the very special case of certain treaties for which

² *Yearbook of the International Law Commission, 1963, Vol. I, p. 126, para. 59.*

paragraph 2 (b) would not provide a proper safeguard. Because of the need to obtain the consent of all the other parties, an injured State might, if only one State objected, find itself defenceless in face of the breach committed by the defaulting State, since it could not legally suspend the operation of the treaty in relation to itself.

15. Mr. JIMÉNEZ de ARÉCHAGA said he fully supported the changes proposed by the Special Rapporteur.

16. With regard to paragraph 2 (*bis*), its provisions were a welcome improvement to the text and would serve to deal with certain exceptional cases.

17. The dangers to which Mr. Tunkin had drawn attention were minimized by the fact that the provisions of paragraph 2 (b) required the unanimous agreement of all the parties for the termination of the treaty. It was better to lay down a distinction between the treaties covered by paragraph 2 (*bis*) and other multilateral treaties rather than attempt the difficult definition of "general" multilateral treaties.

18. Mr. AGO said that the provision in paragraph 2 (b) of the Special Rapporteur's redraft of article 42 differed from that in article 40 in that, under the former, the agreement of the parties not guilty of the breach was sufficient for the purpose of the suspension of the operation of the treaty or its termination. In other words, the State responsible for the breach could not, as was indeed logical, veto the suspension or termination.

19. In the case covered by paragraph 2 (*bis*), the unanimous agreement of the parties not guilty of the breach was not required, because in such a situation any party must be able to suspend the operation of the treaty in relation to itself or to withdraw from the treaty.

20. The reason for the difference of opinion between Mr. Tunkin and the Special Rapporteur was probably that article 42 dealt simultaneously with two classes of general multilateral treaties which were in fact very different from each other. There were, first, treaties like disarmament treaties or nuclear test-ban treaties, of which the Special Rapporteur had spoken; in the event of a material breach of such a treaty by any of the parties, the other parties should be able to relieve themselves of their obligations or at least to suspend them. Secondly, there were codifying treaties, which constituted the law of the international community; even if one of the parties to a treaty of that class broke the treaty, the law still remained the law, as Mr. Tunkin had said. Perhaps the problem mentioned by Mr. Tunkin lay outside the scope of article 42. The treaties in question formed such a special class of treaty, and it was so important that they should not be the subject of controversy, that the Commission ought probably to deal with them in separate provisions in its draft.

21. Apart from the proviso in paragraph 4 concerning clauses in the treaty that dealt with cases of breach, the Commission should add, either in the article itself or in the commentary, a proviso concerning the possible consequences of the breach of the treaty as they affected the defaulting State's responsibility. As drafted, the article might give the impression that, in the event of

a material breach of a treaty by one of the parties, the only remedy open to the other parties would be to suspend the operation of the treaty or to terminate it.

22. The CHAIRMAN, speaking as a member of the Commission, said that certain multilateral treaties—the so-called *traités-lois*—had the force of international custom. Article 42 was perhaps too liberal to be applicable to treaties of that kind and it did not take into account the evolution of international law as embodied in the judgments of the Nuremberg International Military Tribunal. The humanitarian conventions, for example, formed part of the legal conscience of nations; it was inconceivable that a State should be free to suspend the application of such conventions just because another State had ceased to apply them. A very serious question was involved, and the substance should prevail over the form.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that the humanitarian conventions referred to provided another example of the difficulties of the problem. Clearly, it would not serve any good purpose for the injured State to suspend the operation of a particular clause of a humanitarian convention with respect to nationals of the defaulting State; the effects of the illegality would then be visited on innocent persons. Probably, in those cases, the only effective remedy would lie in other forms of reprisal or counter-action outside the treaty itself. Even so, it might be going too far to forbid the injured State to suspend the operation of the treaty *vis-à-vis* the defaulting State.

24. Any attempt to introduce generally into article 42 the idea suggested by Mr. Tunkin might even endanger the stability of treaties. One of the great weaknesses of international law was the helplessness of an individual injured State in the face of the breach of a treaty, and article 42 was intended to give such a State one possibility of effective reaction. It was also necessary to remember the safeguard in article 53, paragraph 4.

25. He suggested that article 42 be referred to the Drafting Committee for consideration in the light of the discussion.

26. Mr. de LUNA said he wished to explain that, at the previous meeting, he had mentioned multilateral humanitarian conventions mainly in order to satisfy his own conscience and not in order to express disagreement with the Special Rapporteur. Nor, for that matter, had he suggested any change in the proposed redraft. If, as paragraph 2 (*bis*) said, the violation "frustrates the object and purpose of the treaty generally", the parties could hardly be bound to apply the treaty. The treaty as such disappeared, but customary international law, whence the treaty derived, continued to exist without the treaty, as indeed it had existed before the treaty. Consequently he supported the text proposed by the Special Rapporteur, and did not think that the article duplicated article 40. It was quite evident that, when the Commission stopped speculating and looked at concrete problems, it had little difficulty in reaching an agreed solution.

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

refer article 42 to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*³

ARTICLE 43 (Supervening impossibility of performance)

Article 43

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the total and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty.
 2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty.
 3. Under the conditions specified in article 46, if the impossibility relates to particular clauses of the treaty, it may be invoked as a ground for terminating or suspending the operation of those clauses only. (A/CN.4/L.107, p. 39)
28. The CHAIRMAN invited the Commission to consider article 43, for which the Special Rapporteur in his fifth report (A/CN.4/183/Add.3, p. 6) had proposed a new text which read :
1. If the total disappearance or destruction of the subject-matter of the rights and obligations contained in a treaty renders its performance temporarily impossible, such impossibility of performance may be invoked as a ground for suspending the operation of the treaty.
 2. If it is clear that such impossibility of performance will be permanent, it may be invoked as a ground for terminating or withdrawing from the treaty.
 3. Paragraphs 1 and 2 shall not apply when the impossibility of performance is the result of a breach of the treaty by the party invoking such impossibility.
 4. If part of the treaty has already been executed, a party which has received benefits under the executed provisions may be required to give equitable compensation to the other party or parties in respect of such benefits.
29. Sir Humphrey WALDOCK, Special Rapporteur, said that his redraft of article 43 omitted the former paragraph 3, which dealt with the question of separability. That question would be left aside, as had been done in the case of other articles, and the Commission would deal with it when it came to consider article 46.
30. The order of the former paragraphs 1 and 2 had been reversed. The 1963 text dealt first with the case of termination and then, in paragraph 2, with the suspension of the operation of the treaty as a qualification of paragraph 1. He was not very satisfied with that presentation, because it seemed preferable to contemplate that the effect of supervening impossibility should normally be only a temporary suspension of the operation of the treaty. His new paragraph 1 stated that, where the impossibility of performance was only temporary, it could be invoked as a ground for suspending the operation of the treaty; paragraph 2 went on to state that, where the impossibility of performance became permanent, it could be invoked as a ground for termination.
31. His new paragraph 3 stated that the rules in paragraphs 1 and 2 would not apply when the impossibility of performance was "the result of a breach of the treaty by the party invoking such impossibility". That language was based on a suggestion by the Government of Israel, but it would also meet the point raised by the Pakistan delegation that the impossibility of performance might result from circumstances deliberately created by the complainant State. The Commission would now have an opportunity of discussing the points raised by those two governments.
32. He had introduced the new paragraph 4 in order to provide a basis for the discussion of the difficult problem of a treaty which had already been executed in part and where a party to the treaty had received benefits under the executed provisions. He had not fully made up his mind on the question of substance involved, but felt that the Commission should deal with a problem to which attention had been drawn by certain governments.
33. Mr. YASSEEN said that, so far as the form was concerned, he could support the redraft proposed by the Special Rapporteur. It was better to mention temporary impossibility of performance, which led to a suspension of the operation of the treaty, before permanent impossibility of performance, which could be invoked as a ground for terminating the treaty. The two rules were of equal force, and the former was not an exception to the latter.
34. So far as substance was concerned, however, the 1963 text was preferable. Neither the article itself nor the draft as a whole seemed to be the right context for the two new paragraphs proposed by the Special Rapporteur.
35. The qualifying provision in paragraph 3 was hardly justified. Since the article dealt with impossibility of performance, there was no reason why any party should not have the right to invoke such impossibility, in other words, to secure recognition of a *de facto* situation. What good could a treaty do that was maintained in force by virtue of that paragraph?
36. It seemed to him that the governments whose comments had given rise to the Special Rapporteur's proposed paragraph 3 had been concerned mainly with the effect of the termination of a treaty owing to impossibility of performance; in other words, they had touched on the question of State responsibility. Yet the other articles dealing with the termination of treaties said nothing about State responsibility and did not specify the extent to which the responsibility of the parties was involved. The question should not be singled out for special mention in the article concerning the termination of a treaty owing to the impossibility of its performance. The entire problem of the responsibility of States in the event of the termination of a treaty should be left in abeyance.
37. Paragraph 4 dealt with the case where part of the treaty had already been executed at the time of its termination or of the suspension of its operation. But that problem arose also in connexion with the termination of a treaty for any other reason—error, fraud, or other—or even on grounds of absolute nullity in virtue of the principle of unjust enrichment. The question of the

³ For resumption of discussion, see 842nd meeting, paras. 2-31.

compensation due in respect of benefits derived from the partial execution of a treaty should be dealt with in a separate article relating to the consequences of the termination of treaties for various reasons.

38. Mr. CASTRÉN said that, apart from the question of separability, which was held over, the Special Rapporteur's redraft did not change the substance of the 1963 text of article 43. So far as form was concerned, the reversal of the order of the first two paragraphs was an improvement.

39. He could accept paragraph 1 of the redraft, though it might be simplified by replacing the words "such impossibility of performance" by the words "this fact".

40. In paragraph 2, the Special Rapporteur had been right to add the words "or withdrawing from", for it was conceivable that the performance of a multilateral treaty might become impossible for one or a few of the parties, whereas the other parties could continue to apply the treaty *inter se*.

41. Paragraph 3 also was acceptable, for it was consistent with a general rule of law applied among the members of the international community. An analogous principle was stated in article 52, paragraph 2, of the draft. Like the Special Rapporteur, he preferred the formula suggested by the Government of Israel to that suggested by the Government of Pakistan, which was rather too elaborate. Both were based on the same idea, namely, that the treaty should be carried out in good faith. The provision was probably of moral rather than practical importance, since in the event of the supervening impossibility of performance there was no remedy, and generally it was the aggrieved party which brought a claim for responsibility on account of the violation of the treaty. The proposed provision would, however, act as a bar to the plea of impossibility of performance.

42. He doubted whether paragraph 4 was desirable. Although a comparable rule existed in municipal law, it was arguable whether one should also be adopted in international law. An attempt in that direction had been made by introducing the idea of unjust enrichment in the field of State succession, but the principle was not accepted without qualification by all authors and was even less generally admitted in the practice of States.

43. Both from the point of view of substance and from that of procedure the problem was very complex, for it was very difficult to evaluate the advantages derived from the partial execution of a treaty and to determine the nature and the amount of the compensation. In the absence of an international jurisdiction, it would probably be wiser and more practical to leave the parties concerned to settle such questions themselves by negotiation. Besides, would the proposed provision be applicable also in the event of temporary impossibility of performance within the meaning of paragraph 1? Another point was that the innocent party could claim what was its due under paragraph 3, but there the Commission would be touching on problems of international responsibility which it should not attempt to settle in its draft. He proposed that paragraph 4 be omitted, though he would not object if the question was mentioned in the commentary.

44. Mr. AGO said that the drafting of article 43 was particularly difficult. He did not like the word "subject-matter" in the English text or the word "*objet*" in the French, but was unable for the moment to propose anything better. In general the rights and obligations dealt with in the Commission's texts were not rights and obligations *in rem* but contractual. The subject-matter of such rights and obligations was not a *res*, but a service of another kind, even if bound up with the use of something. Where a river ran through a frontier region, it was quite usual for the two neighbouring States to enter into an agreement under which State A acknowledged the right of State B to build a dam and a power station on condition that State B supplied to State A a specified share of the power generated by the station. What, in such a case, would be the "subject-matter" of the right? It was surely neither the dam nor the power station but the service, in other words, the supply of a certain quantity of power. If the dam was destroyed by an avalanche, what was destroyed was not the subject-matter of the treaty. Some other formula should therefore be used; perhaps the provision should speak of a disastrous event rendering the performance of the treaty impossible.

45. In other respects, there was no great difference between the 1963 text and that proposed by the Special Rapporteur. In the new text the emphasis was placed on a different aspect, but the substance remained unchanged and on the whole the new approach seemed preferable.

46. He hoped, however, that both the Drafting Committee and the Commission would think carefully before adopting paragraph 4; it might appear to be only secondary, but if any mistake were made in its drafting, the consequences could be very serious.

47. Mr. ROSENNE said that paragraphs 1, 2 and 3 of the Special Rapporteur's new draft were acceptable, subject to review by the Drafting Committee. Mr. Ago had rightly pointed out that the actual wording would need careful consideration.

48. He had tried without success to formulate an alternative text for paragraph 4, which as it stood was vague. For example, it was not clear what was meant by the words "if part of the treaty has already been executed" or by the words "may be required". He was also uncertain of the purport of the words "equitable compensation", though some guidance on that point could be found in Mr. Jiménez de Aréchaga's paper concerning State responsibility,⁴ where reference was made to the concept of unjust enrichment. He strongly doubted whether a provision on the matter rightly belonged in article 43. If it were included at all, it should be either considered in conjunction with article 53 or dealt with in the introduction to the commentary, where mention would be made of certain general topics not covered in the draft.

49. Mr. de LUNA said he could support the revised order of the paragraphs. The Special Rapporteur had quite rightly distinguished between suspension, in para-

⁴ *Yearbook of the International Law Commission, 1963, Vol. II, p. 243.*

graph 1, and termination, in paragraph 2. As Mr. Ago had said, the Commission should choose the terminology with great care. The article was concerned not with rights *in rem* but with subjective rights derived from an international obligation.

50. With regard to paragraph 3, Mr. Ago's suggestion that there should be an express reference to a disastrous event would not cover all possible situations. An event might occur which would render the execution of the treaty impossible, but would not be a disaster although it might be an event of *force majeure*. For example, if the treaty was an extradition treaty under which State A committed itself to deliver to State B a person or a ship, the person might die or the ship might be burnt, but there would not be a disaster. Mr. Yasseen had been right in saying that the paragraph was unnecessary. If the person to be extradited to State B died in consequence of some culpable negligence on the part of State A, then, if State A had a certain duty to protect the personal safety of aliens in its territory, the fact that there had been culpable negligence on its part would not bring the deceased back to life and the State in question, being unable to deliver the person to the other State, was in fact unable to carry out the terms of the extradition treaty.

51. With regard to paragraph 4, he agreed with Mr. Yasseen. The Special Rapporteur had done right to raise the question, even though article 43 was not the right context. The problem of unjust enrichment owing to the non-application, in various situations, of certain provisions of the treaty should be considered by the Commission and either admitted or dismissed. His personal inclination would be to admit it subject to the necessary safeguards, though he fully realized that an article covering the case would be difficult to formulate. Unlike Mr. Rosenne, he did not think that the responsibility of the State would be engaged. The underlying idea was that of unjust enrichment: a State had benefited from a performance, which should be required by a counter-performance by the other party, but for reasons of *force majeure* the counter-performance had become impossible. In such circumstances the principle of unjust enrichment had to enter into operation in one way or another, and the Commission should consider all the cases in which paragraph 4 might apply. It could perhaps deal with them in a separate article covering the possible consequences of the continued application of a treaty in various situations, with or without the responsibility of the State.

52. Mr. JIMÉNEZ de ARÉCHAGA said that the 1963 draft of paragraphs 1 and 2 was preferable to the new one suggested by the Special Rapporteur because it started by referring to impossibility of performance as a ground for the termination of a treaty. Also it was better in that case to deal first with the termination of a treaty rather than with its suspension, because impossibility of performance would normally lead to the extinction of the treaty, and only in exceptional circumstances to its suspension.

53. Paragraph 3 could be dropped, because its content could be inferred from general rules of law and its omission would not in any way affect the rights of States.

54. If the content of the new paragraph 4 suggested by the Special Rapporteur were retained, it ought to form the subject of a separate article or perhaps be incorporated in article 53, paragraph 4. The new paragraph 4 had been drafted by the Special Rapporteur in wider terms than those suggested by the United States and Pakistan Governments because it granted also to a party which was not invoking impossibility of performance the right to claim equitable compensation in the circumstances envisaged in that paragraph.

55. Mr. TUNKIN said that the wording of the new paragraphs 1 and 2 did not differ in substance from that of the 1963 text, but the latter was clearer and was preferable because it gave more prominence to the central idea, which was the impossibility of performance. He also preferred the original order of the first two paragraphs, because termination was the logical result of impossibility of performance and should be mentioned first.

56. With regard to paragraph 3, there could be cases of impossibility of performance without any breach having taken place. Perhaps paragraph 3 could be omitted altogether and the point covered in some kind of general provision.

57. Paragraph 4 was concerned with a wider problem than that covered by article 43 and had some relevance to article 34, as for example when an error in a treaty was discovered after some of its provisions had been executed. The Commission would need to give careful thought to the way in which that problem should be dealt with, if at all.

58. Mr. AGO said he wished to consider first the connexion between paragraphs 1 and 2 of the redraft and paragraphs 1 and 2 of the 1963 text. With regard to the question whether termination or suspension should be mentioned first, he agreed with the Special Rapporteur that suspension should be the rule in the case under consideration. By a treaty of 1945, Italy had ceded to France a piece of territory on which lay the Lake of Mont Cenis, on condition that France supplied to Italy a certain proportion of the power to be generated by the power station on the site. If the power station were destroyed by some event it would be too easy to say that the treaty was terminated. The first thing France should do would be to rebuild the power station; and the treaty would be suspended pending the reconstruction. Consequently, only where it was physically impossible to make good the consequences of an event could *force majeure* be pleaded for the purpose of terminating a treaty. In all other cases the treaty was only suspended.

59. With regard to paragraph 3, he thought Mr. Tunkin's remarks were justified. Two situations were conceivable. The first was where the conduct of the State owing the obligation was the violation not of a clause of the treaty, but of a different rule; the second was where its conduct was incompatible with respect for the treaty itself. If, for example, under the treaty he had mentioned, the State owning the power station had a duty to inspect and maintain a dam, but owing to its negligence the dam burst, the problem would arise of knowing whether the guilty State could invoke an event of that kind as grounds for claiming that the

treaty, and consequently its obligation, was terminated or suspended. Before deciding to omit the paragraph, the Commission should reflect carefully and remember that the case where the event occurred owing to the fault of a State was different from the case of *force majeure*.

60. The provision which was most difficult to draft was paragraph 4; as it stood the paragraph was not acceptable to him. The situation contemplated in the paragraph could only be that of a treaty where there was truly *do ut des* but where only one of the parties managed to derive the intended benefit from the treaty. But there were other situations where the application of paragraph 4 would lead to absurd results. To continue with the example of the neighbouring State which for some time received the power to which it was entitled, it would be inconceivable if, after the event interrupting the execution of the treaty, the State which no longer derived any benefit under the treaty should still have to pay compensation to the other for the benefit which it had received previously.

61. In any case, it was doubtful whether paragraph 4 was in its right place in the draft. He would take the case of a treaty which provided benefits for both parties but which at a particular moment ceased to be capable of execution and consequently was suspended or terminated. In that situation the problem of compensation, because one party had and the other had not derived benefits from the treaty, might be governed either by a general rule of international law—other than a rule of the law of treaties—or by a rule of equity which did not form part of the existing law. Perhaps the Commission should drop the paragraph, since it dealt with a question so remote from the subject being considered.

62. Mr. BRIGGS said he approved of the change in the order of paragraphs 1 and 2 suggested by the Special Rapporteur because it was more logical to deal with suspension before termination; perhaps, however, they could be drafted in such a way as to refer first to a party being able to invoke an impossibility of performance, instead of employing the rather difficult language with which the Special Rapporteur's new text opened and for which he had not been able to find a satisfactory alternative.

63. He had no strong views about paragraph 3, but wondered whether it was strictly necessary. It did not deal with the question of whether a State could invoke an impossibility of performance created by itself as a defence for non-performance, but stipulated that a State which had caused the impossibility through breach could not invoke it as grounds for suspension or termination.

64. While he understood the reasons for the suggestion put forward by the United States Government, he considered that paragraph 4 should be transferred to a separate article, or perhaps the point could be dealt with in the commentary.

65. Mr. ROSENNE said that some of the criticism levelled against paragraph 3 was perhaps well-founded where bilateral treaties were concerned, but not multi-lateral treaties. Since the rule was that normally multi-lateral treaties would continue in force, the idea contained in paragraph 3 should find expression in the draft.

66. Mr. YASSEEN said he wished to explain his earlier remarks on paragraph 3. Impossibility of performance could be invoked by any party, for in invoking it the party was simply asking for the recognition of a *de facto* situation, and a treaty which was incapable of performance should not be maintained in being. According to the principle recognized by the Permanent Court of International Justice, a party could not benefit from its own wrong. But if a party invoked the impossibility of performance, even if that was the consequence of its own wrong, it would only be benefiting from that wrong if it disclaimed responsibility. But, there was surely a difference between a declaration terminating a treaty and a declaration disclaiming responsibility for a wrong, since a declaration terminating a treaty did not prejudice the question of responsibility. Subject to that remark, he considered that paragraph 3 was unnecessary.

The meeting rose at 6 p.m.

833rd MEETING

Tuesday, 18 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cast-rén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 43 (Supervening impossibility of performance)
(continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 43.

2. Mr. TUNKIN said that, in the discussion on the implications of the new paragraph 3, there had been some confusion of the problem of suspension or termination with that of State responsibility. Paragraph 3 concerned only the question of suspension, termination, or withdrawal. It dealt with the case where a State, by its own actions, had created a situation that made it impossible to fulfil the obligations placed upon it by the treaty, and laid down the rule that such State could not invoke that impossibility as a ground for withdrawing from the treaty but continued to be bound by its obligations under the treaty.

¹ See 832nd meeting, after para. 27, and para. 28.

3. The question of the underlying reasons for non-fulfilment of a State's obligations and the responsibility which resulted from that non-fulfilment was a separate one and belonged to the topic of State responsibility. And for State responsibility to arise from a treaty, there must be a valid treaty in operation. In the circumstances contemplated in paragraphs 1 and 2, the treaty was suspended or terminated because of the impossibility of performance; there was therefore no treaty in operation. The purpose of paragraph 3 was therefore to make it clear that a State which was in a position of factual impossibility of performance as a result of its own actions continued to be bound by the treaty despite that impossibility.

4. Mr. de LUNA said that the legal principle on which his statement at the previous meeting had been based could be more simply expressed as the common-sense rule that it was desirable to obtain the maximum effect with a minimum of effort.

5. After listening to the discussion, he realized that article 43 involved greater complexities than he had at first thought. That was not a matter for surprise: the problem of the validity of legal instruments was not an easy one in municipal law; it was even more difficult in international law, into which, because of its special character, it was not possible without more ado simply to inject concepts which municipal law had painfully worked out over the centuries. Those concepts included the distinction between non-existence at law and nullity, between absolute and relative nullity, between acts that were void and acts that were voidable, between grounds of nullity which could be invoked by a judge as a matter of course and grounds which could be invoked only by a party, between total and partial nullity, between nullity that could be remedied, and irreparable nullity and lastly, with regard to the effects of nullity, between instruments that were void *ex nunc* and those that were void *ex tunc*.

6. In the search for the *ratio juris* of article 43, it was appropriate to compare it with article 45 on the emergence of a new preemptory norm of general international law. Article 45 dealt with legal impossibility of performance and article 43 with factual impossibility of performance. Since the object of a treaty was one of its essential elements, the disappearance or destruction of that object suspended or terminated the treaty, as set forth in paragraphs 1 and 2 of article 43.

7. The impossibility of performance covered by article 43 was not there at the time of the conclusion of the treaty, but had supervened later. Pufendorf had long ago drawn a distinction between the case of a State which had subscribed an undertaking in the belief that it could carry it out while unaware of the existence of circumstances which rendered performance impossible, and the case contemplated in article 43, where performance had been possible at the time of the conclusion of the treaty, but had later become impossible. In the first case, the legal instrument was non-existent because of the lack of an essential ingredient; it therefore gave rise to no obligations. The State which had subscribed the undertaking had neither an obligation to perform it nor the duty to repair the injury. In the second case, that of supervening impossibility of performance, it was necessary to in-

vestigate whether there had been bad faith; that was the problem to which the new paragraph 3 was directed.

8. Article 43 dealt with supervening factual impossibility of performance of an absolute character. The obligations arising from the treaty could in no case be performed because of the disappearance or destruction of the object of the treaty.

9. The question, however, arose whether provision should not also be made for practical or relative impossibility of performance. That matter had been discussed by a former Special Rapporteur, Sir Gerald Fitzmaurice, in his second report.² The subject was a delicate one because of the perils which it involved for the stability of treaties. Nevertheless, consideration should be given to the possibility of covering the cases envisaged by such doctrines as the continental notion of state of necessity and the common-law concept of self-preservation. The question deserved consideration because there were some judicial precedents in the matter, in particular, the ruling of the Permanent Court of Arbitration in its 1912 award in the Case concerning Turkish War Reparations, "*Pour peu d'ailleurs que la responsabilité mette en péril l'existence de l'Etat, elle constituerait un cas de force majeure qui pourrait être invoqué en droit international public aussi bien que par un débiteur privé*",³ where the Court had found that Turkey had not established the existence of a state of necessity.

10. International treaties, particularly those of an economic character, often included provisions for relative impossibility of performance. Examples were article 19 of the Convention on the Régime of Navigable Waterways of International Concern, signed at Barcelona on 20 April 1921;⁴ articles 7 and 16 of the Convention on the International Régime of Maritime Ports, signed at Geneva on 9 December 1923,⁵ and article 89 of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944.⁶

11. In his view, the question was not covered by article 44, on fundamental change of circumstances. That article did not deal with impossibility of performance, whether absolute or relative, but with the case where the treaty had lost all meaning. It was immaterial from that point of view whether the *rebus sic stantibus* rule was construed subjectively, as based on the interpretation of the will of the parties, or objectively, as a question of the effect of the passage of time on a treaty of unlimited duration. It was not a case of applying the doctrine of frustration or the *théorie de l'imprévision*: the purposes of the treaty were not frustrated in any way, nor was there any question of *imprévision*. The cases which he had in mind were cases where performance, without being totally impossible, had been rendered extremely difficult by supervening circumstances. For example, Switzerland, as a neutral country during the Second World War, was only allowed by the belligerents to receive extremely small quantities of raw materials; consequently there had existed a relative impossibility of

² *Yearbook of the International Law Commission, 1957, Vol. II, pp. 47 et seq.*

³ J. B. Scott, *Cases of International Law* (1922), Vol. I, p. 545.

⁴ League of Nations, *Treaty Series*, Vol. VII, p. 35.

⁵ *Ibid.*, Vol. LVIII, p. 285.

⁶ United Nations *Treaty Series*, Vol. 15, p. 295.

performance with respect to treaties by which Switzerland had undertaken to supply certain manufactured goods.

12. The new paragraph 3 should be deleted because the problem to which it related was purely one of State responsibility.

13. Mr. AGO said that, if the impossibility of performance was the consequence of the fault of a party which had specific obligations either under the treaty or under a general rule, that party was responsible not only for the breach of those specific obligations but also for the non-performance of the treaty generally. To drop the provision contained in the new paragraph 3 might cause the second of those two forms of responsibility to disappear, for with the disappearance of the treaty, the obligation to carry it into effect would cease to exist. Accordingly, it was desirable to lay down the rule that, if the impossibility of performance was due to the breach of the treaty by one party, that party would be debarred from pleading the impossibility as a reason for terminating or suspending the operation of the treaty. In the absence of such a rule, it would be too easy for the parties to divest themselves of the primary obligation to give effect to the treaty.

14. Mr. RUDA said he supported the Special Rapporteur's suggestion to reverse the original order of paragraphs 1 and 2. In the new paragraph 1, he found the expression "the subject-matter of the rights and obligations contained in a treaty" unnecessarily cumbersome; the word "object" should be sufficient.

15. In the new paragraph 2, the opening words "If it is clear that such impossibility" introduced an element of obscurity; the phrase could be conveniently shortened to read simply "If such impossibility". That change would have the additional advantage of bringing the wording of paragraphs 1 and 2 closer into line.

16. With regard to the proposed new paragraph 3, he had been convinced by Mr. Ago that it would be useful to retain such a provision.

17. It seemed equally important to retain the new paragraph 4, but article 43 was not perhaps the right place for the idea it contained, which was equally applicable to article 44. He therefore suggested that it be made the subject of a separate article, the provisions of which would apply to both articles 43 and 44.

18. Mr. JIMÉNEZ de ARÉCHAGA said that paragraph 1 raised a problem of language. The Commission had chosen the wording "the subject-matter of the rights and obligations contained in a treaty" deliberately; it differed intentionally from that of article 69 as adopted in 1964, where the expression used was "the objects and purposes of the treaty". Unfortunately, in the French and Spanish versions of article 43, the term "subject-matter" was rendered by "*objet*" in French and by "*objeto*" in Spanish, the same word in each case as was used in the French and Spanish versions of article 69 to render the term "objects" in the phrase "objects and purposes". That double use created some misunderstanding as to the meaning of paragraph 3 of article 43 and raised a problem which the Drafting Committee should consider.

19. Mr. YASSEEN said that Mr. Ago had drawn an ingenious distinction between two forms of responsibility. It was true that there was one kind of responsibility for breach and another for non-performance of the treaty. But in all cases the responsibility might be based in the last resort on a rule of international law. Consequently, even if the treaty were terminated owing to absolute impossibility of performance, the responsibility for non-performance would not disappear on that account; but the article was not the right context for dealing with the question of responsibility.

20. Mr. AGO, replying to Mr. Yasseen, said that according to the first two paragraphs of the article, the State could invoke impossibility of performance as a ground for terminating or suspending the operation of the treaty, which meant terminating the obligations laid down by the treaty. If it was admitted that there was responsibility for non-performance, the State could not at the same time be heard to say that the treaty had ceased to exist, for with the disappearance of the treaty the obligation to carry it into effect would likewise cease.

21. Mr. de LUNA, referring to the example he had given at the previous meeting of an extradition treaty relating to a specific person, said that he still failed to see how it would be possible to insist on the application of the treaty if that person were dead, even if his death was due to the fault of the State which, under the treaty had had the duty to deliver the person in question to the other State. In such a case, a question of responsibility undoubtedly arose, but it was totally irrelevant to article 43.

22. The CHAIRMAN, speaking as a member of the Commission, said that he could discern a distinction between the responsibility deriving from the treaty—analogue to liability *ex contractu* in private law—and the responsibility which arose in certain cases outside the treaty. If the Commission wished to cover both types of responsibility, it could say that there was always a responsibility for certain forms of conduct, independently of the obligations under the treaty. In consequence of the recent development of public international law, and more particularly of the law of treaties, the duty to make reparation and the duty to be vigilant were becoming generalized. In that respect, he disagreed with Mr. Yasseen.

23. Sir Humphrey WALDOCK, Special Rapporteur, replying to the point raised by Mr. de Luna on the subject of the general concept and effects of article 43, said that the provisions of the article were confined to cases of actual impossibility of performance, permanent or temporary. The Commission had not altogether overlooked the question of *force majeure*, which he himself had examined in his second report, in paragraph 7 of his commentary on what was then article 21, Dissolution of a treaty in consequence of a supervening impossibility or illegality of performance. In that paragraph he had explained that cases where a substantial doubt existed as to whether the impossibility of performance would be permanent "might simply be treated as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance". He had added, however, "But where there is a continuing impossibility of

performance of continuing obligations it seems better to recognize that the treaty may be suspended. It should perhaps be added that one obvious case of impossibility, namely, the impossibility resulting from the outbreak of hostilities . . . is not covered by the present article. The effect of war on treaties raises special issues and is not covered by the present report.”⁷

24. The Commission, following its discussion of that article in 1963, had arrived at the conclusion that the question of *force majeure* could be safely left to be dealt with as part of the topic of State responsibility, and that the article on supervening impossibility of performance should deal only with the suspension or termination resulting from that impossibility. In the interests of the stability of treaties, the provisions on the subject had been couched in narrow terms. However, the Drafting Committee and the Commission itself should perhaps consider whether, in the draft articles as a whole and not merely in article 43, there was a gap which needed to be filled with regard to *force majeure*.

25. With regard to the wording of paragraph 1, the phrase “the subject-matter of the rights and obligations contained in a treaty” was based on the terminology commonly used by common law lawyers in relation to frustration of contract. The phrase might perhaps carry a nuance somewhat different from the concept of “the object of the treaty”. It referred to the matters to which the rights and obligations of the treaty related. Even that phrase might prove too narrow: there could well be cases where the impossibility arose from the disappearance of certain physical facts that were essential to performance, and not from the destruction of things to which the rights and obligations related. The whole question would have to be considered by the Drafting Committee, together with the use of the words “disappearance” and “destruction”.

26. He noted that the Commission as a whole supported his rearrangement of the order of the first two paragraphs, the purpose of which was to stress that suspension should be the natural result, and termination only a last resort. It was precisely for that purpose that the opening words “If it is clear that” had been used in paragraph 2: in all cases where the permanent character of the impossibility of performance was not obvious to all, the normal rule stated in paragraph 1 would apply and the treaty would be merely suspended, not terminated.

27. He had included the new paragraphs 3 and 4 in order to provide the Commission with an opportunity of discussing the two questions involved. It had been his intention to raise those questions also in article 44, because they could equally well arise in connexion with the provisions of that article, and in due course he would invite the Commission to consider the inclusion of similar paragraphs in article 44.

28. After listening to Mr. Yasseen’s remarks at the previous meeting, he now felt that paragraph 3 was necessary, not only in article 43 but perhaps also in article 44, although it simply stated the general principle of law, and of international law, that no one could

benefit from his own wrongdoing. Paragraphs 1 and 2 established in general terms a right of suspension or termination for the benefit of any party to the treaty. It was therefore desirable to retain the new paragraph 3, the purpose of which was to exclude the possibility of a State invoking article 43 to limit its responsibility arising from its own wrongdoing. If the paragraph were not included, a wrongdoing party might invoke article 43 and claim that the treaty was terminated, so that its obligations under the treaty had ceased. He did not therefore agree with Mr. Yasseen that the matter could be left entirely for treatment in the law of State responsibility.

29. With regard to the new paragraph 4, he agreed that the idea embodied in it, if included, should be placed elsewhere in the draft, since it applied not only to article 43 but also to article 44. However, he could not agree with the suggestion that it should be made to cover an even wider field.

30. It should be remembered that paragraph 1 of article 52, on the legal consequences of the nullity of a treaty, specified that the nullity of a treaty did not affect the legality of acts performed in good faith by a party in reliance on the void instrument before nullity was invoked, and went on to state that “The parties to that instrument may be required to establish as far as possible the position that would have existed if the acts had not been performed”.

31. The position was quite different in the circumstances envisaged in articles 43 and 44, which related to a valid treaty. The new paragraph 4 was intended to cover the case where a party had partly performed its obligations under a treaty and where a certain inequality arose upon its termination because of the greater benefits derived by the other parties. The proposed new paragraph dealt with the difficult problem of trying to restore the balance between the parties concerned. As such, its contents had a connexion with the provisions of article 53, on the legal consequences of the termination of a treaty.

32. However, the rule stated in the new paragraph 4 was not one of general application. It clearly did not apply to cases of termination by agreement, where the consequences of termination were a matter to be decided by the parties by agreement. Nor did it apply to the case of breach, which gave rise to its own problems. Its field of application was confined to the cases of termination brought about independently of the action of the parties and dealt with in article 43, on supervening impossibility of performance, and article 44, on fundamental change of circumstances.

33. It was his impression that the Commission as a whole considered that paragraph 4 deserved further examination, although most members wished to reserve their final position until the Drafting Committee had given a more concrete expression to the rule embodied in that paragraph and had expressed its views thereon.

34. The Drafting Committee should also perhaps consider whether article 43 ought not to include a provision on the lines of paragraph 1 (c) of his redraft of article 44, which ruled out the possibility of a party invoking a change of circumstances which had been

⁷ *Yearbook of the International Law Commission, 1963*, Vol. II, p. 79.

foreseen in the treaty and the consequences of which were provided for therein (A/CN.4/183/Add.3, p. 20). In the case envisaged in article 43, it was less likely that the parties would foresee circumstances which might cause the supervening impossibility of performance. Since, however, it had been suggested that certain treaties concerned with hydro-electric power made provision for drought and other natural disasters that might prevent electricity supplies from being available, the Drafting Committee should examine in general terms whether a provision of that type might be useful in article 43 as well.

35. Mr. de LUNA said he had never disputed that the new paragraph 3 covered a real problem of State responsibility. What he had urged was that it would be absurd to suggest that a treaty which had been terminated because of the total destruction of its object could possibly be revived.

36. Since the intention of the new paragraph 3 was to cover a question of State responsibility, the Commission should state that fact clearly in the text. The paragraph could be redrafted so as to state that the provisions of paragraphs 1 and 2 did not exonerate a State from the responsibility which it might have incurred if the impossibility of performance was due to a breach of the treaty by that State.

37. The same problem of State responsibility also arose in connexion with a number of other articles, particularly those dealing with fraud and coercion.

38. Mr. YASSEEN said he had the impression that his earlier remarks had been misunderstood. He had not intended to say that the party which invoked an impossibility of performance caused by itself in breach of the treaty could be exonerated from all responsibility. What he had intended to say was that article 43 should apply to all the parties without distinction, including the defaulting party. Where performance became impossible, the impossibility was absolute, and there was no reason why even the State through whose fault performance had become impossible should not have the right to plead the inability to discharge an obligation.

39. In that respect his view coincided with Mr. de Luna's. Their opinion differed from that of other members of the Commission, not so much regarding the substance as regarding the drafting. Perhaps a proviso could be added to the article indicating that it did not deal with the question of responsibility consequential upon the situation described. He still believed that even the responsibility for the breach of the treaty had its origin in a rule of international law.

40. The CHAIRMAN, speaking as a member of the Commission, said he realized that the Commission could legitimately choose between two points of view: according to one, which was derived from the law of obligations, the contract lapsed with the disappearance of its subject-matter; according to the other, based on the notion of delinquency, the party responsible for the delinquency had the obligation, if not to restore the *status quo*—which was often impossible, at least to restore a certain situation in the light of the duties under the treaty.

41. He personally had chosen to support the point of view expressed by Mr. Tunkin and Mr. Ago, because he thought it more conducive to the security of the international order. It offered a better assurance that the obligations under the branch of international law which concerned treaties would not be evaded.

42. Mr. AGO said that the physical impossibility of carrying out a treaty did not necessarily mean that the legal obligation created by the treaty ceased to exist. Where such an impossibility supervened without any fault on its part, the State might not only find it factually impossible to carry out the treaty, it might also declare that it was no longer legally bound to carry it out. If, on the other hand, the impossibility of performance was the result of a fault on its part, the State might find it impossible to execute the treaty, but it could not declare that it was not bound to carry it out. That was the true meaning of article 43.

43. Mr. JIMÉNEZ de ARÉCHAGA said that all members were in basic agreement on the practical solution to be adopted in the case envisaged in the new paragraph 3; the treaty was terminated and the State guilty of a breach was responsible. They were divided only on the doctrinal question of the basis of State responsibility in that case. Some felt that responsibility was based on the treaty itself and was a liability *ex contractu*, Mr. Yasseen regarded it as a liability by operation of law, or *ex lege*, other members thought that it arose from a violation of international law, or *ex delicto*. As was often the case in the Commission, such doctrinal differences must not be allowed to stand in the way of agreement on a concrete provision.

44. Many members felt that the provisions of the new paragraphs 1 and 2 might be invoked by a defaulting State to exonerate itself from responsibility where its breach had resulted in an impossibility of performance. That problem could be solved either by means of a provision such as the Special Rapporteur's new paragraph 3, or by amending paragraph 1 so that it did not contain the implication to which he had referred. In any event, the Drafting Committee should be asked to find appropriate language to express a practical solution with regard to which there was no disagreement in the Commission.

45. Mr. TUNKIN said that, in connexion with the questions of doctrine involved, it was worth considering the so-called "doctrine of effectiveness" about which a good deal had been written recently.⁸ The doctrine stated that, whatever the circumstances of its conclusion, any treaty was legally valid if it was made effective, even by force, and that a validly concluded treaty should be regarded as legally terminated simply because it has been rendered ineffective by the use of force. Such a doctrine sanctioned the use of force in international relations.

46. The Drafting Committee should be requested to confine the provisions of paragraph 3 to a statement of the rule that a State could not invoke the impossibility of performance which resulted from its own wrongdoing as a ground for terminating a treaty or for suspending

⁸ See particularly Jean Touscoz, *Le principe d'effectivité dans l'ordre international*, Paris, 1964.

its operation. The questions of State responsibility which might arise from that situation should be left to be dealt with by the Special Rapporteur on State responsibility.

47. Mr. YASSEEN said that he had not the slightest desire to invoke the doctrine of effectiveness to explain his attitude. He was quite content with a realistic approach, and it would be unrealistic to contend that a party could be obliged to do something impossible.

48. Sir Humphrey WALDOCK, Special Rapporteur, proposed that article 43 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed ⁹

ARTICLE 44 (Fundamental change of circumstances)

Article 44

Fundamental change of circumstances

1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as grounds for terminating or withdrawing from a treaty under the conditions set out in the present article.

2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

(a) The existence of the fact or situation constituted an essential basis of the consent of the parties to the treaty; and

(b) The effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.

3. Paragraph 2 above does not apply:

(a) To a treaty fixing a boundary; or

(b) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself.

4. Under the conditions specified in article 46, if the change of circumstances referred to in paragraph 2 above related to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only. (A/CN.4/L.107, p. 40)

49. The CHAIRMAN invited the Commission to consider article 44, for which the Special Rapporteur, in his fifth report (A/CN.4/183/Add.3, p. 20), had suggested a revised text reading:

1. A fundamental change which has occurred with regard to a fact or state of facts existing at the time when a treaty was entered into may be invoked by a party as a ground for terminating or withdrawing from the treaty only if:

(a) The existence of that fact or state of facts constituted an essential basis of the consent of the parties to be bound by the treaty;

(b) The effect of the change is to transform in an essential respect the character of continuing obligations undertaken in the treaty; and

(c) The change has not been foreseen by the parties and its consequences provided for in the treaty.

2. A fundamental change may not be invoked as a ground for terminating or withdrawing from a treaty provision fixing a boundary or affecting a transfer of territory.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that for the time being he had not included a provision on separability in article 44 as the whole problem was to be considered at a later stage.

51. When reconsidering the 1963 text of the article, he had come to the conclusion that paragraph 1, which was really in the nature of an introduction, was unnecessary and repeated paragraph 2, so he had decided to drop it.

52. In the Drafting Committee, a marked preference had been shown for framing the articles on termination and suspension in the negative and he expected that the Drafting Committee would wish to do the same in his new text of paragraph 1, which would then have to be modified by the insertion of the words "not be" before the word "invoked" and by the substitution of the word "unless" for the words "only if". Personally he did not altogether favour stating in the negative rules of law admitting rights to invoke grounds of invalidity or termination, but the Drafting Committee desired to lay stress on the stability of treaties and to bring out the fact that grounds for invoking termination should be regarded as exceptions.

53. In paragraph 2, he had taken account of the Israel Government's suggestion to bring the wording into line with that of article 34 and to refer to a "state of facts". But in article 34, that expression had now been replaced by the word "situation" by the Drafting Committee, and if that change were endorsed by the Commission he would withdraw his suggestion.

54. He had found the Australian Government's proposal to insert in sub-paragraph (b) the word "continuing" before the word "obligations" acceptable, because that would make it plain that the obligations in question were those which had not yet been executed. By an oversight the word "undertaken" appeared in paragraph 1 (b); as indicated in his observations in his report, it should be replaced by the words "to be performed", so as to bring out the same point.

55. When examining the 1963 text of paragraph 3, he had decided that the two exceptions laid down were of a very different kind and that it would be more logical to transfer the second to the new paragraph 1, because it was closely linked with the conditions for the operation of the rule contained in article 44. If that arrangement did not find favour, the exception could form part of a separate paragraph.

56. It would be remembered that, in his original proposal, the first exception had covered a broader category of treaties than those fixing a boundary,¹⁰ but the Commission had decided to narrow down the provision. The matter would probably need to be reconsidered, particularly as the Australian Government had proposed a rather more general formula to cover determinations

⁹ For resumption of discussion, see 842nd meeting, paras. 33-37.

¹⁰ *Yearbook of the International Law Commission, 1963*. Vol. II, p. 80.

of territorial sovereignty. As a matter of drafting, the expression "stipulations of a treaty" fixing a boundary, which was used by the Netherlands Government in its comments, might perhaps be better than the expression "a treaty fixing a boundary".

57. As he had indicated in paragraph 8 of his comments, the Canadian Government had pointed out that the Commission had perhaps overlooked the case of a boundary fixed by a *thalweg* which might be altered by a natural disaster such as a flood. In his opinion the point did not need to be taken into account because such a case would merely involve the interpretation of the treaty in the light of a change of fact.

58. The Commission would need to consider whether article 44 was comprehensive enough to cover cases of a change of circumstances provoked by a breach which entirely altered the character of the treaty. It would also need to decide whether provisions should be included concerning "breach" and "equitable compensation" in cases where a fundamental change of circumstances supervened.

59. Mr. VERDROSS said he congratulated the Special Rapporteur on his revised version of article 44. Never before had the three conditions which had to be fulfilled for terminating a treaty in reliance on the *clausula rebus sic stantibus* been so clearly stated.

60. The opening clause of paragraph 1 seemed, however, too weak. According to Anzilotti and other leading jurists, a State could not plead the *clausula rebus sic stantibus* for the purpose of being released from a treaty unless it had first endeavoured to negotiate an amicable arrangement through the diplomatic channel, an idea reflected in the Declaration of London, 1871,¹¹ adopted by the Great Powers. It was true that in principle a distinction should be drawn between rules of substance and rules of procedure, but there were cases where compliance with a certain procedure was the condition precedent to the assertion of a right. Just as local remedies must have been exhausted before a diplomatic claim could be brought, so it might be necessary to exhaust the diplomatic procedure before pleading the *clausula rebus sic stantibus*. It was such a serious step to terminate a treaty in reliance on that clause that it should be stipulated that endeavours to work out an amicable settlement must precede such action. The formula he had in mind differed from those suggested by some governments, which considered that provision should be made for an application to the International Court or for submission to an arbitral tribunal; such proceedings required a special agreement between the parties, whereas representations through the diplomatic channel were admissible under general international law. He suggested that the Drafting Committee consider adding a passage reflecting that idea in the opening clause of paragraph 1.

61. He could support the rule laid down in paragraph 2, which concerned treaties fixing a boundary or effecting a transfer of territory. The rule was not a special rule, but simply the application of a more general rule to the effect that the *clausula rebus sic stantibus* was not appli-

cable to a treaty which had already been fully executed, for reliance on that clause always presupposed the continued existence of obligations flowing from the treaty. Where a treaty had been fully executed, it ceased to produce any obligation and the clause was inoperative. If State A ceded a territory to State B, the ownership of the territory in question was vested in State B and the treaty was fully executed. Similarly, if a State committed itself to pay a certain indemnity in annual instalments, then, upon the payment of the last annual instalment, the treaty would have been fully executed and the *clausula rebus sic stantibus* could no longer be invoked.

62. It might, therefore, be better to state in paragraph 2 the general rule that the *clausula rebus sic stantibus* was not applicable to a treaty which had been fully executed; examples could be given in the commentary.

63. Mr. CASTRÉN said that most of the changes made by the Special Rapporteur in the 1963 text were purely drafting changes. Some were improvements although even the revised text could be further improved. The Special Rapporteur had been right to amalgamate paragraph 1 and the opening passage of paragraph 2 of the 1963 text. As a consequence, the redraft was more concise, although even in the redraft the opening phrase of paragraph 1 and paragraph 1 (a) were repetitive.

64. A more serious criticism was that, since the redraft referred only to "fundamental" changes, it could be cunningly argued that, in the case of other, less important changes, that state of affairs could always be invoked as a ground for terminating the treaty. In order to remove the ambiguity and the remaining repetitions, the word "fundamental" should be omitted from the opening words of paragraph 1, and in paragraph 1 (a) the words "the existence of that fact or state of facts constituted" should be replaced by the words "the change is a fundamental one affecting". In addition, the words "fundamental change" in paragraph 2 should be replaced by the words "change of circumstances".

65. He doubted whether the word "continuing" was necessary in paragraph 1 (b), although he would not object to it.

66. Paragraph 1 (c) was also ambiguous and, in its new context, open to the absurd inference that it would not be permissible to invoke a provision in the treaty which provided for the consequences of a change of circumstances. That provision should be moved to a separate paragraph, as in the 1963 text.

67. In paragraph 2, the Special Rapporteur had perhaps gone too far in extending the scope of the paragraph to cover treaties effecting a transfer of territory. In 1963, the Commission had deliberately refrained from mentioning such treaties, but the reference had been restored in the Special Rapporteur's redraft in a slightly different form. The importance of the exception concerning territorial treaties was stressed by the fact that they and boundary treaties were dealt with in a separate paragraph. The Commission should revert to the structure of the 1963 text and the question of such treaties should be dealt with in the paragraph concerning changes of circumstances foreseen by the parties and provided for in the treaty itself, subject to the reversal of the order

¹¹ *British and Foreign State Papers*, Vol. LXI, p. 1198.

of the two paragraphs in question. Equally, Mr. Verdross's proposal might offer a satisfactory solution.

68. In reply to Mr. Verdross, who had expressed anxiety lest the article be invoked without good cause, he would say that the case was covered at least in part by article 51, which dealt with procedure and with the duty to negotiate with the other party before a treaty was declared void or inapplicable.

69. Mr. de LUNA said that the Special Rapporteur's redraft of article 44 was a definite improvement, apart from some minor points. The three conditions which had to be fulfilled were set out in logical order and clearly stated. At the same time, it might not be a bad idea to specify that the conditions were cumulative, even though that was self-evident.

70. The addition of the word "continuing" in paragraph 1 (b) was an improvement although it was not strictly necessary, because if the treaty had already been executed, there were no longer any obligations to be performed.

71. He agreed with Mr. Verdross's remarks concerning paragraph 2. He did not object to the extension of the scope of the provision to treaties effecting a transfer of territory, for a transfer of that nature was always a concrete transaction; it was impossible to transfer an unspecified and undemarcated territory. The provision did not therefore do any harm.

72. While it was true, as Mr. Verdross had said, that throughout the history of the *clausula rebus sic stantibus* it had always been held that the parties could not be confronted with the *fait accompli* of a unilateral denunciation without their being consulted, he still doubted whether it would be very useful—apart from the case of the special procedure provided for in article 51—to lay down the condition that there had to be negotiations. In the case-law of the Court, that condition had been found to be a mere formality; in other words, the parties had fulfilled it once they had stated their position, even if they had not negotiated from good faith. On the other hand, the paragraph could hardly lay down a condition *de contrahendo*.

73. He could accept the redraft. The Special Rapporteur, in commenting both on article 43 and on article 44, had said that the Commission should consider whether a general clause should be added which would apply to several articles and which would cover the question of good faith or, as it was known, the doctrine of "clean hands". The fundamental change of circumstances might be spontaneous, outside the control of any of the parties, or it might be the indirect consequence of their actions, or it might be attributable to the fault of a State which had unlawfully altered the fundamental circumstances. Articles 43 and 44 were probably the right context for a provision on those lines. An alternative solution would be to set forth the principle in a separate general article, with cross-references to all the cases in which it would apply to the behaviour of a State which so conducted itself that circumstances changed and the performance of the treaty became impossible.

74. Mr. BRIGGS said that, as would be seen from his comments at the 695th and 710th meeting,¹² he had

found it difficult to accept article 44 and had abstained from the vote on it. He had indicated at that time that the article did not set out a rule of international law but a doctrine which, though it had been invoked by States, had never been upheld by any international court.¹³

75. As indicated in paragraph (3) of the 1963 commentary to article 44, municipal courts had always ended by rejecting the application of the principle of *rebus sic stantibus* in the particular circumstances of any case before them. The Governments of Colombia, Italy, Turkey and the United States had referred to the controversial nature of the principle, and the observations of many others fell far short of endorsing the Commission's conclusions in paragraphs (1) and (2) of the commentary that international law recognized that treaties might cease to be binding upon the parties through a fundamental change of circumstances, and that there was considerable evidence that the principle was recognized as a rule of customary law. Thirteen governments had referred to *rebus sic stantibus* as a doctrine, one as a concept, one as a notion and one as a clause. Eight regarded it as a principle, only three had called it a rule.

76. In reality, what the Commission was proposing in article 44 was the progressive development of international law on a subject concerning which practice was not sufficiently developed, and therefore the greatest caution was needed in the drafting of the article.

77. He agreed that, in the interests of consistency, the negative form would have to be used. The phrase "state of facts" in the new text should be replaced by "situation".

78. The essence of paragraphs 1 (a) and (b) must be retained and the parties must be referred to in the plural, so as to include them all. The Special Rapporteur's changes in paragraph 1 (b) were acceptable, as was the use in both sub-paragraphs of the word "essential".

79. The reference in paragraph 2 to terminating or withdrawing from a "provision" seemed to conflict with the Special Rapporteur's contention that the question of separability had been set aside, and that was a point that should be borne in mind by the Drafting Committee. The exception itself as stated in paragraph 2 was sound and should be retained.

80. The question whether provisions analogous to those in the new text of article 43, paragraphs 3 and 4, should be added, ought to be left over until the Commission came to consider article 53.

81. As it stood, article 44 was not adequate. First, because something on the lines of the provision contained in the original text of what used to be article 22, paragraph 1 (a), in the Special Rapporteur's second report, was needed. That provision read: "A change in the circumstances which existed at the time when a treaty was entered into does not, as such, affect the continued validity of the treaty".¹⁴ He had suggested the addition at the end of that text, of the words "or entitle a party thereto to terminate or withdraw from a treaty".

¹³ *Ibid.*, p. 146, para. 29.

¹⁴ *Yearbook of the International Law Commission, 1963, Vol. II, p. 79.*

¹² *Yearbook of the International Law Commission, 1963, Vol. I.*

82. With regard to Mr. Castrén's proposal about the word "fundamental", the article was concerned only with a fundamental change in circumstances. In his opinion it should be made plain that no mere change of circumstances entitled a party to terminate or withdraw from a treaty.

83. The second reason why the text was inadequate was that it contained no provision for adjudication, a gap on which seven governments had commented. When he had drawn attention to a similar gap in other articles, he had been told that the Commission was engaged in drafting substantive rules and not with their procedural application or institutional development. But he agreed with Mr. Verdross that procedure could in some cases be a condition of formulating the rule itself, and judicial determination could become a part of the substantive rule. In the present instance, a rule that would allow States to invoke a fundamental change of circumstances must contain an integral provision requiring them to try to seek a settlement first, and he could not agree with Mr. Castrén that, for that purpose, article 51 would suffice.

84. For those reasons he considered that even the Special Rapporteur's new version was dangerously vague and difficult to accept, unless considerably modified. An example of the kind of danger he had in mind was provided by the fact that certain elements of the 1963 draft, although it was known to be provisional, had been invoked by Panama against the United States without any reference whatever to the procedural devices set out in article 51.

The meeting rose at 12.40 p.m.

834th MEETING

Wednesday, 19 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 44 (Fundamental change of circumstances)
(continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 44.

¹ See 833rd meeting, after para. 48, and para. 49.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been reminded of a proposal by the Pakistan Government that a provision should be incorporated in article 44 stipulating that a party which had substantially contributed to the change of circumstances could not invoke that fact as a ground for termination or withdrawal from the treaty. That proposal might be examined in conjunction with his proposal that the Commission consider the inclusion in the article of an additional paragraph concerning breach.

3. Mr. RUDA said he agreed with those who, in 1963, had doubted whether the principle *rebus sic stantibus* was recognized as a rule of modern international law. Furthermore, to adopt the principle in the draft would jeopardize the security of treaties. The draft should therefore specify the conditions in which it was applicable and provide appropriate safeguards.

4. Paragraphs 1 and 2 of the 1963 text had stated much the same idea, and the Special Rapporteur had had the choice of dropping either the one or the other. And yet there had been a shade of difference between those two paragraphs, as Mr. Briggs had noted. The original paragraph 1 had stressed, more categorically than paragraph 1 of the latest redraft, the exceptional character of the principle *rebus sic stantibus*. In the course of successive revisions, the principle had become diluted. The Commission should either stress in paragraph 2 of the latest redraft the exceptional character of the principle, or restore paragraph 1 of the 1963 text as the opening passage of article 44.

5. He noted that in the latest redraft the words "a fact or state of facts" had replaced the expression used in the 1963 text, "fact or situation". The Special Rapporteur had explained the connexion between that provision and article 34 concerning error, but in his (Mr. Ruda's) opinion, the expression used in the 1963 text, and in particular the word "situation", at any rate in the Spanish version, was preferable.

6. He approved of the addition of the word "continuing" in paragraph 1 (b), which made it clear that the principle did not apply to obligations already discharged by both parties.

7. He had been interested to hear Mr. de Luna say that paragraph 1 should state clearly that the conditions laid down in sub-paragraphs (a), (b) and (c) were cumulative.

8. With regard to paragraph 2, he agreed with Mr. Verdross that it could not apply to a treaty which had already been executed. That was logical and correct in theory, but since the paragraph dealt with frontier problems, a subject on which States were very sensitive, the reference to treaties fixing boundaries should be allowed to stand. States would certainly be favourably impressed by a provision which emphasized still further the exceptional nature of the principle and declared that it was not applicable to the politically very delicate subject of frontiers. He did not, however, understand the reference to provisions effecting a transfer of territory. Since any such transfer necessarily presupposed the fixing of a boundary, it should suffice if only the latter idea were mentioned.

9. With regard to the question of the safeguards for the application of the rule, he noted that the idea of a higher jurisdiction appeared to overhang the entire draft. Article 31, for example, contained the words "unless the violation of its internal law was manifest", while article 43, paragraph 2, in the Special Rapporteur's redraft, opened with the words "If it is clear". Those were patently subjective notions on which a ruling could only be given by a third party, not by the parties themselves. Again, the idea of a higher jurisdiction was inherent in article 44, where it spoke of a change that transformed in an essential respect the character of obligations. Who was to decide what was "an essential respect"? Consequently, he supported the comment by the United Kingdom Government that mere reference to the Charter under article 51 of the draft was quite inadequate for the purpose of safeguarding the security of treaties.

10. It was true that the rule laid down in article 44 might redress certain injustices. But at the same time it would tend to give rise to considerable instability and to manifest injustice in international relations, unless there was an appropriate safeguard to its application. In the ever-present dilemma between stability of the law and development of the law, he was on the side of stability.

11. Mr. ROSENNE said he was reminded of the words of Mr. Amado at the 695th meeting when he had said that: "Those who had been brought up to believe in the sanctity of the maxim *pacta sunt servanda* and in the inviolability of treaties were always inclined to adopt a defensive attitude to the insidious wiles of that serpent of the law, the *rebus sic stantibus* clause".² The real problem posed by article 44 was to achieve a balance between the *pacta sunt servanda* rule and the cautious recognition of the need to allow for the modification of treaties so that excessive rigidity should not prove harmful to the maintenance of peace.

12. Article 44, with articles 43 and 68, paragraph (c), formed a logical scheme in which the first contained an element of controlled subjectivity and the other two contained objective elements.

13. When describing the rule of *rebus sic stantibus* as controversial, he was uncertain whether governments were questioning its existence, or its scope and nature. Moreover, some of the comments perhaps reflected a transient attitude created by pending disputes.

14. The Commission should put aside doctrinal controversy and decide the question: should article 44, whether it was *lex lata* or whether it was *de lege ferenda*, be included in the draft? He favoured its being kept more or less in the form adopted at the fifteenth session, for the reason given in paragraph (6) of the commentary to that text, which stated that "The Commission, however, concluded that the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties. A treaty might remain in force for a long time and its stipulations come to place an undue burden on one of the parties."³

² *Yearbook of the International Law Commission, 1963, Vol. I, p. 142.*

³ *Ibid., 1963, Vol. II, p. 209.*

15. With regard to the Special Rapporteur's new text, he feared that the amalgamation of paragraphs 1 and 2 might obscure the exceptional character of the rule. He was therefore inclined to think that paragraph 1 of the earlier text should be retained with the substitution of the words "concluded may not" for the words "entered into may only", the substitution of the word "unless" for the word "under", and the addition at the end of the paragraph of the words "are established".

16. Paragraphs 1 and 2 of the 1963 text rightly differentiated between mere changes of circumstances and fundamental changes of circumstances, and that distinction should be maintained.

17. The greater precision of the new paragraph 1, which referred to a fundamental change being invoked "by a party", was appropriate because it made it plain that the article only applied to States which had consented to be bound and for which the treaty had come into force. The article would not therefore apply to any State bound otherwise than by its own consent—if that were possible, which he doubted—and which was not a party within the terms of article 1 (*f*) (*bis*). The observations by the Governments of Cameroon and Jamaica on that point should be reflected in the text and in the commentary.

18. While there was force in a number of government comments concerning the impact of the principle of self-determination on the law of treaties, the Commission should adhere to its policy of refraining from interpreting the Charter. That was all the more necessary because the problem of self-determination had recently been referred to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. Articles 37, 45 and 68, paragraph (c), probably had a bearing on the principle of self-determination, and the matter could be further clarified in the final version of paragraph (1) of the commentary.

19. The Special Rapporteur's new version of paragraph 2 was not very satisfactory; the 1963 text of paragraph 3 (*a*) was preferable. In conjunction with article 46, that provision would be sufficiently comprehensive.

20. The question had been raised whether or not to include in article 44 provisions analogous to those proposed by the Special Rapporteur for inclusion in article 43, paragraphs 3 and 4. But the very consideration which had prompted that proposal as regards article 43 should militate against introducing something of the same kind into article 44. Article 43 was entirely objective in character and the purpose of the new paragraph 3 was to avoid introducing subjective elements into it; article 44 attempted to provide an objective rule after the appearance of certain subjective factors which made the maintenance of the treaty burdensome for one of the parties, and the introduction of any provision similar to the new paragraph 3 proposed for article 43 would only be confusing. He had nothing to add to the comments he had already made during the discussion on article 43 concerning the proposed new paragraph 4 to that article.

21. He was unable to accept the thesis advanced by previous speakers about the relationship between procedural and substantive provisions and the contention that

procedure could be a condition for the formulation of a rule of law; it could only be a condition for its application. The concern expressed by those speakers was met in the present instance, and would be further emphasized by the Special Rapporteur's proposal to transfer certain general provisions to the beginning of section III. It would be impracticable for the Commission to go beyond article 33 of the Charter, which all would agree constituted *lex lata*. A diplomatic conference might wish to do more, but he was far from convinced that disputes about the interpretation or the application of treaties were inherently more justiciable than other international disputes, an idea which had been introduced at the 1907 Hague Peace Conference.

22. He doubted whether article 44 entailed greater risks for the stability of treaties than certain other articles in the draft. Indeed, the risks might even be less.

23. It seemed to him that the 1963 text achieved a balance between the requirements of stability and those of change, and could form a basis for discussion at a diplomatic conference.

24. Mr. YASSEEN said that the principle on which article 44 was based was not seriously challenged by governments. The principal criticism related to the procedure for applying the article. His own opinion was that the question of the application of such an article should be independent of the question of its formulation, a view often expressed by Mr. Ago.

25. He did not deny that, in some cases, a certain procedure for the application of a provision could be considered as a rule of substance. For example, Mr. Verdross had suggested, in his anxiety to safeguard the stability of treaties, that prior negotiations should be regarded as a substantive condition to be fulfilled before the article could operate. In that respect, Mr. Verdross had not gone so far as some governments, in whose opinion the article should not operate except after submission to arbitration or to the International Court of Justice.

26. His personal opinion was that an article of that nature would serve very little purpose. Normally, States did not sever relations until after they had tried to reconcile their points of view and had approached the other parties with a request for a review of the problem. Accordingly, conversations and negotiations did not have to be considered as a substantive condition for the operation of the rule *rebus sic stantibus*.

27. With regard to the drafting, the omission of paragraph 1 of the 1963 text was a definite improvement; having proposed that change in 1963,⁴ he was glad that his proposal had been heeded, since the substance of the former paragraph 1 was inherent in the former paragraph 2.

28. Under paragraph 1 (c) of the Special Rapporteur's redraft, it was a condition precedent for the operation of the doctrine *rebus sic stantibus* that the change in circumstances had not been foreseen. That proposition was correct, for if the parties had made provision for dealing with the consequences of the change, the article

would be inapplicable. He did not oppose the idea that the exception should be regarded as a condition for the application of the principle, but he thought that the paragraph should retain the form of the corresponding provision in the 1963 text, which in the revised wording had been strengthened without any compelling reason. He preferred the wording "for the consequences of which they have made provision in the treaty" to the vaguer expression "its consequences provided for. . .". The 1963 text made it clear that the treaty itself had to contain some provision for dealing with the consequences of a fundamental change of circumstances. A vague provision concerning some unspecified change should not prevent the principle *rebus sic stantibus* from operating.

29. So far as the proposed exceptions were concerned, Mr. Verdross had drawn attention to one of the very real aspects of the problem: the change must not have been provided for and must affect continuing obligations. In other words, the exception was based on the intrinsic nature of the principle *rebus sic stantibus*.

30. The exception concerning boundary treaties or treaties effecting a transfer of territory was merely an application of that general condition for the applicability of a rule. It would therefore be better to work out a formula which would cover not only those particular cases but all cases of the same nature. In that respect the Harvard draft might be helpful, for it stated that the treaty "may be declared. . . to have ceased to be binding, in the sense of calling for further performance".⁵ That language might form the basis of a formula of a general exception derived from the very nature of the principle *rebus sic stantibus*, and not covering only certain special cases.

31. Mr. TUNKIN said that, as he had explained at the fifteenth session, in his view a rule of international law concerning a fundamental change of circumstances did exist, but it was imprecise and for that reason presented a danger to the stability of treaties and international relations as a whole. The Commission's task was to define the rule clearly and make it applicable only in exceptional cases.

32. Generally speaking, the 1963 text was acceptable, though open to drafting improvements. In some respects the Special Rapporteur's new text was better, but of course in substance it did not depart from the earlier version.

33. The Special Rapporteur's new text for the beginning of paragraph 1 could be made more precise by dropping the phrase "or state of facts". Similarly, he was not in favour of using the expression "a situation" which, as United Nations practice had demonstrated, was not a precise notion.

34. In the new paragraph 1 (a), the word "essential" should be dropped as it would require interpretation.

⁵ Article 28: *Rebus sic stantibus*

(a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of calling for further performance, when that state of facts has been essentially changed.

⁴ *Yearbook of the International Law Commission, 1963, Vol. I, p. 250, para. 35.*

35. In the new paragraph 1 (b), the insertion of the word "continuing", as proposed by the Australian Government, was acceptable since it made plain that the obligations in question had not yet been executed. The words "in an essential respect", however, were not sufficiently definite and ought to be replaced by some such word as "radically".

36. He agreed with Mr. de Luna and Mr. Ruda that the three conditions set out in sub-paragraphs (a), (b) and (c) of the new text must all be met before the rule in paragraph 44 could be applicable, and that that should be brought out more clearly in the text.

37. He had already expressed his views on the general problem of combining substantive and procedural rules. The attempt to combine important substantive rules with the obligation to submit disputes to compulsory jurisdiction often resulted in killing the rule, because compulsory jurisdiction had only been accepted by some forty Member States of the United Nations.

38. Mr. PESSOU said he agreed with Mr. Ruda and Mr. Rosenne regarding the exceptional character of the rule *rebus sic stantibus*.

39. From among the comments made during the most recent session of the General Assembly, he wished to refer only to those by the delegation of Cameroon, which had said that it would be going too far to exclude boundary treaties altogether from the operation of the rule *rebus sic stantibus*, since to do so would be "contrary to the principle of self-determination laid down in the Charter, especially in cases where the States had had their territorial boundaries forced on them without the slightest heed for geographical or ethnic considerations". It would be realized that Cameroon's position was influenced by the problem of the two former territories of Cameroon under the trusteeship of the United Kingdom and France respectively and of the attachment of a part of one of them to Nigeria, a problem which had been brought before the International Court of Justice.⁶

40. Referring to the 1963 text of article 44, he said that in certain situations a change of circumstances did indeed occur, but the change itself was not decisive. The *clausula rebus sic stantibus* had been described as a rule operating in the case of a change of circumstances which rendered the achievement of the object of the treaty utterly impossible; however, it operated not as a term of the treaty but as a general principle of law.

41. Immediately after the proclamation of the independence of the thirteen French-speaking States in Africa south of the Sahara, what had happened was, at least in the case of Senegal and Dahomey, that the treaties fixing the frontiers had become the law for the new States, pursuant to the principle *uti possidetis, ita possideatis*. They also enjoyed the advantages of the agreements concluded by a small number of States for the benefit of the entire international community. The rule *rebus sic stantibus* did not raise any problem so far as the French-speaking States of Africa were concerned, for French law, from which their own law was derived, had the theory of *imprévision*. It was true that, as between

France and those States, practice had evolved. By their silence, the new States would be provisionally bound by the earlier general conventions to which the former territorial sovereign had been a party. It would be open to those States, by simple notice and without observance of the procedure laid down in those treaties, to declare that they did not accept those treaties. That approach was close to that reflected in the comment by the United Kingdom Government, that "in the present connexion a party alleging a fundamental change of circumstances is under an obligation, before it may invoke the change in any way, to propose negotiations to the other party and, if these are not successful, at least to offer arbitration of the issue" (A/CN.4/183/Add.3, p. 11).

42. As between the French-speaking States of Africa south of the Sahara and the former metropolitan Power, the question of arbitration had never arisen and no dispute had been brought before the International Court of Justice, for there was another procedure which worked very satisfactorily. If any difficulty arose, either by reason of earlier agreements signed by France or because an African State needed to strengthen its sovereignty, the head of the African State in question approached the President of the French Republic, who took the necessary action *vis-à-vis* the other parties to work out a settlement.

43. The legal relationship established between France and those States at the time of recognition of their independence by France was evolving rapidly and peacefully. But that transformation was not akin to "decolonization", a term which had overtones of aggression. The process was one of political emancipation in a climate of mutual trust. The practice which had been established was excellent; it safeguarded the freedom of action of the new States and had prevented, as was necessary, the formation of a legal vacuum in international relations at the time of the transfer of power.

44. With regard to the form of article 44, the fact that the parties had not foreseen the change, and the absence from the treaty of provisions concerning the change, should be stated not as a supplementary condition but as the principal condition for the operation of the rule laid down in the article.

45. Mr. AGO said that, after the debates in the Commission in 1963, the conclusion had been reached that the *clausula rebus sic stantibus*, however dangerous its operation might be, was a safety valve and definitely answered a need. The rule was not new; it had existed in earlier times when the means of peaceful settlement of disputes had been much more primitive, and when the idea of the compulsory jurisdiction of an international court of justice would have been inconceivable.

46. Some members of the Commission were concerned because there was no objective authority qualified to determine whether a fundamental change of circumstances had or had not occurred. Their concern might be justified, though the existence of a provision under which a State could invoke such a change as a ground for terminating a treaty did not in any way imply that the other party or parties were bound to concur; they might very well take the opposite view, that the treaty remained in force. That meant a legal dispute and every possible means should be employed to settle it—negotiation,

⁶ Case concerning the Northern Cameroon, I.C.J. Reports 1963, p. 15.

compulsory jurisdiction if agreed to by the parties, arbitration, or special modes of settlement like those mentioned by Mr. Pessou. It was to be hoped that, with the progressive development of international law, still further means would be devised.

47. On balance, the Special Rapporteur's latest redraft was an improvement on the 1963 text. If only for psychological reasons, it was important to stress the exceptional character of the proposed rule. From that point of view, the repetitious language of the 1963 text had not been particularly felicitous.

48. It would be a pity to drop the word "situation", which he preferred to "state of facts", alongside "fact" in paragraph 1, for often it was a situation in the general meaning of the term that was involved. But another possibility would be to use the word "circumstances", a term traditionally used in connexion with the *clausula rebus sic stantibus*; it still appeared in the title of the article and had appeared in paragraph 1 of the 1963 text. If that term were used, the ideas contained in paragraph 1 of the 1963 text and paragraph 1 of the new text might be expressed in a single clause which might read: "A change which has occurred in the circumstances existing at the time when the treaty was entered into may be invoked . . .".

49. One of the changes proposed by the Special Rapporteur was that the idea expressed in paragraph 3 (b) of the 1963 text should be transferred to paragraph 1 (c) of his redraft. On close inspection that change was not satisfactory either. According to the latest redraft, the change in circumstances could not be invoked if foreseen in the treaty; actually, however, the treaty might have mentioned precisely such a change as a ground for terminating the treaty.

50. Furthermore, paragraphs 1 (a) and (b) of the redraft laid down two equally essential conditions which had to be fulfilled before the exceptional rule laid down in the article could operate. If a third condition were added, it could hardly be stipulated that all three conditions had to be fulfilled simultaneously, particularly as the presence of the word "and" between the second and the third conditions seemed to introduce an element of ambiguity. If, on the other hand, only two conditions were mentioned, the place and meaning of the word "and" became perfectly clear.

51. For the purpose of expressing the condition laid down in paragraph 1 (c) of the redraft—the absence of provisions in the treaty—the Commission might mention the condition at the very beginning of the article in the following way: "A change which has occurred in the circumstances existing at the time when the treaty was entered into and which was not foreseen by the parties to the treaty may be invoked . . .". In that way, the drafting would be simplified to the maximum extent.

52. With regard to the two conditions laid down in paragraphs 1 (a) and (b), he saw no reason to amend the redraft proposed by the Special Rapporteur. The only effect of replacing the words "an essential basis" by the words "a basis" would be to state the rule in less categorical terms, and that was the very thing they wished to avoid.

53. The suggestion by Mr. Verdross at the previous meeting that paragraph 2 should contain a general reference to treaties which had been fully executed had at first sight seemed attractive, but on reflection he did not think it was acceptable. A treaty which had been fully executed was normally a treaty which had ceased to exist, and consequently a provision drafted on the lines suggested by Mr. Verdross would be devoid of all meaning. On the other hand, a treaty fixing a boundary was not terminated for the reason that it had been fully executed; a treaty which fixed a boundary along the thalweg of a river was a treaty which was not terminated and was not fully executed; it was in force and remained in force and continued to have effect. Consequently, it was better that paragraph 2 should retain the reference to a treaty fixing a boundary. The other case mentioned in paragraph 2, that of a treaty effecting a transfer of territory, seemed in fact to be covered by the reference to a boundary treaty.

54. Since the members of the Commission were agreed as to substance, and since the comments of governments on the whole seemed to endorse the article, he suggested that the Drafting Committee study the questions still undecided without, however, amending too drastically the text adopted in 1963.

55. Mr. de LUNA said that, after listening to the discussion, he saw no reason to change the views he had expressed at length in 1963. At the twentieth session of the General Assembly, he had noted with satisfaction in the Sixth Committee discussions that article 44 was generally acceptable to governments. That result was particularly fortunate because the provisions of the article were essential to the progress of international law.

56. With regard to the text, he preferred the term "circumstances" to "a fact or state of facts". "Circumstances" was the term traditionally used in the *rebus sic stantibus* rule. It had the additional advantage of being supported by etymological considerations, since it was derived from the same Latin root as *stantibus*. The provisions of article 44 came into play as a result not of a mere isolated fact, but of a change in the facts surrounding the treaty, in other words, of the circumstances.

57. He agreed with Mr. Rosenne, Mr. Yasseen and Mr. Tunkin that procedural rules should be a condition not of the formulation of substantive rules but of their application. Substantive rules were directly addressed to those called upon to comply with them, who did so spontaneously in most cases. It was only in exceptional cases that an authority independent of the parties had to decide on the application and interpretation of those rules. To make the very existence of substantive rules subject to procedural qualifications would betoken an extremely pessimistic view of the prospects of compliance by States in good faith with such rules. In fact, violations of substantive treaty provisions were extremely rare. There were some 30,000 international treaties in existence and they were being daily carried out in good faith by the parties thereto. It was therefore not possible to say that there could be no compliance with a rule of international law in the absence of a system of third party adjudication and of machinery for the enforcement of decisions.

58. The pessimistic view to which he had referred reminded him of the "double norm" doctrine put forward towards 1880, by the advocates of legal positivism, Binding in criminal law and Thon in civil law. According to that theory, every legal rule appeared as two norms: first, an imperative norm addressed to the actual subjects of the law and laying down the consequences of a given behaviour in society; secondly, a norm addressed to the authorities—from the law courts down to the police—instructing them as to what their reaction should be to a given behaviour on the part of the addressees of the first norm. According to those who held that doctrine, the first norm was of little or no importance; the whole emphasis should be placed on the second norm, which was addressed to the courts and to the enforcement authorities. That reactionary philosophy, which had emerged not inappropriately in the days of Bismarck, had failed to gain acceptance in the realm of municipal law. It was even more bound to fail in international law, which governed a community consisting of a small number of subjects and which laid down what were essentially rules of co-ordination. The fact that the subjects of international law were few in number enhanced the importance of each of them; moreover, they were all of them sovereign and equal.

59. He agreed with Mr. Tunkin on the need to avoid anything that might hamper the progress of international law. At a time when society was going forward at the speed of the jet engine, the law should not be allowed to advance at a walking pace. States should be trusted to carry out substantive rules in good faith. In the absence of good faith, no procedural safeguards could ensure the observance of international law, and force would dominate international relations.

60. Mr. JIMÉNEZ de ARÉCHAGA said that he would like to see in article 44 an express reference to judicial procedures, as advocated by Mr. Briggs, as well as by a number of governments. Like Mr. Verdross, he also favoured the inclusion of a reference to diplomatic negotiations.

61. However, he was prepared to abide by the compromise reached in 1963 and omit the reference to judicial procedures in article 44, while maintaining the general provisions in article 51. That being his position, he wished to place on record his interpretation of the relationship between articles 44 and 51.

62. Article 51 did not provide for any unilateral right of termination. Paragraph 1 of that article laid down the requirement of notification of any claim by a party to terminate a treaty. With regard to the consequences of that notification, there was a significant difference between the provisions of paragraph 2 and those of paragraph 3. It was only in the event of no reply being received from the other party that, under the provisions of paragraph 2, a unilateral right of termination existed. In the event of objection being raised by any other party, paragraph 3 specified that "the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations".

63. That reference was not devoid of legal significance, since Article 33 (1) of the Charter obliged all member

States to seek a solution of their disputes by "peaceful means of their own choice". Accordingly, a party was not entitled to refuse to recognize the existence of a dispute and thereby deny to the other all methods of peaceful settlement. A lot had been talked about unfounded claims for revision, but it was important to remember that all too often a satisfied State would adopt a negative attitude and refuse to recognize the existence of a dispute, thereby denying to its treaty partner any means of settlement. In the presence of such an attitude, it would be in conformity with Article 33 of the Charter for the claimant State to take unilateral action. The normal position, however, would be the recognition of the existence of a dispute; that recognition would result from the reply to the original notification. In such cases, it was of course possible that the parties might not agree on the choice of the appropriate method of settlement. And under the Charter, one party was not entitled to impose on the other party a particular mode of settlement. The theory of the Charter was that every dispute had an appropriate procedure for its settlement and Article 36 (1) instructed the competent organs of the Organization to recommend "appropriate procedures or methods of adjustment".

64. If a disagreement arose on the choice of procedures for peaceful settlement, it was for the appropriate organ of the United Nations, or of the competent regional organization, to recommend the appropriate mode of settlement of the dispute. Now, Article 36 (3) of the Charter, which was binding on all United Nations organs, stated that "legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court". Normally, the kind of dispute that could arise concerning the validity or termination of a treaty would, in the majority of cases, be a legal dispute.

65. Those provisions did not amount to a system of compulsory adjudication, since Article 36 of the Charter did not lay down binding rules for States. However, the sequence of events clearly pointed to judicial adjudication of the question of the change of circumstances as a ground for the termination of a treaty. That approach was logical, for if a State initiated a legal dispute concerning the validity or termination of a treaty, the least that could be required, in order to release it from the treaty, was that it should be prepared to accept adjudication of the dispute by an impartial third party.

66. He supported the proposal by Mr. Verdross to replace the reference to a treaty provision fixing a boundary or affecting a transfer of territory by the more general reference to executed treaties and treaties that contained continuing obligations. He supported that proposal all the more readily because in 1963 he had himself unsuccessfully attempted to suggest the inclusion in article 44 of a provision of that type. It was true that, even after a treaty of that type had been executed, it continued to exist as a legal title to the territory transferred under its provisions. In that respect, it was clearly necessary to distinguish between the treaty itself and the situation created by its execution. All too often, a State attempting to revise a frontier settlement did so by attacking the treaty. It was therefore largely for psycho-

logical reasons that the provision excluding boundary treaties had been included, so as to reassure States that binding boundary settlements would not be upset by the rule in article 44. However, as he saw it, the exception did not require to be stated in article 44 because, from the legal point of view, the matter was already covered by the provisions of paragraph 1 (b) of article 53, which stated that the lawful termination of a treaty "Shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty".

67. An illustration of the distinction between executed and executory provisions in a treaty effecting a transfer of territory was provided by the "Free Zones of Upper Savoy and the District of Gex" case.⁷ The treaty provisions in dispute related to a transfer of territory from France to Switzerland; those same provisions, however, established a continuing obligation on the part of France to abstain from levying customs duties in certain frontier zones. Treaty provisions of the latter type could involve the application of the *rebus sic stantibus* principle, and in the very thorough discussion which had taken place in 1963, that example had been particularly stressed.

68. On the wording of the new paragraph 1(a), he agreed with Mr. Ago regarding the retention of the adjective "essential", which underlined the exceptional character of the rule. He also supported Mr. Ago's suggestion to incorporate in the main clause of paragraph 1 the idea embodied in the new paragraph 1 (c).

69. The introductory paragraph, which it was now proposed to drop, he felt should be retained because it served a useful psychological purpose, although it was not essential from the legal or technical point of view.

70. He did not favour the inclusion in article 44 of two additional paragraphs, similar to paragraphs 3 and 4 of the Special Rapporteur's redraft of article 43. Those provisions would only introduce further complexities into an already difficult article. The first of those paragraphs was unnecessary, because its purpose was already served by the rule of estoppel. A similar provision had been proposed by the Special Rapporteur in 1963, but had not been adopted by the Commission. At that time, the present Chairman had given as an example "the case of an agricultural country in process of industrialization, which wished to withdraw from certain trade treaties, if at the time of their conclusion the parties had had the agricultural nature of the country in mind".⁸

71. Mr. CASTRÉN said that, for the purpose of replying to two questions asked by the Special Rapporteur, he would elaborate on his remarks at the previous meeting.

72. First, he did not think that article 44 should contain a provision expressing an idea similar to that embodied in article 43, paragraph 3, as redrafted. If a party invoked a change of circumstances which it had brought on itself, such a change could hardly be said not to have been foreseen by the party in question—a point mentioned by Mr. Rosenne and Mr. Jiménez de Aréchaga.

Such action would, moreover, be unacceptable as conflicting with the overriding principle of good faith.

73. To the suggestion that article 44 should contain a provision analogous to that of article 43, paragraph 4, as redrafted, he would reply that if the Commission wished to deal with that point, it would have to do so either in a separate, general article, or in article 53, on the legal consequences of the termination of a treaty.

74. Mr. BRIGGS said that he had always endeavoured to avoid doctrinal disputes. However, he completely disagreed with the view that questions of theory prevented any reference to procedure in a substantive article. Article 36 offered a simple example. It stated the rule that "Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void". That rule could equally well be formulated in the following terms: "Any treaty which has been found by an international court to have been procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void". The only question which arose was that of deciding which of the two formulations was better. It had been suggested that a formulation of the second type would hamper the development of international law, but personally he felt that the orderly development of international law required a reference to judicial procedures.

75. On the wording of article 44, he supported the retention of the adjective "essential", which rendered the application of the rule more restrictive. The reference to "a fact or state of facts" was more precise than the single word "circumstances", but the matter could be left to the Drafting Committee.

76. Mr. VERDROSS, replying to Mr. Ago, said that a distinction should be drawn between the execution of a treaty and the validity of a treaty. If a State by treaty ceded a territory to another State, then, on the completion of the cession, the treaty could be said to have been executed, but it could not be said to have ceased to exist; disputes concerning the interpretation of the treaty might arise many years later, even a hundred years later. But the same thing could happen with other treaties. For example, under the State Treaty of 1955, Austria had committed itself to delivering to the USSR a certain quantity of petroleum within a specified period; on the completion of the delivery, the treaty was executed, but disputes concerning the quantity or the quality of the petroleum delivered or other matters might still arise. Thus the underlying principle did not apply only to treaties relating to the territory of a State. He was therefore still of the opinion that in such cases the *clausula rebus sic stantibus* could not be invoked.

77. The CHAIRMAN, speaking as a member of the Commission, said that he remained of the same opinion as in 1963. A rule concerning the operation of the *clausula rebus sic stantibus* was indispensable to international law, in consequence of the development of that law. The rule should, however, be formulated with the utmost care, lest it prejudice the stability of treaties. The fundamental rule was *pacta sunt servanda*, but it might happen that circumstances changed so radically that it would not be in the interest of the international

⁷ P.C.I.J., Series A/B, No. 46.

⁸ Yearbook of the International Law Commission, 1963, Vol. I, p. 149, para. 62.

order to maintain in being a treaty which had become anachronistic; in such a case, an exception to the rule *pacta sunt servanda* should be allowed.

78. Like Mr. Verdross, he considered that article 44 should not apply to a treaty which had been executed. And not only frontier treaties should be considered as having been executed but also the large number of treaties which established a certain régime as between States. Such treaties were executed in two ways: first, there was an immediate execution which established the conditions for the régime, and then an extended execution which maintained the régime in existence. The *clausula rebus sic stantibus* should be applied with extreme care to such treaties, lest it upset the régime in question.

79. To forestall possible abuse, the article should state that the proposed rule would apply to the exceptional case where a decisive element in the conclusion of the treaty had been modified. It would be the Drafting Committee's business to work out a formula offering ample safeguards.

80. The Commission's draft should contain a rule concerning the operation of the *clausula rebus sic stantibus* in order that those participating in the conference of plenipotentiaries which would carry the Commission's work to completion should realize the importance of the question and beware of the risk of the doctrine being abused.

81. Mr. AMADO said that never before, perhaps, had he followed a discussion with such keen interest, nor had he ever experienced such great satisfaction in seeing the correct rule crystallizing out. Every member of the Commission, each in his own way, had made a useful contribution. It remained for the Drafting Committee to work out the best formulation and to remove the minor differences between the versions of the article in the different languages.

The meeting rose at 1 p.m.

835th MEETING

Thursday, 20 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-4, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 44 (Fundamental change of circumstances)
(continued)¹

¹ See 833rd meeting, after para. 48, and para. 49.

1. The CHAIRMAN invited the Commission to continue its consideration of article 44.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that his own position remained very much what it had been in 1963 when he had submitted his second report. There were far too many indications, both in State practice and in legal literature, of the existence of a rule or doctrine that the continuance of a treaty could be affected by a fundamental change of circumstances for the issue to be ignored. The Commission was faced with the alternatives of either stating that no such rule existed, or trying to define it with sufficient strictness for it to be acceptable as part of the codification of the law of treaties. The first course was ruled out because it would certainly not receive the support of the majority of governments. Having taken the second course, the Commission had to a large extent discharged its task by adopting a close definition of the conditions for the operation of the rule. No doubt the drafting of article 44 could still be improved, but the position had been reached where the Commission had arrived at a text which, if applied in good faith, should not leave any room for abuse of the *rebus sic stantibus* principle.

3. It had been suggested by some members that article 44 would involve grave dangers to the stability of treaties, unless it contained procedural safeguards in the form of a requirement of the exhaustion of negotiations, and possibly even of a jurisdictional clause. He had some sympathy for those views but felt that there was no reason for making procedural requirements part of the substance of article 44 when the Commission had not done so in the case of article 37, on *jus cogens*, which represented a much greater danger to the stability of treaties. The provisions of article 44 were undoubtedly less susceptible to broad interpretation than some other articles in which the Commission had not included any procedural safeguards.

4. What the Commission should ensure was that the application of the provisions of article 44 was linked with the procedural provisions embodied in article 51, thereby providing the necessary guarantees against a purely arbitrary application of the doctrine of fundamental change of circumstances.

5. The *pacta sunt servanda* rule in itself prevented a State, acting in good faith, from abusing the provisions of article 44. The draft articles on the law of treaties were intended to become an international convention, and the application of that convention in good faith would provide a further guarantee against abuse.

6. It was almost impossible to prevent an arbitrary application of the law by one State on the basis of an interpretation of a legal rule which was considered inadmissible by others. In the present state of international law, protection could not be complete. In that respect, the situation of article 44 was no different from that of other articles, or indeed of other parts of international law.

7. The narrow formulation of the text of the article itself was calculated to diminish the dangers of the doctrine. It had been agreed by all members that the drafting should be as tight as possible so as to make it clear that

any application of the *rebus sic stantibus* doctrine was exceptional.

8. With regard to the wording of the article, he noted that the majority of members agreed with the suggestion to merge the first two paragraphs of the 1963 text, thereby dispensing with the old paragraph 1 which had been designed to emphasize the exceptional character of recourse to the notion of fundamental change of circumstances. It was felt that the psychological advantage thus gained did not justify the considerable inelegance of repeating in the introductory paragraph what was already stated in the form of a rule in the next paragraph.

9. The Drafting Committee had now decided that the set of articles to which article 44 belonged should be formulated negatively. In the 1963 text, paragraph 1 stated that a party could only invoke the change of circumstances "as a ground for terminating or withdrawing from the treaty under the conditions set out in the present article", while paragraph 2 set out the conditions for the application of paragraph 1. If the rule were now stated negatively, the former paragraphs 1 and 2 could be merged into one paragraph, stating that a fundamental change of circumstances "may not be invoked as a ground for terminating the treaty unless...". Wording of that kind would provide all the degree of emphasis formerly achieved by the presentation in two paragraphs in 1963.

10. He accepted the suggestion by Mr. Ago that the idea contained in sub-paragraph (c) should be transferred to the opening phrase of paragraph 1, although, at least as far as the English text was concerned, there could be no question but that the conditions set out in sub-paragraphs (a), (b) and (c) were cumulative; in English legal drafting, the provisions of those three sub-paragraphs could never be interpreted disjunctively. Paragraph 1 could therefore be reformulated to read more or less:

"A fundamental change which has occurred with regard to circumstances — or a fact or state of facts — existing at the time when the treaty was concluded, and which is not provided for in the treaty, may not be invoked by a party as a ground for terminating or withdrawing from the treaty unless:"

followed by sub-paragraphs (a) and (b). That formulation would have the advantage of keeping the conditions in sub-paragraphs (a) and (b) distinct, while at the same time achieving the intended cumulative effect.

11. The various suggestions which had been made with regard to the words "a fact or state of facts" and the suggested alternative "circumstances" could be referred to the Drafting Committee. He appreciated the purpose of Mr. Tunkin's proposal, but felt that the word "fact", if used by itself, would require an extremely narrow interpretation if the rule itself was to be kept narrow.

12. In sub-paragraph (a), the word "essential" was, in his opinion, fundamental to the safety of the text. To say that the fact or state of facts constituted merely a "basis" of the consent of the parties would make the provisions of the article much too wide.

13. In sub-paragraph (b), the introduction of the term "continuing" seemed to be generally approved. That

adjective to some extent met the point raised by Mr. Verdross on paragraph 2, with regard to the distinction between executed and executory clauses of a treaty.

14. He could not agree with the suggestion that the intention of paragraph 2 was to exclude executed treaties, and accordingly could not accept the change of wording proposed by Mr. Verdross. The purpose of paragraph 2 was to exclude from the operation of the article treaties which dealt with boundary settlements. The reason for that exclusion was not that the provisions of those treaties were "executed" provisions, but that treaties of that type were intended to create a stable position. It would be inconsistent with the very nature of those treaties to make them subject to the *rebus sic stantibus* rule. In a recent arbitration case, Mr. Ruda and himself had been concerned with problems arising out of a boundary treaty more than half a century old, and they would both find it extremely difficult to understand the idea that a treaty of that type could be regarded as completely executed and terminated.

15. The question of determining what treaties were covered by the exception stated in paragraph 2 was largely one of fact. In the case of territorial settlements, the provisions of the treaty could be apparently completely executed, but problems could later arise as to the interpretation or the application of an obligation contained in the treaty.

16. Admittedly, it was difficult to define the treaties covered by the exception in paragraph 2. It had been suggested by some members that it was sufficient to refer to treaties which fixed boundaries. However, a wording of that kind would create ambiguity; the expression "to fix a boundary" had such a direct meaning, as referring to actual delimitation of frontiers, that it would exclude such cases as the cession of an island, like Heligoland.

17. He had suggested that article 44 should include a paragraph similar to paragraph 3 of his redraft of article 43, stating that a party to a treaty whose own breaches had caused a change of circumstances would be unable to invoke that change as a ground of termination. It had been suggested by one government that the exclusion should apply to any party which had contributed to the change in circumstances, but he himself had not wished to go so far. In any case, his suggestion had not attracted much comment in the Commission and should perhaps be considered by the Drafting Committee.

18. Lastly, he had placed before the Commission a proposal for the inclusion in article 44 of a paragraph on the subject of equitable compensation for unjust enrichment, similar to paragraph 4 of his redraft of article 43, though it was not a proposal that he himself would advocate. The question whether such a provision should be included in the draft articles, and whether it should apply both to article 43 and to article 44, should perhaps be considered when the Commission came to consider article 53, on the legal consequences of the termination of a treaty.

19. Mr. VERDROSS said he wished to remove the misunderstanding which seemed to have arisen between himself and the Special Rapporteur; he approved the underlying idea of paragraph 2 of the Special Rapporteur's

redraft. What he had meant to say in his earlier statements was that treaties fixing a boundary or effecting a transfer of territory were not the only treaties to which the *clausula rebus sic stantibus* was inapplicable.

20. More generally, in his opinion the clause could not be invoked in respect of treaties which were completely executed, but he had never intended to say that completely executed treaties ceased to be valid: on the contrary, they continued to exist as treaties, and disputes concerning their interpretation could still arise.

21. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 44 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*²

ARTICLE 45 (Emergence of a new peremptory norm of general international law)

Article 45

Emergence of a new peremptory norm of general international law

1. A treaty becomes void and terminates when a new peremptory norm of general international law of the kind referred to in article 37 is established and the treaty conflicts with that norm.

2. Under the conditions specified in article 46, if only certain clauses of the treaty are in conflict with the new norm, those clauses alone shall become void. (A/CN.4/L.107, p. 41)

22. The CHAIRMAN invited the Commission to consider article 45, for which the Special Rapporteur in his fifth report (A/CN.4/183/Add.3, p. 23) had proposed an amended text for paragraph 2 reading:

If certain clauses only of the treaty are in conflict with the new norm and the conditions specified in article 46, paragraph 1, apply, those clauses alone shall be void.

He had also proposed the substitution of the word "if" for the word "when" in the first line of paragraph 1.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that there had been no detailed comments on article 45 and such governments as had made observations had merely referred to their comments on article 37 and reiterated their difficulties with the *jus cogens* rule itself.

24. Some comments submitted in writing by Mr. Liu applied to both article 37 and article 45 and were in line with the observations of certain governments.

25. Paragraph 2 dealt with the problem of separability. The Commission had established a distinction between article 37 and article 45 in that it had allowed separability in the latter but not in the former. Even if the Commission were ultimately to decide to deal with the whole question of separability in a single article, there would still be a strong case for retaining paragraph 2 so as to underline the difference between those two articles.

26. In paragraph 1, he proposed only a minor drafting change, the replacement of the word "when" by the word "if", so as to stress that the rule applied to an

exceptional type of case. The term "when" could give the impression that the cases envisaged occurred in the ordinary course of events.

27. He had left the wording "A treaty becomes void" in order to meet the wish of the Commission. The point had, however, been made by governments that there was some inelegance in using that expression because the result was a case of nullity, the consequences of which were dealt with not in article 52, on the legal consequences of the nullity of a treaty, but in article 53, on the legal consequences of the termination of a treaty. Personally he would prefer a different expression to describe the effects of the emergence of a new rule of *jus cogens*. In his view, the situation in article 45 was that performance had become contrary to international law and the treaty was therefore terminated.

28. Mr. YASSEEN said that article 45 should stand. In 1963, the Commission had unanimously taken the view that the nullity contemplated in the article was a nullity *ex nunc*, and for that reason had preferred the conjunction "when" to the conjunction "if". However, he could accept the latest redraft, for the expression "becomes void" was sufficient to convey the idea that the nullity was not retrospective. The States had not done anything wrong in concluding the treaty; consequently, if a new peremptory rule subsequently emerged which conflicted with the treaty, the treaty could not be void *ab initio*.

29. With regard to paragraph 2 dealing with separability, he had no objection regarding the substance. The principle of separability was not admitted in cases where the treaty was void *ab initio* as conflicting with a rule of *jus cogens* existing at the time of its conclusion, a case governed by article 37, but should be admitted in cases where the *jus cogens* emerged after the conclusion of the treaty. Since, however, the Commission was proposing to deal with the entire question of the separability of treaties in a separate article, there was no reason why an exception to the system should be made specifically in the case of article 45. Since the provisions concerning separability had been provisionally dropped from each of the articles concerning the nullity or termination of treaties, paragraph 2 should be dropped, pending a thorough study of the whole question in connexion with article 46.

30. Mr. CASTRÉN said that he wished to repeat the proposal he had made during the discussion on article 37, that articles 37 and 45 should be amalgamated; he hoped the Drafting Committee would take that proposal into consideration.

31. He could accept the drafting change proposed by the Special Rapporteur in paragraph 1, but the provision should also be improved so far as substance was concerned. It seemed excessive to provide that a treaty became void in consequence of the emergence of a new peremptory rule of general international law. The treaty had been valid until the international law had changed. Actually, the general rule was that an instrument that was declared void was void *ab initio*. He had the impression that the Government of the United States held the same opinion, as could be seen from the Special Rapporteur's fifth report. The report also mentioned that the delegation of

² For resumption of discussion, see 842nd meeting, paras. 38-57.

El Salvador to the Sixth Committee of the General Assembly had suggested that the Spanish text of the article begin with the words “*Un tratado se extingue cuando*”, without mentioning nullity (A/CN.4/183/Add.3, p. 22). The Commission itself, in paragraph (2) of its commentary to article 45 as adopted in 1963, had said “it [the rule] does not nullify the treaty, it forbids its further performance”.³

32. In the light of that comment, and in order to simplify paragraph 1, he proposed that it be redrafted to read:

“1. A treaty terminates if it is incompatible with a new peremptory norm of general international law of the kind referred to in article 37 which emerged after the treaty entered into force”.

33. Paragraph 2 was perhaps hardly necessary, since the entire question of the separability of treaties could be dealt with in article 46. If the Commission nevertheless wished the paragraph to stand, he would propose that the words “shall be void” be replaced by the words “shall terminate”.

34. Mr. AGO said that to his mind the expression “becomes void” indicated quite definitely that the nullity was a nullity *ex nunc*. If some members of the Commission considered that, by its very nature, the nullity was necessarily a nullity *ex tunc*, it would be better to add that the treaty “terminates” and so to remove all ambiguity.

35. Mr. VERDROSS proposed that, in paragraph 1, the words “a new peremptory norm of general international law of the kind referred to in article 37” be replaced by the words “a new norm having the character of *jus cogens*”. The provision would then be simpler and clearer and would have the advantage of dispensing with the adjective “peremptory” (*impérative*) which was pleonastic seeing that any norm was peremptory.

36. Mr. AGO said that the French word “*impératif*” denoted something from which there could be no derogation; the corresponding term in other languages might not have quite the same meaning, but in each language the term used should be the customary term.

37. Mr. de LUNA said that he would have to oppose Mr. Castrén’s proposal for the amalgamation of articles 45 and 37 for the very reason that he supported Mr. Castrén’s approach to the substance of the article. The case dealt with in article 45 was one of the termination or extinction of a treaty which had been validly in force. The treaty could no longer be executed because of the emergence of a new *jus cogens* rule. It was a case of supervening legal impossibility of the object of the treaty, parallel to that in article 43, where the performance of the treaty had become physically impossible.

38. Viewed from that standpoint, the situations envisaged in articles 37 and 45 were radically different and so should be dealt with in separate articles. In the case covered by article 37, the treaty was void *ab initio*; in the case in article 45, a treaty the original object of which had been perfectly licit was later extinguished as a

result of the subsequent emergence of a new rule of *jus cogens* which made its object legally impossible.

39. He agreed with Mr. Yasseen that the problem of separability should be dealt with in one general article and that paragraph 2 should therefore be dropped.

40. He did not see how the term “imperative” could in any language convey the idea of a constitutional norm. As he had stated during the discussion on article 37 (828th meeting, para. 34), *jus cogens* could be defined, in the words of Mr. Bartoš in 1963, as “the superstructure of the international community which resulted from the evolution of international society” and “the minimum of rules of conduct necessary to make orderly international relations possible”.⁴ Those minimum rules proceeded from the conscience of the international community at a particular moment in its historical evolution.

41. For those reasons, it was essential to describe fully the implications of the *jus cogens* character of a rule of international law.

42. Mr. AMADO said he supported Mr. Verdross’s proposal for the deletion of the word “peremptory”. The meaning of paragraph 1 would not be affected by the change, for the reference to article 37 showed clearly that a rule of *jus cogens* was meant.

43. The Drafting Committee should consider carefully whether both expressions, “becomes void” and “terminates”, should stand.

44. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission had acted wisely in keeping separate the provisions of articles 37 and 45. The case envisaged in article 37 was one of nullity, whereas that in article 45 was one of termination.

45. The concept embodied in article 45 was new to international law but not to legal science. Countries with a rigid constitution had long been familiar with the problem of the conflict between constitutional law and statute law. In those countries a distinction was made between cases where a statute conflicted with a pre-existing rule of constitutional law and cases where a statute came into conflict with a subsequently adopted rule of constitutional law, and the constitutional court of Italy and the constitutional courts or supreme courts of certain Latin American countries had established a clear distinction between the effects of such conflict in the two cases. Where a statute had been adopted in violation of a pre-existing constitutional norm, it was invalid because, in adopting it, the legislature had acted *ultra vires*. If, however, a statute came into conflict with a subsequent norm of constitutional law, the case was one of derogation. Since a statutory provision was automatically repealed by the subsequent enactment of legislation that was incompatible with it, then *a fortiori* a statutory provision would be repealed by the subsequent adoption of a norm of constitutional law which conflicted with it.

46. For these reasons, he agreed with the view that the expression “becomes void” was inappropriate in paragraph 1, which should state simply that the treaty

³ Yearbook of the International Law Commission, 1963, Vol. II, p. 211.

⁴ Yearbook of the International Law Commission, 1963, Vol. I, p. 76, para. 33.

terminates. The effects of the emergence of a new rule of *jus cogens* were adequately described by the words “*prend fin*” used in the French version: the treaty came to an end.

47. With regard to paragraph 2, he held the view that the question of separability should be dealt with as a whole. Perhaps when the Commission came to consider article 46, it might find that the articles on *jus cogens* had certain peculiar features which justified a special reference to separability.

48. Mr. TUNKIN said that the effect of the emergence of a peremptory norm in the case contemplated in article 45 would be analogous to its effect in the situation covered in article 37. The difference was that in the former case the effect would be *ex nunc*, as was quite clearly brought out in the text adopted at the fifteenth session, the meaning of which could hardly be misunderstood.

49. The reference to article 37 must be maintained, because that article stated what was meant by a peremptory norm.

50. As the Commission had not yet reached a decision about the provisions to be inserted concerning separability, consideration of paragraph 2 should be deferred.

51. Mr. BRIGGS said that the effect of the emergence of a new peremptory norm invalidating a treaty *ex nunc* would mean some interference in the expectations of the parties, and would destroy a legal relationship that had been valid when the treaty had been concluded. That consideration might have prompted the United States Government to interpret article 37 as having retroactive effect. It seemed to him that there was also an element of retroactivity in article 53, paragraph 2.

52. As he had indicated during the discussions on article 37, the rules of *jus cogens* set out in articles 37 and 45 were a threat to the stability of treaties, in the absence of compulsory international jurisdiction.

53. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was running into a terminological difficulty, the reason for which was that naturally everybody tried to import into international law ideas which were sometimes peculiar to his own country's system of international law.

54. The expression “becomes void” was clear. But according to the theory and case-law of many States, a juridical act which was declared void was deemed never to have existed, and only some of its effects were admitted. In the case contemplated by article 45, the Commission's intention was that the existence of the treaty should not be disputed but that it should cease to produce its effects *ex nunc*.

55. Similarly, the use of the adjective “peremptory” (*impérative*) was accounted for by the fact that, in the legal systems derived from Roman law and French law, a peremptory rule was a rule from which there could be no derogation. Actually, the point which the Commission had meant to stress was precisely that the new norm referred to in article 45 was a universal norm from which there could be no derogation. In certain legal systems, particularly in German administrative law, peremptory norms were distinguished from permissive norms.

56. The Commission should explain in its commentaries to the articles the difficulties raised by the use of certain expressions. It was perhaps inclined to use excessively terse language, and it might be desirable to offer some fuller explanations to prevent any misunderstanding of its intentions.

57. Article 45 raised the further question of transitional measures. If provisions concerning such measures were added to the article, the effect of the emergence of a new rule of *jus cogens* might be postponed indefinitely. At the same time, there was no doubt that, in practice, States would endeavour to make adjustments to deal with exceptional situations.

58. Mr. VERDROSS said he supported the Chairman's remarks on terminology. The Commission should remember that its draft would eventually become a worldwide convention which would be translated into many languages. It should, therefore, choose terms that would be understood by all and were susceptible of translation.

59. Mr. ROSENNE, referring to the Chairman's observations on problems of terminology, said that the Drafting Committee was already finding it difficult to prepare concordant texts in three languages and could not be expected to examine problems of translation into other languages. All it could hope for was to express as lucidly as possible the rules in the articles themselves and to incorporate any explanations that were necessary in the commentary.

60. In his view, the transitory aspect of the situation that could arise with the emergence of a new peremptory norm was covered by the words “becomes void and terminates”.

61. He was in favour of maintaining two separate articles on *jus cogens*, but agreed that the distinction between article 37, which dealt with nullity *ab initio*, and article 45, which was concerned with subsequent nullity, might be brought out by placing greater stress on the fact that article 45 dealt primarily with the aspect of termination. One way of achieving that would be to delete the references in article 53, paragraph 2, to a treaty becoming void.

62. The language of paragraph 1 in article 45 ought not to be changed, apart from the substitution, suggested by the Special Rapporteur, of the word “if” for the word “when”.

63. He felt no deep concern about the problem of retrospective effect as far as articles 37 and 45 were concerned, because the matter would be adequately covered by the general rules of the inter-temporal law in its application to the interpretation of treaties.

64. Mr. AMADO said that the word “peremptory” was the right term in article 37. But if article 45 spoke of “a new peremptory norm of general international law of the kind referred to in article 37”, the reader would wonder whether there were any peremptory norms of a kind other than those referred to in article 37. The adjective “peremptory” was not only unnecessary in article 45, it was also a source of confusion.

65. Mr. RUDA considered that the opening words of paragraph 1 as adopted in 1963, “A treaty becomes

void and terminates”, should stand. What happened was that the treaty did not terminate spontaneously because of the emergence of a new rule of *jus cogens*, but that the effect of the new rule was that the treaty became void and consequently terminated.

66. He shared Mr. Amado's opinion concerning the use of the word “peremptory”. It was true that in article 45, as in article 37, the notion to be conveyed was that of public order. Article 37 was based on the idea that, in modern international law, there were fundamental norms of international public order from which no State could derogate, even by agreement with another State. That idea, which was clear enough to jurists brought up in the tradition of the Roman legal system, was reflected in the word “peremptory”, not in the word “imperative”. The text as it stood might create the impression, as Mr. Amado had said, that there were norms of general international law which were not peremptory — an idea that contained an inherent contradiction, for all norms of international law, as indeed the rules of any law, were peremptory, precisely because they were rules of law.

67. The intention in the particular context was to say that there were certain rules of public order from which the parties could not derogate. The difference in terminology and approach as between the Roman law system and the common law system presented a difficulty which could, however, be overcome by the simple solution proposed by Mr. Verdross, which was that the paragraph should refer to “a norm having the character of *jus cogens*”.

68. So far as paragraph 2 was concerned, he was inclined to share Mr. Yasseen's view that it would be wise to postpone consideration of that provision until the Commission dealt with article 46, concerning the separability of treaty provisions.

69. Mr. YASSEEN said that the expression “*norme impérative*” denoted a rule of *jus cogens*. All rules of law were mandatory, but not all were peremptory. In article 37, the Commission had given a full definition of *jus cogens* as a peremptory norm of international law from which no derogation was permitted. Article 37 consisted of two parts: one stated that the rule was peremptory, and the other, which in the opinion of some was explanatory and in the opinion of others substantive, stated that no derogation from such a rule was permitted. Consequently, when article 45 said that a treaty became void and terminated if a new peremptory norm of general international law of the kind referred to in article 37 was established, it was referring back to both of the two parts of article 37. From the practical point of view, that was all the Commission meant to say.

70. With regard to the view that article 45 ought to refer only to the termination of the treaty, he said that it ought to specify the reason for the termination, which was in effect the nullity of the treaty. There was no room for any doubt: a treaty that was incompatible with a rule of *jus cogens* was void. It would surely be wrong to refrain from mentioning the nullity just because nullity was always *ab initio*. In any case, even if some thought that a nullity was always a nullity *ab initio*, the

Commission was preparing a draft convention and was perfectly free to say that, in the particular case, the nullity was not a nullity *ab initio* and did not operate *ex tunc* but only *ex nunc*. That conclusion was quite evident from the text of the article, which opened with the words “A treaty becomes void and terminates . . .”. That was why he thought that the 1963 text should be retained, if it was intended to set out clearly the meaning of *jus cogens*, whose effects were recognized by the Commission in the law of treaties.

71. Mr. AGO said that the problem was quite simple: as he had already said, in each language the term used should be the term customarily employed to express the idea that was intended to be expressed. In the French text, the customary term “*impérative*” should be used, and in English the word “peremptory”; it was not without reason that the Commission had not employed the English word “imperative”. If, however, the Commission wished to avoid all ambiguity, it might use in article 45 precisely the same formula as in article 37 and omit the words “of the kind referred to in article 37”, which were a little inelegant; article 45, paragraph 1, would then simply speak of “a new peremptory norm of general international law from which no derogation is permitted”.

72. The Chairman had rightly drawn attention to the problem of substance and to the comments of jurists who had criticized the Commission for preparing an excessively terse text that was difficult to apply, an opinion apparently shared by several Governments, including that of the United States. The international community and the international legal order had no legislator capable of changing, from one day to the next, the rules of the civil code and of deciding that some particular rule became peremptory. It might take a long time for a dispositive rule to become peremptory. A peremptory rule began to take shape at a particular time, but was not in fact “established” as such until much later.

73. In addition, several members of the Commission considered that the article should specify as clearly as possible that the nullity was operative only as from the time when the peremptory norm was established. That being so, perhaps the order of the passage should be reversed and the Drafting Committee might consider a text on the following lines:

“If a new peremptory norm of general international law emerges from which no derogation is permitted, an existing treaty which is incompatible with that norm becomes void and terminates as from the time when the new norm is established.”

The word “emerges” would indicate the long process by which a peremptory norm eventually became established, whereas the expression “is established” would denote the completion of the process.

74. Mr. de LUNA, commenting on the expression “peremptory norm”, said that any legal precept was mandatory; the contrast was between *jus dispositivum* and *jus cogens*. Clearly, however, some norms were more peremptory than others, and it was the former which constituted *jus cogens*. It would be more sensible and more elegant to drop the cross-reference to article 37

and to define in article 45 the rule of *jus cogens* in exactly the same terms as in article 37.

75. He had never argued that nullity always operated *ex tunc*. There were two kinds of nullity—absolute and relative; there was the nullity which could be declared *de officio*, and there was the nullity which could only be declared on the application of a party and which consequently never operated *ex tunc*, but always *ex nunc*. The formula which the Commission should choose was therefore clear, and the article should be referred to the Drafting Committee.

76. Mr. TUNKIN said that the wording suggested by Mr. Ago had certain obvious drawbacks. First, it departed considerably from the general structure of article 37. Secondly, it made no reference to article 37. During the discussion of that article there had been general agreement in the Commission that it should be read in conjunction with article 45 so as to obviate any possibility of misunderstanding and therefore a cross-reference from one to the other was necessary.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had been a useful one on an article which was perhaps more intricate than had at first been realized. Provided articles 37 and 45 were read together, there should be no room for misunderstanding as to their meaning. Some governments had complained that the Commission, after drawing a distinction between nullity and termination, had then confused the two concepts in articles 52 and 53, but that was a defect that could be remedied by better drafting. Perhaps in places elegance might have to be sacrificed in the interests of clarity so as to bring out the connexion between articles 37, 45, 52 and 53. The word “peremptory” was not indispensable in article 45, but it did catch the attention of the reader. Perhaps the Drafting Committee could be asked to consider whether or not it should be retained. The reference to article 37 was, of course, necessary because it linked the two articles.

78. The Drafting Committee should also be asked to consider the point made by the Chairman about the need to cover transitional arrangements that might be necessary with the emergence of a new norm of general international law, as there was perhaps some force in the contention that the statement of the rule was rather too abrupt. The new text suggested by Mr. Ago seemed to be designed to soften the draft in that regard, and to reassure those States that had expressed concern about the rule being too indefinite on account of the difficulty of knowing when a peremptory norm had become established.

79. As far as merging articles 37 and 45 was concerned, Mr. Castrén would have noted that most members were in favour of keeping them separate—and that was his own firm opinion—for otherwise serious confusion might result.

80. The CHAIRMAN suggested that article 45, together with the various proposals made concerning the article, be referred to the Drafting Committee.

*It was so agreed.*⁵

⁵ For resumption of discussion, see 842nd meeting, paras. 58-70.

Arrangements for the Eighteenth Session

81. The CHAIRMAN said that Mr. Rosenne had proposed that, in conformity with a proposal submitted to and adopted by the General Assembly, the Commission decide forthwith that its summer session would last for twelve weeks, on the understanding that it would be free to meet for a shorter period if such a long session proved not to be necessary.

82. Mr. VERDROSS said that he would not object to a summer session of twelve weeks if the Commission had the necessary funds at its disposal, though personally he might not be able to attend for the whole of the session.

83. The CHAIRMAN proposed that the Commission decide that its summer session should last until 22 July 1966.

It was so decided.

The meeting rose at 12.30 p.m.

836th MEETING

Friday, 21 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Organization of Work

1. The CHAIRMAN said that the Officers of the Commission had met that morning and submitted the following recommendations:

(a) it is noted that it is impossible for the Commission to complete at the present session its examination of all the articles in part II of the draft and it is accordingly recommended that the Commission should not go beyond article 51;

(b) it is recommended that the Drafting Committee speed up its work and meet more frequently and that the Commission hold shorter meetings in order to allow the Drafting Committee the time it needs;

(c) it is recommended that the second Vice-Chairman, Mr. Paul Reuter, be asked to replace the General Rapporteur, Mr. Elias, now absent, and undertake the drafting of the Commission's report on its present session;

(d) it is recommended that the articles adopted at the present session be included in the report without any commentary and that the commentaries be added when the Commission's final report on the draft articles on the law of treaties is prepared;

(e) it is proposed that the Commission express its thanks to the Government of Monaco for its invitation and hospitality.

The recommendations of the Officers of the Commission were unanimously adopted.

Law of Treaties

(A/CN.4/183 and Add.1-4, A/CN.4/L.107, A/CN.4/L.108)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 46 (Separability of treaty provisions for the purposes of the operation of the present articles)

Article 46

Separability of treaty provisions for the purposes of the operation of the present articles

1. Except as provided in the treaty itself or in articles 33 to 35 and 42 to 45, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall relate to the treaty as a whole.

2. The provisions of articles 33 to 35 and 42 to 45 regarding the partial nullity, termination or suspension of the operation of a treaty or withdrawal from particular clauses of a treaty shall apply only if:

(a) The clauses in question are clearly severable from the remainder of the treaty with regard to their application; and

(b) It does not appear either from the treaty or from statements during the negotiations that acceptance of the clauses in question was an essential condition of the consent of the parties to the treaty as a whole. (A/CN.4/L.107, p. 41)

2. The CHAIRMAN invited the Commission to consider article 46, for which the Special Rapporteur had proposed a new title and text which read:

Grounds for invalidating, terminating, withdrawing from or suspending the operation only of particular clauses of a treaty

1. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty which relates to particular clauses of the treaty may be invoked only with respect to those clauses when:

(a) the said clauses are clearly separable from the remainder of the treaty with regard to their application; and

(b) it does not appear from the treaty or from the circumstances of its conclusion that acceptance of those clauses was an essential basis of the consent of the other party or parties to the treaty as a whole.

2. However, in cases falling under articles 33 and 35 the State entitled to invoke the fraud or the personal coercion of its representative may do so with respect either to the whole treaty or only to the particular clauses as it may think fit.

3. Paragraph 1 does not apply in cases falling under articles 36 and 37. (A/CN.4/183, p. 24)

3. Mr. YASSEEN said that article 46 laid down a general principle governing nearly all cases of the

termination or nullity of treaties. It would be better to allow members of the Commission time over the weekend to consider how the article should be redrafted.

4. Mr. JIMÉNEZ de ARÉCHAGA said that some members had prepared their statements on article 46 and would be seriously inconvenienced if the Commission took up another article instead.

5. Mr. ROSENNE said that article 46 raised three distinct problems, its substance, its place and its application to other articles in the draft. The first two could be discussed forthwith, but the third would have to be left until the eighteenth session when the Commission had before it all the other articles in their final form.

6. Mr. TUNKIN said that the discussion could at least be opened on articles 46 and 47 and resumed if necessary at the following meeting.

7. Mr. CASTRÉN said that the Special Rapporteur had expressed a wish that the Drafting Committee should consider the order of the articles as soon as possible. He asked what action had been taken to comply with that request.

8. The CHAIRMAN said that the Drafting Committee had decided to deal with the question of the order of the articles after settling the text of the articles which had been referred to it. He proposed that the Commission begin its consideration of articles 46, 47 and 49 and continue in the following week.

It was so agreed.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that in paragraphs 6 and 7 of his observations he had explained why he was suggesting that articles 46, 47 and 49 be transferred to section 1 of part II. If that change were made, the reader would first be confronted with the restrictions on the operation of the detailed articles laying down the grounds for invoking the invalidity, termination or suspension of treaties; that might help to diminish the impression that the provisions of that part of the draft would endanger the stability of treaties.

10. The arrangement adopted in the 1963 text, whereby article 46 dealt in general terms with the problem of separability and then separate provisions on the subject were included in various succeeding articles, was heavy and repetitive.

11. In re-examining the problem, the Commission must be quite clear as to which articles were subject to the operation of the separability rule, and whether it applied automatically or at the discretion of the State invoking termination or nullity. At its fifteenth session it had been decided that, in cases of fraud, the injured State had the option of applying the rule, but the Commission had not really tackled the problem of how the rule operated in cases of error.

12. Mr. JIMÉNEZ de ARÉCHAGA said that the Special Rapporteur's new draft for article 46 was a considerable improvement on the 1963 text.

13. At its fifteenth session, the Commission had adopted a mixed system of a general article on separability, with individual provisions on the subject in the various articles to which the rule applied. Now that it had obtained a clearer idea of how the principle applied in different cases, the Commission could consider a single

provision concerning the separability of treaties. He welcomed the proposal by the Special Rapporteur that the article should be transferred to part II, section 1 (General rules), as that would enable the Commission to dispense with the individual clauses on separability in various articles.

14. For purposes of separability, the Special Rapporteur had grouped grounds for invalidity or termination into three categories. The first were those in which separability could be admitted, provided certain clauses be separated from others and the parties had not expressed any intention of prohibiting such separation when the treaty had entered into force. The second group comprised certain grounds in which a State had been guilty of fraud or coercion, and therefore, as an additional sanction, an option was given to the injured State to terminate or suspend the operation of the whole or only some part of the treaty. Thirdly, there was the category of grounds which constituted such serious violations that the separability of any one of their provisions was unthinkable. He fully endorsed the approach adopted by the Special Rapporteur in his new text, but pointed out a possible interpretation, which certainly had not been intended by the Special Rapporteur, that denunciation in accordance with the terms of article 38 could apply to only parts of a treaty. That would obviously not be the case unless there was some express provision to that effect in the treaty itself. Thus, if article 38 were to be retained, a reference to it would need to be included in paragraph 3 of the Special Rapporteur's new text.

15. It was also necessary to emphasize that article 46 did not apply to the cases contemplated in article 42, which would be regulated by a different system.

16. In his opinion, and as suggested by certain governments, treaties violating *jus cogens* should be included in paragraph 1 and not in paragraph 3.

17. The complete nullity of a treaty as a whole should be the rule in cases where the offending clauses formed its object, but if the clauses in question were accessory stipulations, separability could be allowed; in that regard the Commission might follow private law where a contract was void if its object were found to be illegal but where an accessory clause contrary to public order would be regarded, to use the French expression, as "*réputée non écrite*" and would not render the contract as a whole void.

18. Mr. ROSENNE said that in general the Special Rapporteur's proposal had merit, and that he shared many of the views expressed by Mr. Jiménez de Aréchaga. However, the Commission should adhere to its position that the fundamental principle was that treaties were indivisible and make it clear that the separability of treaty provisions was an exception. That principle had been stated twice in the Special Rapporteur's original text and was retained in the 1963 text of article 46, paragraph 1. It would then be easier to combine the objective and subjective elements involved in the rule.

19. He agreed with Mr. Jiménez de Aréchaga that article 46 would not apply to the cases contemplated in article 42 (breach), but did not think that the application of paragraph 3 should be extended to cover cases of conflict with *jus cogens* (article 37), though it was

otherwise as regards article 45. The Drafting Committee should be asked to consider which articles were subject to the application of the rule in article 46, so as to ensure that the categories set out in the new article were comprehensive.

20. The CHAIRMAN suggested that further consideration of article 46 be postponed until the next meeting.

*It was so agreed.*¹

ARTICLE 47 (Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty)

Article 47

Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty

A right to allege the nullity of a treaty or a ground for terminating or withdrawing from it in cases falling under articles 32 to 35 and 42 and 44 shall no longer be exercisable if, after becoming aware of the facts giving rise to such right, the State concerned shall have:

(a) Waived the right; or

(b) So conducted itself as to be debarred from denying that it has elected in the case of articles 32 to 35 to consider itself bound by the treaty, or in the case of articles 42 and 44 to consider the treaty as unaffected by the material breach, or by the fundamental change of circumstances, which has occurred. (A/CN.4/L.107, p. 42)

21. The CHAIRMAN invited the Commission to consider article 47, for which the Special Rapporteur had proposed a new title and text which read:

Relinquishment of the right to invoke a ground of invalidity, termination, withdrawal or suspension

A State may not invoke any ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 31 to 35 inclusive or articles 42 to 44 inclusive if, after becoming aware of the facts giving rise to such ground, the state:

(a) shall have agreed to regard the treaty as valid or, as the case may be, as remaining in force; or

(b) must be considered, by reason of its acts or its undue delay in invoking such ground, as having agreed to regard the treaty as valid or, as the case may be, as remaining in force. (A/CN.4/183, p. 17)

22. Sir Humphrey WALDOCK, Special Rapporteur, said that he had analysed the comments of governments on article 47 in his report. Some had objected to the way in which the rule had been expressed, and more particularly to the use of the words "waived" and "so conducted itself as to be debarred". The text adopted in 1963 was the result of a compromise and the Commission's inability to find better language. In order to take account of some of the comments made, he had suggested that the rule should be stated in more affirmative terms, though he was by no means certain that that particular form was the right one. In subparagraph (b) of his redraft, he had introduced the concept of implied agreement and perhaps it would be preferable to substitute the word "accepted" for

¹ For continuation of discussion, see 837th meeting, paras. 1-79.

the words "agreed to regard". If objection were made to his proposal, it would not be difficult to express the idea in sub-paragraph (b) in negative form.

23. Some governments had proposed that a time-limit should be laid down within which a ground of invalidity would have to be invoked, if at all, but he did not think that such a stipulation would be practicable in the situation covered in article 47, because circumstances varied widely.

24. He had changed the title of the article and used the word "relinquishment" as the word "loss" seemed inappropriate.

25. Mr. BRIGGS said that there was a major shift of emphasis in the Special Rapporteur's new text for article 47, which made most of the commentary drawn up at the fifteenth session irrelevant. The shift was from preclusion to implied consent to accept a treaty or part of a treaty which, but for the implied consent, might not be binding by reason of a ground of invalidity, termination or suspension. Personally, he questioned whether a treaty ceased to be binding merely because of the existence of a "ground" of invalidity, termination or suspension.

26. The implied consent to accept a treaty referred to by the Special Rapporteur in paragraph 3 of his observations (A/CN.4/183, p. 15) was in reality a second consent to a previously accepted treaty, and the State's failure to invoke a ground of invalidity or termination was less a new consent or implied agreement to remain bound than a bar to the possibility of invoking the ground later. The Commission's draft should stress that inconsistent conduct by States was barred.

27. The Israel Government had urged the Commission to distinguish carefully between the principle of preclusion and tacit consent, but the new draft seemed to confuse them more than the 1963 text.

28. He suggested that the introductory paragraph of the Special Rapporteur's new text be retained up to the words "the State", and that sub-paragraphs (a) and (b) be combined and replaced by the following text:

"... [the State] shall by its acts or omissions (including undue delay) have precluded itself from claiming that the treaty has become invalid or has ceased to be binding on it".

29. Such a text would retain the principle of preclusion and the idea of waiver would be implicit in it.

30. The new title could be accepted provided that the word "relinquishment" was dropped and the word "loss" restored.

31. Undue delay was not the only factor involved in an omission to act; rather it was failure to act when action was required that was important. He could accept the Special Rapporteur's proposal that article 47 should be transferred to a new section 1 (General rules) of part II of the draft.

32. Mr. JIMÉNEZ de ARÉCHAGA, referring to the Special Rapporteur's statement in paragraph 1 of his observations (A/CN.4/183, p. 14) that, if article 47 did not affect cases of *jus cogens* falling under articles 36, 37 and 45, that was only because those articles provided for the automatic avoidance of the treaty, said he thought

that the use of the word "automatic" might create difficulties when article 51 came to be interpreted. He would be interested to hear an explanation on that point from the Special Rapporteur.

33. Mr. CASTRÉN said that in his opinion the question of the placing of the article should be left open, for there were as many reasons for keeping it in its present place as for transferring it, as proposed by the Special Rapporteur. As Mr. Ago had said earlier in the session, the article should logically follow the articles to which it referred. On the other hand, those articles would be easier to draft if the provisions at present in article 47 formed part of a section 1 containing general rules.

34. So far as substance was concerned, he approved the changes made by the Special Rapporteur in the 1963 text in the light of government comments. The scope of the article should accordingly be enlarged in the manner proposed by the Special Rapporteur.

35. So far as the drafting was concerned, in order to avoid repetition, sub-paragraphs (a) and (b) could be amalgamated. Accordingly he proposed the following redraft, which, he thought, would not affect the substance of the article:

"... shall have agreed or must be considered, by reason of its acts or its undue delay in invoking such ground, as having agreed to regard the treaty as valid or, as the case may be, as remaining in force".

36. Mr. AGO said he supported the Special Rapporteur's proposals concerning the substance of the article, and his (Mr. Ago's) comments, which were intended for the Drafting Committee, related principally to the French text.

37. The word "ground", which was not perhaps the right word in English, was admittedly not easy to translate into French, but it was surely wrong to say "*Un Etat ne peut invoquer un motif permettant de rendre un traité non valide.*" One could speak of a "*motif*" for nullity, but not of a "*motif*" for invalidating a treaty; that would mean something different. Besides, what was meant by the expression "*permettant de rendre non valide*"? It was an attempt to render the English word "invalidating", but what that really meant was "invoking the nullity of the treaty".

38. Nor was it clear what was meant by the expression "*ce droit*". There had been no mention of any right. If the provision read "a State may not exercise the right (*le droit*) to invoke the nullity of a treaty..." the words "*ce droit*" would be understandable.

39. Furthermore, he was not satisfied with the passage "*comme ayant accepté de considérer le traité comme valide*" ("as having agreed to regard the treaty as valid") in sub-paragraph (b). In the same sub-paragraph, the correct translation of the expression "undue delay" was "*retard injustifié*", not "*retard indu*".

40. He would not oppose Mr. Briggs's proposal for amalgamating sub-paragraphs (a) and (b) if, as a consequence, the article became less clumsy.

41. The article should contain a cross-reference to articles 31 to 34, instead of to articles 31 to 35, since the Commission had decided that coercion would be a ground for invoking the absolute nullity of a treaty.

42. Mr. VERDROSS said that the distinction drawn in the 1963 text between an express waiver, in sub-paragraph (a), and a tacit waiver, in sub-paragraph (b), had been clearer than it was in the Special Rapporteur's latest redraft, where the distinction between the two situations seemed to be blurred. He therefore supported Mr. Briggs's proposal.

43. Mr. ROSENNE said that the shift of emphasis in the Special Rapporteur's new draft for article 47 was essentially a matter of legal theory. Its practical effect would be the same as that of the 1963 text, and it was adequate. He supported the proposal for its transfer to section 1 of part II.

44. Mr. de LUNA said that in his opinion the Special Rapporteur's latest redraft was clearer and simpler than the 1963 text. Referring for the moment to general considerations only, he said that whereas the word "invalidity" was current in the legal systems following the English common law, the corresponding Spanish term "*invalidéz*", although grammatically correct, was not used in Spanish law. While Spanish law spoke of the "validity" of a legal act, it employed the term "*nulidad*", not "*invalidéz*", to describe an act which was not valid. While, therefore, the comments by the Government of Israel were pertinent from the point of view of common law, he did not think that they were universally valid.

45. Furthermore, he did not think that a positive formulation should be used to convey the idea of tacit agreement, an opinion apparently shared, to judge by his written and oral comments, by the Special Rapporteur. The legislative history of the article was essentially that of the idea of estoppel (*preclusión*) in the draft. Estoppel (*preclusión*) could of course be interpreted as implying tacit consent, but perhaps the idea was being somewhat overworked, though he had no fixed opinion on the subject. It seemed to him that, whenever tacit consent had been pleaded in international practice, it had been pleaded in pursuance of the principle of estoppel, because for the purpose of interpreting the consent it had to be assumed that the State concerned had a clear notion of what it wanted, even if it was not expressed and communicated to the outside world. After all, it happened quite frequently that a State wished to have the best of both worlds. He remembered a case where a State, after having accepted a sum of \$1 million which had been offered to it, had made a claim 20 years later—for reasons of internal law—invoking the nullity of the transaction. Patently, the fact of having accepted the money immediately had deprived that State, in conformity with the principle *nemo contra factum suum proprium venire potest*, of whatever right it might have had to claim that the transaction was void. Third parties could not be expected to know the innermost intentions of a State; they simply noted that a State had conducted itself in a certain manner. The principle of estoppel was superior even to the rule *pacta sunt servanda*, which flowed from the same paramount principle—good faith.

46. Without wishing to express a final opinion before hearing the other members of the Commission, he was at present inclined to support Mr. Briggs's proposal.

47. Mr. RUDA, with regard to the placing of the article in the draft, said that the Special Rapporteur had given as a reason for transferring the article to section 1 the fact that the article affected the operation of all the articles which recognized rights to invoke particular grounds of invalidity or termination. Precisely for the same reason he (Mr. Ruda) considered that the article should form part of part II ("Invalidity, termination and suspension of the operation of treaties") of the draft.

48. So far as form was concerned, he entirely agreed with Mr. Verdross. Much the same idea was expressed in each of the two sub-paragraphs (a) and (b) of the redraft. The Special Rapporteur's intention had evidently been to cover express consent in sub-paragraph (a) and tacit consent in sub-paragraph (b), but that intention was not reflected in the new text. Consequently, it would be better to retain the text of sub-paragraph (a) as adopted in 1963. The idea inherent in the Spanish word "*renuncia*" was definitely that of express consent.

49. The CHAIRMAN, speaking as a member of the Commission, said he reserved the right to speak more fully on the article after a text had been prepared by the Drafting Committee.

50. He wished, however, forthwith to express his disagreement with the remarks of Mr. de Luna in which he had equated "*forclusion*" with estoppel. For the purpose of "*forclusion*", it was not essential that the State should have manifested the will to act in a manner different from that in which it was entitled to act. In the case of estoppel, however, according to the most recent decisions of courts following the English common law, the State had deliberately acted in such a manner as to lead others to believe that it was acting at variance with its rights and that it was in good faith, in other words, that it was not making any mistake as to the substance of its rights. In order that "*forclusion*" should operate, there must have been a pre-established time-limit after the expiry of which the State would no longer be able to invoke the invalidity of the transaction in question.

51. Speaking as Chairman, he suggested that, as with article 46, further consideration of article 47 be postponed until the next meeting.

It was so agreed.²

ARTICLE 50 (Procedure under a right provided for in the treaty)

Article 50

Procedure under a right provided for in the treaty

1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must be communicated, through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary.

² For continuation of discussion, see 837th meeting, paras. 80-95 and 838th meeting, paras. 1-38.

2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect. (A/CN.4/L.107, p. 43).

52. The CHAIRMAN invited the Commission to consider article 50, for which the Special Rapporteur had proposed a new text which read:

Unless the treaty otherwise provides:

(a) a notice to terminate, withdraw from or suspend the operation of a treaty given in pursuance of a right provided for in the treaty, becomes operative by its communication to the other parties;

(b) after such communication, the notice may be revoked only with the consent of the other parties. (A/CN.4/183/Add.4, p. 4)

53. Sir Humphrey WALDOCK, Special Rapporteur, said that at the end of the 828th meeting, the Commission, after its discussion of the 1963 text of article 38, on termination of treaties through the operation of their own provisions, and of his own shorter redraft, had referred that article to the Drafting Committee. The Drafting Committee had arrived at the conclusion that article 38 should be deleted but that any points of substance in it should be incorporated in other articles. One such point was the provision in paragraph 3 (a) concerning the date on which a notice of termination took effect: the Drafting Committee had found that that provision overlapped with the corresponding provision in paragraph 1 of article 50.

54. He therefore proposed that paragraph 1 of article 50 be referred to the Drafting Committee, together with sub-paragraph (a) of his redraft. In that sub-paragraph, he had used the expression "becomes operative" instead of "takes effect", thus maintaining the distinction which the Commission had made in part I between the concept of an instrument which became operative as an instrument, as in article 15, and that of an instrument which took full effect.

55. It would obviously be necessary to deal in sub-paragraph (b) with the question of the date on which a notification took effect, a matter formerly dealt with in paragraph 3 (a) of article 38. The Drafting Committee would also consider a number of drafting points affecting the same provision.

56. Paragraph 2 of article 50, which in his redraft became sub-paragraph (b), involved a question of substance on which the Commission should take a decision before referring the whole article to the Drafting Committee. The 1963 text specified that a notice of termination could be revoked at any time before the date on which it took effect. Some governments, in their comments, had pointed out that such a wide provision would largely defeat the object of the notice of termination. The very purpose of the notice was to enable the States receiving it to adopt the necessary measures to take into account the new situation which would be created when the notice took effect. In particular, those States might have to consider in what way their municipal law should be amended in the light of the changed situation.

57. It had therefore been suggested that the absolute discretion to revoke a notice of termination, embodied in the former paragraph 2, should be qualified in some way. In that connexion, the United States Government's

proposal was much too complex and was based on a hypothetical example unlikely to occur often in practice. He had therefore proposed as sub-paragraph (b) a text, based on a proposal by the Polish Government, that would make revocation dependent on consent.

58. Mr. YASSEEN said he could agree with the Special Rapporteur's proposal that sub-paragraph (a) of the new text be referred to the Drafting Committee, since it was logical that the point with which it dealt should be considered in conjunction with article 38.

59. Sub-paragraph (b) raised a question of substance. In his comments, certain governments had probably somewhat exaggerated the risks which might be created by the revocation of a notice to terminate, withdraw from or suspend the operation of a treaty. At the same time, some allowance should certainly be made for the difficulties which other parties might experience in adapting themselves to the new situation brought about by the revocation of such a notice. It was right that a party which had wished to withdraw should be able to revoke that decision, but the other parties should not be left to the mercy of the whims of one State. It would therefore be better to say that the notice could be revoked only with the consent of the other parties.

60. Mr. AGO said that he agreed that article 50 should be referred to the Drafting Committee, but it must be particularly careful in reviewing it, especially the French version.

61. Sub-paragraph (a) gave the impression that the right in question was the right to communicate the notice, whereas in fact it was the right to terminate, withdraw from or suspend the operation of a treaty which was referred to.

62. Sub-paragraph (a) also raised once again the difficult problem of the French translation of the English expression "becomes operative". The French expression "*prend effet*" suggested that what was referred to was the effect of terminating the treaty; but it might be that the purpose of the notice was to indicate that the treaty would be terminated later, at some particular date or within a given period. What was intended to be referred to was simply the completion of the notice itself. It was important to remove that ambiguity which might have serious consequences.

63. Mr. ROSENNE said that he was prepared to accept the Special Rapporteur's proposal for the first paragraph and the revised text of the second paragraph submitted as sub-paragraph (b). However, he was increasingly concerned at the difficult problems of substance and of co-ordination which arose with respect to the various articles containing provisions on communication or notification.

64. At the first part of its seventeenth session, the Commission had adopted an article 29 (*bis*)³ dealing with the manner in which communications and notifications to contracting States should be made. On the question of substance, however, there was a real need to formulate accurately throughout the text of the draft articles the distinction between the binding char-

³ Yearbook of the International Law Commission, 1965, Vol. I, 815th meeting.

acter of an instrument for the State from which it emanated, and its effect *vis-à-vis* the State or States receiving the instrument, and to define clearly the time from which that instrument produced legal effects both for the State making the communication and for the State or States receiving it.

65. In 1965, on the basis of certain government comments, he had put forward a proposal (A/CN.4/L.108) to the effect that, unless the treaty provided otherwise, any notice communicated by the depositary became operative 90 days after the receipt by the depositary of the instrument to which the communication related. That proposal, although it did not cover the whole question, could provide a basis for the consideration of the problem to which he had referred; and as would be seen from paragraph 60 of the summary record of the 815th meeting, it had been agreed to defer consideration of that proposal. He therefore hoped that that delicate point of substance would in due course be considered in connexion with all the articles which contained provisions on communication or notification.

66. Mr. CASTRÉN said he accepted the Special Rapporteur's proposal that sub-paragraph (a) of the redraft of article 50 be referred to the Drafting Committee for consideration in conjunction with article 38.

67. The rule stated in sub-paragraph (b) was almost the opposite of that stated in paragraph 2 of the 1963 text. It was very difficult to make a choice between the two extremes. In paragraph (3) of its commentary on article 50, the Commission had argued strongly in favour of a rule that would permit, until a certain date, the revocation of a notice to terminate a treaty. The governments which had criticized that provision had put forward contrary arguments which could not be disregarded. Already at the fifteenth session Mr. Tsuruoka had raised the question of the consent of the other parties.⁴ Although the problem was not one of great importance in practice, the Commission should endeavour to draft a provision acceptable to all States. If it was decided to make revocation more difficult, the Polish Government's formulation, which provided the basis for sub-paragraph (b) of the new text, was simpler and thus preferable to that of the United States Government.

68. Mr. de LUNA said that he accepted the Special Rapporteur's proposals for article 50, though so far as the drafting was concerned, the reference to the "communication" of the notice was unsatisfactory. In Spanish at least, the term corresponding to "communication" had the same meaning as that corresponding to "notification"; the latter, more erudite, term was used in legal contexts. Perhaps the intention was to state that a notification did not become operative until received (*Una notificación no produce efecto hasta su recepción*).

69. Mr. TUNKIN said that the Special Rapporteur's redraft was an improvement on the 1963 text, particularly in that in the new text the phrase "Unless the treaty otherwise provides" qualified the provisions which followed.

70. With regard to the revocation of a notice, he sympathized with the views expressed by some governments and, in general, favoured the idea that such revocation should be subject to the consent of the other parties. However, he would hesitate to go too far in that direction: a government might revoke a notice of termination only a few days after making it; that revocation would cause no harm to any other party and would, in fact, be beneficial.

71. So far as the terminology was concerned, he preferred "notification" to "communication". The former was the more strict legal term.

72. He agreed with the Special Rapporteur that the first sub-paragraph of article 50 overlapped with the provisions of article 38 and supported the proposal that it be referred to the Drafting Committee for consideration in conjunction with the provisions of article 38.

73. Mr. BRIGGS said he accepted the Special Rapporteur's proposal that sub-paragraph (a) be referred to the Drafting Committee. The expression "becomes operative" struck him as ambiguous and probably inaccurate and he therefore suggested that the Drafting Committee should examine it carefully.

74. With regard to sub-paragraph (b), like Mr. Castrén he doubted the wisdom of regarding the problem as one of a choice between two extremes of either providing that the notice could be revoked at any time, or providing that the revocation needed the consent of all the other parties. On the whole, it was desirable to encourage a State to revoke a notice of termination if, on reflexion, it wished to do so. The League of Nations Covenant made provision in Article 1, paragraph 3, for a two-year notice for the purpose of withdrawal from the League, and in some cases a State which had given such notice had changed its mind before the expiry of the two years. Another example was provided by an extradition treaty between the United States and Greece⁵ which the United States had recently denounced; within a few months of that denunciation, an additional protocol had been signed and the notice of termination had been withdrawn.

75. It was hardly desirable to express the rule that a denunciation could not be revoked in terms as absolute as in sub-paragraph (b). He was prepared to agree that the point should be referred to the Drafting Committee, but since it was one of substance, he had thought it necessary to give his views on it.

76. Mr. VERDROSS said that, in his view, the notice could not become operative until received by the addressee. That idea was not clearly expressed by the term "communication". In sub-paragraph (b) at any rate, the words "after such communication" should be replaced by the words "after such communication has been received".

77. Mr. REUTER said that the article would set many problems to the Drafting Committee. As Mr. Ago had pointed out, the expressions "becomes operative" and "*prend effet*" did not have quite the same meaning. In French, it would be sufficient to say that the notice "*devient opposable*", an expression which did not entail

⁴ *Yearbook of the International Law Commission, 1963, Vol. I, p. 164, paras. 25 and 26, and p. 277, para. 12.*

⁵ *League of Nations, Treaty Series, Vol. CXXXVIII, p. 294.*

very precise consequences. What the provision was really concerned with was the fact that, upon being communicated, the notice could be pleaded against the notifying State. The provision was not concerned with other effects which might be produced later.

78. As to sub-paragraph (b), he agreed with Mr. Briggs that it was going too far to require the consent of all the other parties. The Drafting Committee might consider drafting the rule in a negative form, stating that the revocation would be without effect if any one of the other parties objected to it. It might also be provided that the revocation must take place within a stated period, which should be very short. The rule would thus make it easier to revoke the notice of denunciation, provided that action was taken promptly to revoke the notice.

79. Mr. JIMÉNEZ de ARÉCHAGA said that he was in general agreement with the text proposed by the Special Rapporteur. It would be difficult to adopt a negative formulation for sub-paragraph (a) because an "objection" could not be made by one party to another's exercise of a right provided for in the treaty itself.

80. Mr. TSURUOKA said that, as he had taken up a definite position on article 50, then article 24, at the fifteenth session,⁶ he felt obliged to express an opinion on the redraft of the article. He could accept the new formulation in sub-paragraph (b), which in his view would be conducive to the stability of treaties. If a State knew that it could not reverse its decision without the consent of the other parties, it would not lightly give notice of its wish to terminate, withdraw from or suspend the operation of a treaty. A psychological effect of that kind was important in the conduct of international relations. Since the Commission desired to safeguard the existence of treaties as much as possible, it should prefer the new formulation to the old.

81. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the question dealt with in sub-paragraph (a) could be settled in another article. Nevertheless, as the question was very important, the Drafting Committee would have to take great care to ensure that the provision said whatever needed to be said, after taking article 29 (*bis*) into account.

82. In a sense, Mr. Verdross had been right in his comments on sub-paragraph (b): the notice became operative at the time when the addressee was in a position to take cognizance of it. Nevertheless, he did not think that the provision should go so far as to state that the date of the communication was the date of its receipt. Some intergovernmental organizations published notifications of that kind as a matter of routine, and in such cases the date of communication was the date of publication.

83. So far as the substance was concerned, it could hardly be laid down that revocation of a notice required the express consent of all the parties. It would be better if the provision allowed tacit consent to be inferred from the absence of objection; it might perhaps be added that such objection should be expressed within a certain period. There were instances in diplomatic history

where some States had notified their intention of ceasing to be parties to a treaty because they had wished to evade their obligations at a given moment; once that moment had passed, they had expressed the wish to re-assume their obligations. On the whole, he thought the article should make it possible for States to resume their contractual relationships; on the other hand, the Drafting Committee should be careful to draft a provision which would forestall any abuse.

84. Mr. YASSEEN said that he would have no objection if the rule in sub-paragraph (b) were formulated in negative terms. On the other hand, it should be noted that the Special Rapporteur's proposal was more moderate than the Polish delegation's proposal, under which the express consent of the other party would be required. The expression "with the consent of the parties" in sub-paragraph (b) did not exclude tacit consent.

85. Mr. ROSENNE said that it was desirable to retain the requirement that the notification should be made through the "diplomatic or other official channel", as in the 1963 text. Though the point was perhaps covered by the new article 29 (*bis*) adopted in 1965, the Drafting Committee should consider it. In that connexion, he drew attention to the explanatory passage in paragraph (2) of the commentary to article 50 in the 1963 report, which read:

"It sometimes happens that in moments of tension the termination of a treaty or a threat of its termination may be made the subject of a public utterance not addressed to the State concerned. But it is clearly essential that such statements, at whatever level they are made, should not be regarded as a substitute for the formal act which diplomatic propriety and legal regularity require."

86. The CHAIRMAN said that the Third Reich had contended that anything announced by Radio Berlin constituted notice *erga omnes*. During the Nuremberg trials, for example, the question had arisen whether there had in fact been a declaration of war. The Commission could hardly condone such practices. Radio broadcasting could be used in emergencies, but it was not a normal official channel.

87. Mr. AGO said that Mr. Verdross was right in saying that the phrase "after such communication has been received" would be clearer; but the idea of "receipt" could not very well be introduced into the text. The notice might, for instance, state that "the treaty will be terminated six months after the present notice", in which case the six-month period would begin to run as from the date of the notice and not from the date of its receipt. The Drafting Committee should do its utmost to avoid any ambiguity on that point.

88. Sir Humphrey WALDOCK, Special Rapporteur, said that most of the matters raised in the discussion would have to be considered by the Drafting Committee.

89. With regard to sub-paragraph (b), he thought that the Commission had gone too far in the 1963 text in giving complete discretion to revoke a notice. His own proposal did not go as far as that of the Polish

⁶ Yearbook of the International Law Commission, 1963, Vol. I, p. 164, paras. 25 and 26, and p. 277, para. 12.

⁷ *Ibid.*, 1963, Vol. II, p. 214.

delegation's—that the right to revoke a notice should be linked to the “clear consent” of the other party—for it spoke merely of “consent”, a term which did not necessarily mean express agreement. He agreed with Mr. Yasseen's interpretation of “consent” as meaning also tacit consent. In substance, therefore, his own proposal was not very different from the negative formula suggested by Mr. Reuter, but he would not object if the Drafting Committee were asked to consider the possibility of a less drastic formulation. He realized that Mr. Briggs and Mr. Castrén were not yet wholly convinced, but he hoped the Drafting Committee would be able to produce a generally acceptable text.

90. On the subject of the terms “communication” and “notification”, he said that he had followed the terminology of article 29 (*bis*). He had had in mind a formal notice, but the point deserved the attention of the Drafting Committee, in connexion not only with article 50 but with other articles as well.

91. He suggested that article 50 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁸

The meeting rose at 12.55 p.m.

⁸ For the decision with regard to further consideration of article 50, see 842nd meeting, para. 107.

837th MEETING

Monday, 24 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-4, A/CN.4/L.107)

[Item 2 of the agenda]

(*continued*)

ARTICLE 46 (Separability of treaty provisions for the purposes of the operation of the present articles) (*resumed from the previous meeting*)¹

1. The CHAIRMAN invited the Commission to resume its consideration of article 46.

2. Mr. YASSEEN said that the Special Rapporteur's excellent redraft of article 46 took into account the importance of the rule and the possibilities of its general application. It was preferable to set forth once and for all

the principle of the separability of treaty provisions and the criteria governing its application.

3. The arguments in support of the rule had been discussed thoroughly in 1963, and the essential point then made was that whatever could be saved of the treaty should be saved. If there was a reason for the nullity or termination of part of the treaty only, it should affect that part only, and the rest of the treaty should remain in force as far as possible.

4. The next problem was that of the general scope of the principle of the separability of treaties. Should the principle be accepted in all cases? It could be admitted without difficulty in all cases involving the termination of a treaty. But where the question was that of the nullity of a treaty, greater caution was needed, for in some cases the nullity of a treaty was the result of events which constituted a challenge to the international legal order, or which seriously jeopardized the climate of trust necessary for good international relations. The sanction for such cases of international brigandage should be commensurate with the seriousness of the act; the sanction should be the disappearance of the entire treaty, though the parties wishing to salve the treaty would be at liberty to make a fresh treaty which would avoid causes of nullity.

5. It seemed to him that, in the application of that criterion, the rule concerning the separability of treaty provisions should apply in the case of fraud only, but should not apply in cases of coercion, even if directed against the representative of the State. That conclusion would be consistent with the unequivocal attitude adopted by the Commission with regard to coercion, the effect of which was to render the treaty void *ab initio*.

6. He had no criticism to make concerning the redraft of article 46; it was not really indispensable to introduce the notion of good faith into the article, for that notion permeated the entire law of treaties. Finally, he considered that not only article 37, on conflict with a rule of *jus cogens*, and article 36, on coercion of a State, but also article 35, on coercion of the representative of a State, should be covered by the exception in paragraph 3 of the new article 46.

7. Mr. TUNKIN said he could in general accept the Special Rapporteur's new text for article 46. In 1963 the Commission had dealt with the separability of treaty provisions in somewhat piecemeal fashion and, having had no time for detailed study, had reached no firm conclusion about the scope of the article's application. The Special Rapporteur had shown how a general rule could be framed which made it possible to dispense with repetitive provisions in each of the articles dealing with cases in which the principle might operate.

8. He agreed that the rule of the separability of treaty provisions should apply to the cases covered by articles 31, 32, 39, 40 and 41, but he was unable to support the Special Rapporteur's proposal that it should apply to treaties entered into under personal coercion (article 35). On that point he was largely of the same opinion as Mr. Yasseen.

9. It was clearly the majority view in the Commission that a treaty obtained by the personal coercion of the representative of a State was void. The use of force or

¹ See 836th meeting, after para. 1, and para. 2.

threats against a State's representative was a dangerous violation of international law which came close to the use of force against the State itself, and in such cases the result should be the nullity of the treaty. Accordingly, article 35 should be mentioned in addition to the others referred to in paragraph 3 of the Special Rapporteur's new text for article 46.

10. Mr. CASTRÉN said that the Special Rapporteur's latest redraft of article 46 was on the whole acceptable to him from the point of view of both substance and form. Nevertheless, as several speakers had mentioned, the Drafting Committee should look at each article in section 2 for the purpose of determining whether and how the rule concerning the separability of treaty provisions operated in the case of each particular article. Mr. Jiménez de Aréchaga had proposed a number of amendments which seemed justified.

11. So far as the placing of article 46 was concerned, he agreed with the Special Rapporteur's proposal that it should be transferred to a new section to be entitled "General rules", to follow articles 30 and 49.

12. Mr. RUDA said that the Special Rapporteur was to be commended on the careful way in which he had worked out a difficult article. The fundamental idea in the article as adopted in 1963 was that the nullity, termination or suspension of the operation of a treaty related to the treaty as a whole. That general proposition might be subject to certain objective and subjective exceptions if specified conditions were fulfilled.

13. A treaty secured by coercion against a State, or one which conflicted with a rule of *jus cogens*, was void, but in the case of a treaty obtained by the coercion of a representative, the injured State could choose whether or not to invoke the principle of the separability of the treaty provisions.

14. As to the place of article 46, if the Commission accepted the scheme proposed by the Special Rapporteur, the article should remain where it was, but if the Commission decided to revert to the Special Rapporteur's proposal made at the fifteenth session, then the article should be transferred to a section entitled "General rules", at the beginning of part II of the draft.

15. In his opinion, the principle of the separability of treaty provisions could not apply in cases of failure to comply with provisions of internal law (article 31), since such failure could hardly affect part of a treaty only.

16. As far as the drafting of the article was concerned, he thought that some such wording as that proposed by the Netherlands Government for paragraph 1 could be accepted because, though the proposition that nullity, termination and suspension in principle affected the entire treaty was implicit in the Special Rapporteur's new text, it did not receive sufficient emphasis. The word "clearly" in paragraph 1 (a) should be dropped as too vague, and so should the word "essential" in paragraph 1 (b), because what might be regarded as essential by one party might not be so regarded by another.

17. While he approved of the general structure of the Special Rapporteur's new draft of paragraph 2, he

shared the doubts expressed by Mr. Yasseen and Mr. Tunkin as to its substance.

18. He considered that paragraph 3 should be retained.

19. Mr. de LUNA said that the Special Rapporteur had produced a very good redraft. He could accept the proposal that article 46 should form part of a section to be entitled "General rules", in which event it would become unnecessary to make express reference to the "separability" rule in the substantive articles setting out grounds of invalidity, termination, etc.

20. He shared the opinions expressed by Mr. Yasseen, Mr. Tunkin and Mr. Ruda concerning the addition of a cross-reference to the article dealing with treaties obtained by coercion directed against the representative of a State. There was a manifest difference between duress exerted on the organ of a State in person and duress exerted against the State itself. In the course of history, international law had happily evolved to the point where duress against the State was outlawed, inasmuch as a war of aggression had been declared an international crime. He was therefore a little surprised that it should be proposed in article 46, paragraph 3, to provide for an exception concerning article 36 but not also for an exception concerning article 35.

21. A great controversy had arisen, in theory and in practice, regarding cases like that of the treaty of Madrid of 1526, which Francis I, King of France, who had been taken prisoner, had been forced to sign. Whatever opinions might have been held over the centuries, even in the age of absolute monarchy, it had never been held that a treaty concluded at a time when the sovereign had been a prisoner and under personal duress was valid. Consequently, since throughout the history of international law a treaty entered into through duress exerted on an organ of the State had been void, and a treaty obtained through coercion directed against the State itself had not been void, it would surely be wrong to give special treatment to the case covered by article 36 and not to that contemplated in article 35.

22. His view was supported by the terms of article 35 which, correctly, spoke only of coercion directed against the person of the representatives of a State, without differentiating between the two possible kinds of threat. Clearly, the most general case was that of *vis compulsiva*, the moral duress brought to bear on a representative. The effect of that kind of duress was to vitiate the will and to render the treaty void. Mr. Yasseen and Mr. Tunkin had rightly said that the Commission had recognized that a treaty was void if there had been no genuine will. As it stood, the new text of the article did not exclude the idea of absolute coercion which nullified the legal act. Was the Commission proposing to admit and to apply the principle of the separability of treaties to a case which was in fact a mere hypothesis, but which was not expressly excluded from article 35? Was it proposing to provide the legal means for retrieving a non-existent act? Article 46, paragraph 3, should contain a cross-reference to article 35, which dealt both with *vis compulsiva* and with coercion directed against the organ of a State.

23. Another question was whether article 46, paragraph 3, should contain a cross-reference to article 31. In

the opinion of Mr. Ruda, it was hardly conceivable that cases could occur in which the nullity did not affect the treaty in its entirety. That opinion was debatable. Apart from the case where there had been some infringement of the constitution, a situation could be visualized where a representative was authorized to conclude a specified type of treaty. Treaties could contain provisions of very different kinds, some relating to a cession of territory, others relating to trade. The representative in question might possess powers which sufficed, under the constitution, for the purpose of entering into some of the clauses of the treaty but not for the purpose of entering into others. Admittedly, the case was rare but it could occur. Accordingly, he endorsed the Netherlands Government's suggestion that article 46 should contain a cross-reference to article 31.

24. Mr. BRIGGS said he could accept the Special Rapporteur's proposal that article 46 should be transferred to a section 1 (General rules) of part II of the draft, and his proposal that provisions concerning the "separability" rule should be omitted from individual articles.

25. He questioned whether the principle of the separability of treaty provisions applied to the cases covered in articles 31, 32 and possibly others, but he would have thought that, in view of the generality of the terms of paragraph 1 of article 46, an enumeration would be unnecessary.

26. The word "clearly" could be dropped from paragraph 1 (a), but the qualification "essential" in paragraph 1 (b) had some significance and should be kept.

27. Paragraph 2 was acceptable and in his opinion the Special Rapporteur had rightly decided that the "separability" rule could apply to treaties obtained by the personal coercion of State representatives. Paragraph 3 was acceptable, but perhaps the reference to article 37, on conflict with *jus cogens*, should be deleted, since the point could be covered by paragraph 1.

28. As to the question whether the new draft reversed the presumption by making separability the rule rather than the exception, he was not sure that the new text made it sufficiently clear that, if the ground for invalidity, termination, etc., related to the treaty as a whole, that treaty's provisions were not severable. Perhaps it would be wise, as suggested by Mr. Rosenne, to retain the 1963 version of paragraph 1 as the opening paragraph, so as to emphasize the principle of the indivisibility of treaties. The new text of paragraph 1 would then follow.

29. Mr. REUTER said that, although he associated himself with the congratulations addressed to the Special Rapporteur, he wished for reasons of clarity to dissociate himself from the views expressed on several questions of principle which he regarded as being of great importance.

30. It was apparently intended to declare that certain treaties obtained by reprehensible means would not be severable. The idea was a lofty one and would be entirely appropriate in a society in which State sovereignty no longer existed. But where such sovereignty existed, the maintenance in certain circumstances of treaty provisions

which were not affected by grounds of nullity was in fact tantamount to a sanction; and if the Commission drafted its text in such a way that certain treaty provisions could not remain in force at all, it might well be removing a sanction that had a certain efficacy. In other words, he opposed the views expressed concerning the effect of article 46 on cases covered by article 35, and he also opposed the Commission's approach to the question of the separability of treaty provisions conflicting with *jus cogens*. For instance, a peace treaty might incorporate a clause which later clashed with a rule of *jus cogens*, for example, the right of self-determination; the rules which the Commission was about to adopt would destroy the peace treaty itself. Such consequences were serious and should be pondered.

31. Mr. TUNKIN said he supported the suggestion that paragraph 1 of the 1963 text should be retained, as it was a clearer expression of the principle underlying article 46. He particularly favoured the inclusion of the phrase "except as provided in the treaty itself".

32. Mr. LACHS said that the Special Rapporteur in his excellent new draft had succeeded in eliminating many of the defects of the earlier version.

33. Some members had advocated the omission of the reference to article 35 from paragraph 2 of article 46 on the grounds that a treaty obtained by personal coercion of a representative was void. However, there might be cases where different criteria would apply to the different provisions of such a treaty and the injured State might not necessarily wish to declare the treaty void *ab initio*, but might try to secure compensation under the terms of the treaty itself and accept those elements which had been freely negotiated and reject those which had been imposed. Although in the majority of cases it would probably not avail itself of the option, it was of paramount importance to consider the interests of the injured State within the general framework of article 35.

34. Mr. ROSENNE said that during the discussion reference had been made to such concepts as absolute and relative nullity, and now a new one had crept in, that of a treaty that was "objectively" void. He wondered precisely what meaning was to be attributed to that phrase.

35. In his opinion the Special Rapporteur had been right to mention article 35 in paragraph 2 of the new text for article 46.

36. Mr. TUNKIN said that, if the idea of objective existence was admitted, then there could be such a thing as objective nullity, but of course Kantians who claimed that we did not know anything of objective reality would dispute that view.

37. He was unable to agree with Mr. Lachs, who had described a very exceptional situation. The Commission's main object should be to discourage as forcefully as possible the coercion of representatives and the use of force, by declaring any treaty obtained by such means void *ab initio*. No purpose would be served by drafting a provision which allowed an injured State an option to declare that the principle of separability applied to such treaties, because that State might not dare to invoke coercion as a ground of partial invalidity. The cases

falling under article 35 should be excluded from the application of article 46.

38. Mr. ROSENNE said that the Commission had enough on its hands with theoretical legal problems without entering into philosophical considerations.

39. One of the difficulties connected with article 35 was that there were many different types of coercion, including coercion by a third State which the Commission had agreed would come within the scope of the provisions concerning error. The question of where a reference to article 35 should appear in the present article could only be settled when a decision had been reached about the text of article 35, and after the Commission had decided whether article 46 should be stated in the form of a general rule to the effect that in principle treaties were indivisible, with the provisions on separability forming exceptions to the rule.

40. Mr. de LUNA said that he had made his remarks concerning articles 35 and 36 because of a desire for consistency in legal thinking throughout the draft. Wherever there was a reason in a particular article for admitting the separability of treaty provisions, then it had to be admitted in every article where that reason existed. Conversely, if the rule of separability was not admitted in the context of any article, then it should likewise not be admitted in any other article where the same reason existed.

41. With regard to the question of terminology raised by Mr. Rosenne, he said that three types of nullity had been recognized for long enough in international law for the Commission to be able to accept them. A treaty could be deemed never to have existed; or it could automatically be declared void absolutely; or it could, at the request of the parties, be declared partially void. If the Commission had decided that a particular juridical instrument did not exist or was void absolutely, it necessarily followed that, in the article on separability, the Commission could not revive that instrument.

42. He had no strong views on the subject of terminology; whether a nullity was absolute, *ab initio* or objective, it was not so declared at the request of the parties and the nullity was effective *erga omnes*. Mr. Reuter had rightly described that consequence as a sanction. It was hardly surprising that, at the stage which international law had reached, the use of force against an organ of the State or against the State, or a violation of *jus cogens*, should have the consequence of rendering the instrument in question void. He would be in favour of even harsher sanctions with a view to eliminating, as far as possible, the use of force from international relations. The rule was in no way surprising since it was reminiscent of the maxim *fraus omnia corrumpit*: the corruption affected not just part of the legal instrument but the instrument as a whole.

43. In his opinion, the use of force resulted in the absolute nullity of the treaty in the cases considered by the Commission. It followed that the Commission's draft should not leave any choice open, not even to the injured party, which would be at liberty to resort to other procedures.

44. Mr. AGO said he was disturbed by some of the ideas voiced during the discussion. In the circumstances

contemplated in article 35, it was hard to see how a rule of nullity that was not only absolute, *erga omnes*, but left no possibility of salvaging anything from the treaty, could be more favourable to the injured State than a rule which would leave it open to that State to choose whether to regard the treaty as absolutely void or only partially void. If, as a result of the personal coercion of its representative, a wholly unacceptable treaty had been imposed on the State, that State could maintain that the whole treaty was void. But that was an extreme case; what could also happen was that the treaty was the result of very complicated negotiations and that, in addition to a clause imposed by coercion, it contained a set of perfectly valid provisions which might even be favourable to the State that had suffered the coercion with regard to a single point. Surely it would be unjust to place the aggrieved State in the position of having to claim that the whole treaty was void and so to lose whatever advantages that treaty might have conferred on it, simply because of one single defective clause.

45. Mr. de Luna had referred to the maxim *fraus omnia corrumpit*; but article 33, on fraud, had been so drafted as to reflect the Commission's decision that the State which had been the victim of the fraud should be free to decide whether or not to invoke the fraud as invalidating its consent. The rule stated in article 35, on personal coercion, was more strict than that stated in article 33.

46. He supported Mr. Reuter's remark that it might create difficulties if the Commission's draft provided that the entire treaty would be void simply because it contained a clause conflicting with a preemptory rule of international law; the clause in question might, after all, constitute an entirely separate matter in a very complex treaty. Cases of the breach of preemptory rules were, admittedly, very serious, but they were also very rare.

47. In general, the Commission should refrain from extending unduly the number of cases of the absolute nullity of a treaty.

48. Mr. TUNKIN said that he had been surprised by some of Mr. Ago's arguments about the need to salvage at least part of a treaty. It was far more important to discourage the use of force and the personal coercion of representatives, which were an international crime and a threat to peace and friendly relations between States. Such coercion had often been employed by the colonial Powers in the past, and the Commission should not be tolerant of such practices. If an injured State wished to pursue the subject of the treaty, the original one obtained by force should first be destroyed. Nothing short of strong sanctions against the use of force would do.

49. Mr. Reuter's argument that cases might occur in which only one provision of a treaty might conflict with *jus cogens* seemed far-fetched. The rules of *jus cogens* were not numerous but they were of fundamental importance, and in the interests of peace the sanction for the breach of such rules should be the nullity of the whole treaty.

50. Mr. CASTRÉN said that the Commission could hardly settle the questions arising out of article 46 until it had drafted the other articles to which article 46

referred. He proposed, therefore, that article 46 be referred to the Drafting Committee.

51. Mr. AGO, replying to Mr. Tunkin, said that no member of the Commission would wish to maintain in a treaty anything which had been obtained as a result of the coercion referred to in article 35. The issue in article 46 was simply that of the separability of the provisions of the treaty. In other words, should the injured State have the option either of having the whole treaty declared void, or of having declared void only the part obtained through coercion? Whatever had been obtained through coercion would in any case be jettisoned. If the rule was laid down that the injured State had to abandon the whole treaty, it might suffer prejudice twice over, since it would be constrained to lose the benefit of whatever part of the treaty had been favourable to it and had been fairly negotiated. In fact, the rule of absolute nullity might operate to the advantage of the State which had used coercion.

52. Whereas cases in which a single clause of a treaty conflicted with a norm of *jus cogens* were of somewhat academic interest, the same could not be said of clauses obtained through the personal coercion of representatives of States. The Commission should, therefore, endeavour to work out the rule which would produce the most beneficial effects in practice.

53. The CHAIRMAN, speaking as a member of the Commission, said that he was prepared to admit that in some cases it was desirable to save what could be salvaged from a treaty. Nevertheless, he was thoroughly opposed to the idea of making the slightest concession in cases where a treaty had been obtained as a result of the personal coercion of a representative of the State, or of the State itself. Even if the coercion had been used in respect of a single clause only, the whole of the rest of the treaty was necessarily suspect. It might be that the other clauses which appeared to offer advantages to the injured State had been conceded only in order to secure acceptance of the part which had been the subject of coercion. The diplomatic history of the nineteenth and early twentieth centuries, notably that of his own country, showed that the great Powers had used the type of coercion referred to in articles 35 and 36, and that many treaties included not only clauses which were the result of direct coercion but also clauses which were the result of indirect coercion. It was impossible to say in the case of a given instrument what was the result of coercion and what was not. The only solution was to declare the entire treaty void.

54. Mr. REUTER said that he wished to put two questions: was article 46 concerned with multilateral treaties as well as with bilateral treaties? And did the principles stated in article 46 apply also to territorial clauses? An answer to the second of those two questions was indispensable.

55. Mr. YASSEEN said that in his earlier observations he had tried to formulate a criterion for determining in what cases treaties were severable and in what cases they were not. His view was that there were some acts constituting grounds for nullity which flouted the international legal order and jeopardized the atmosphere of mutual confidence necessary to the conduct of international relations. Where acts of that nature had occur-

red in the negotiation of a treaty, it was not just one clause of the treaty, but the entire treaty which was void.

56. The instances referred to by some members of the Commission, in which it might be to the interest of the injured State to retrieve some of the clauses of the treaty, were rare and exceptional. Like Mr. Tunkin, he considered that the Commission's object in article 46 was not so much to protect one State as to safeguard the international legal order and the international community as a whole. In juxtaposing the reference to article 35 and the references to articles 36 and 37, to which article 46 did not apply, the Commission would be providing a sanction in conformity with recent developments in international law, which did not countenance any resort to violence and coercion in international relations.

57. Mr. AMADO said that he was firmly of the opinion that the provisions of a treaty concluded under the conditions described in article 35 should not be severable. A treaty which had been tainted by the personal coercion of representatives of States could not be even partially salvaged: it could only be void in its entirety.

58. Sir Humphrey WALDOCK, Special Rapporteur, said he noted that members as a whole favoured the idea embodied in the text of article 46 and also his suggestion for the inclusion of article 46 in a section containing general rules concerning the invalidity and termination of treaties.

59. Several members thought that a provision on the lines of the former paragraph 1 of the 1963 text of article 46 should be reintroduced in order to emphasize that, normally, any ground of invalidity or termination would apply to the treaty as a whole. He had no objection to the introduction, in a suitable form, of that general rule of the non-divisibility of treaties.

60. He did not favour Mr. Tunkin's suggestion that the words "Except as provided in the treaty itself", used in the 1963 text of article 46, should be restored. It was hardly conceivable that a treaty would contain provisions relating to its own invalidity. It should be remembered that article 46 did not relate to cases of termination under a right provided for in the treaty itself.

61. The suggestion that the word "clearly" should be omitted from paragraph 1 (a) of his new text could be referred to the Drafting Committee. That qualification had been introduced in 1963, in paragraph 2 (a) of the 1963 text of article 46, to stress that a treaty was normally indivisible.

62. He strongly favoured the retention of the word "essential" in paragraph 1 (b) of his new text, for the reasons given by Mr. Briggs.

63. With regard to the substantive question which articles should be specified in the new paragraphs 2 and 3 respectively, he said he had been surprised at the liveliness of the debate. The question had been discussed at length in 1963; at the current winter session, there had been a full discussion on the provisions of article 35 and the Commission had clearly indicated that article 35 should provide that, in principle, a treaty was void if the

expression of the State's consent had been obtained through coercion directed against the individual representatives.

64. However, merely because article 35 would make the treaty void if it had been obtained through personal coercion, it did not logically follow that separability could not be applied. Even in the cases covered by articles 36 and 37, separability would have been logically possible, but the Commission had considered that it was not advisable on grounds of policy.

65. The debate had shown that some members wished treaties negotiated under the conditions described in article 35 to be treated, for purposes of separability, in the same manner as those covered by article 36.

66. There was no question of not condemning as essentially void the act of procuring consent by means of the personal coercion of representatives. The intention was simply to give the injured State an option to maintain part of the treaty in force if it considered it in its interest to do so. That option could properly be left to the injured State, because the coercion only affected its representatives as individuals; the situation was not the same as that described in article 36, where the State itself had been subjected to coercion. The Commission had taken the view that, where the State itself had been coerced, the whole treaty should be declared void, and that if the States concerned wished to establish a treaty relationship, they should start with a clean slate.

67. However, the substantive question whether article 36 should be mentioned in paragraph 2 or in paragraph 3 of article 46 could well be settled at a later stage, after the Commission had finally adopted those two articles, as suggested by Mr. Castrén. The Drafting Committee could meanwhile prepare the text of article 46, since the changes in that text which would result from the Commission's decision on the substance would be easy to make.

68. During the discussion, some members had suggested that it was unnecessary to except from the operation of the separability rule the case of treaties conflicting with *jus cogens* (article 37). He would point out, however, that in 1963 the view had prevailed in the Commission that the separability rule should not operate in the case of treaties conflicting with a subsequent norm of *jus cogens*.

69. The point raised by Mr. Ruda concerning article 31, on failure to comply with internal law, should be referred to the Drafting Committee.

70. In conclusion, he proposed that article 46 be referred to the Drafting Committee for consideration in the light of the discussion.

71. Mr. de LUNA said that he had not confused the cases coming under articles 35 and 36. In cases where a treaty had been obtained through the personal coercion of representatives, the long-standing practice of States had been absolutely consistent in declaring the treaty void. On the other hand, treaties obtained through duress applied to the State itself used to be considered valid under the old rules of international law. Only recently had the principle been recognized that an international act procured by the use of force or the threat of force was null and void.

72. As had been pointed out by Mr. Yasseen, the distinction between the absolute nullity and the relative nullity of treaties depended on the degree of importance attached to the matter by the international community. Cases of nullity which were of vital importance to the international legal order could not be condoned by the injured party; the nullity in these cases was absolute, and could be declared as a matter of course. As he had pointed out, the coercion of a representative resulted in the absolute nullity of the treaty in question.

73. Apart from those considerations of principle, there were practical reasons for not allowing the separability rule to operate in cases where a treaty had been obtained through the personal coercion of representatives. Such coercion would invariably be the result of an abuse by a powerful State; if such a treaty was severable there was every danger that the strong State would use the principle of separability as a lever to exert pressure upon the weak State in order to save part of the treaty, ostensibly in the interest of that weak State.

74. Mr. LACHS said he agreed with the Chairman that it would be extremely difficult to say that personal coercion related to only part of a treaty. However, as indicated by Mr. Castrén, the whole question could be decided after the Commission had settled the final text of article 35.

75. Mr. TSURUOKA said that the discussion seemed to have reached a stage at which the article could be referred to the Drafting Committee for examination in an atmosphere of calm.

76. With regard to paragraph 2 of the new text, the main question was how States would behave in practice. A State which considered itself to be the victim of coercion of the kind referred to in article 35 and which wished to salve that part of the treaty which had not resulted from coercion could equally well invoke fraud as a ground for nullity. If, on the other hand, it preferred to regard the whole treaty as void, it could, even in cases of fraud, invoke the fact of coercion. It followed that, whatever decision the Commission reached on a matter which had been the subject of such lively discussion, the practical result would be much the same.

77. Mr. CASTRÉN said that, in his view, the attempt to distinguish between the coercion of a State and the coercion of its representative was somewhat artificial. A State could act only through its representatives and, in the final analysis, it was always the State itself which was the injured party.

78. Mr. VERDROSS said that he could not accept that argument. There was a great deal of difference between bringing pressure to bear on an individual through his private interests and bringing pressure to bear on him through the interests of the State he represented.

79. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to the Special Rapporteur's proposal that article 46 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*²

² For resumption of discussion, see 842nd meeting, paras. 79-97 and 843rd meeting, paras. 1-13.

ARTICLE 47 (Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty) (*resumed from the previous meeting*)³

80. The CHAIRMAN invited the Commission to resume its consideration of article 47.

81. Mr. JIMÉNEZ de ARÉCHAGA said that, in 1963, the formula proposed by the Special Rapporteur for sub-paragraph (b) had been interpreted by some members as giving effect to the common law doctrine of estoppel, to which reference was made in paragraph (5) of the commentary.⁴ One member, Mr. Elias, had even urged that the term "estoppel" should be used in the actual text of the article.⁵

82. Other members had indicated, however, that it was not advisable to use, even in the commentary, the term "estoppel", which was peculiar to the common law. As was pointed out in the separate opinion of Judge Alfaro in the *Temple of Preah Vihear* case, "there is a very substantial difference between the simple and clear-cut rule adopted and applied in the international field and the complicated classifications, modalities, species, sub-species and procedural features" of the "Anglo-Saxon doctrine of estoppel".⁶

83. In order to avoid that difficulty, the Commission had decided not to include in the 1963 text any reference either to "estoppel" or to "forclusion"; instead, it had deliberately used the expression "shall have so conducted itself as to be debarred from denying".

84. In so doing, the Commission had not intended to reject but rather to retain the essential principle of estoppel as accepted in international law. It was for that reason that the Commission had adopted a formulation embodying objective criteria, a formulation which had not given rise to any government comment, other than the Israel Government's comment that the phrase "debarred from denying" appeared "awkward" (A/CN.4/183, p. 12). Apparently as a result of that mere objection of form, the Special Rapporteur had proposed a redraft of sub-paragraph (b) which would introduce a new and different formula to express the principle adopted by the Commission in 1963. That redraft replaced the objective formula of 1963 by a subjective one, since it spoke of a State which "must be considered, by reason of its acts or its undue delay in invoking such ground, as having agreed to regard the treaty as valid".

85. That formula had the defect of referring only to one type of omission: undue delay in invoking the ground for invalidating or terminating the treaty. Other omissions could be relevant, such as the omission to protest at the appropriate time, as had been held in the *Arbitral Award by the King of Spain* case.⁷

86. However, the proposed new text had a more serious implication: under its provisions, it would be necessary to show that the State must be considered as having agreed to regard the treaty as valid or as continuing in force.

³ See 836th meeting, preceding para. 21, and para. 21.

⁴ *Yearbook of the International Law Commission, 1963*, Vol. II, p. 213.

⁵ *Ibid.*, Vol. I, p. 186, para. 56.

⁶ *I.C.J. Reports 1962*, p. 39.

⁷ *I.C.J. Reports 1960*, p. 213.

It would not be sufficient to establish the conduct of the State; a purely subjective element was introduced.

87. In the *Temple of Preah Vihear* case, the International Court of Justice had held that Thailand had "for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map". From those two objective determinations of fact, and without examining whether there was any element of consent on the part of Thailand, the Court had concluded that "Thailand is now precluded by her conduct from asserting that she did not accept it [the map]".⁸

88. Likewise, in the *Arbitral Award by the King of Spain* case, the Court had relied on "Nicaragua's failure to raise any question with regard to the validity of the award for several years" to infer, not that there had been any consent, but merely that "it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the award".⁹

89. The result in those cases was that the State was deprived of the right to challenge or, as the Commission had said in the 1963 text of article 47, "debarred from denying", the binding force of a treaty, and not a tacit agreement.

90. For those reasons, he urged that the Drafting Committee should draft the article in terms embodying a more objective criterion, on the lines of the rulings of the International Court of Justice and of the 1963 text.

91. Mr. de LUNA said that he agreed with the Special Rapporteur's decision not to use the term "estoppel", not because the term was unknown in international law, but rather for the reason given by Lord McNair, that "It is open to doubt whether the conception of estoppel which appears to be gaining recognition in international law will be the same as the common law conception, and there is no reason why the international formulation of the rule should be identical with that of national law".¹⁰

92. Apart from the *Temple* case, to which reference had been made, there was the *Eastern Greenland* case, in which the Permanent Court of International Justice had said: "In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland and, in consequence, from proceeding to occupy it".¹¹ Again, in the *Serbian Loans* case, the Permanent Court had stressed that the international law concept of estoppel was different from the common law conception.¹²

93. It was easy to see why both the Permanent Court and the International Court of Justice had stressed the distinct character of the international law conception of the matter. The common law doctrine of estoppel

⁸ *I.C.J. Reports 1962*, p. 32.

⁹ *I.C.J. Reports 1960*, p. 213.

¹⁰ McNair, *The Law of Treaties*, 1961, p. 487.

¹¹ *P.C.I.J. Series A*, No. 53, p. 68.

¹² *P.C.I.J. Series A*, Nos. 20/21, pp. 38, 39.

had resulted from a long history of judicial decisions. On the continent, the subject was governed by rules which had their origin in the Roman law maxims *nemo contra factum suum proprium venire potest* and *allegans contraria non audiendus est*. The rules which derived from those maxims in the laws of the various European countries were not identical with the common law rules of estoppel.

94. With regard to the redraft proposed by the Special Rapporteur, he said he could not accept the introduction of a provision referring to consent or agreement if the provision could be construed to imply a reference to bilateral agreement. In international law, the typical minimum effect of a unilateral act was to create an estoppel: that was true not only of acts but also of omissions. In the *Oscar Chinn* case, for example, the Permanent Court had not declared invalid the Convention of St. Germain of 1919 in relation to the General Act of Berlin of 1885, which it purported to modify; the reason was the omission to protest on the part of those parties to the General Act which were not parties to the Convention of St. Germain.¹³ In that connexion, it was also appropriate to recall Max Huber's award in the *Island of Palmas* case in 1928;¹⁴ in that award, the failure by the Netherlands to protest when notified of the Treaty of Paris between Spain and the United States of America had been construed as an acceptance.

95. For those reasons, he urged that the Drafting Committee should make it clear in article 47 that the intention was to cover also the case of recognition resulting from the failure to protest.

The meeting rose at 6.5 p.m.

¹³ *P.C.I.J.* Series A/B, No. 63.

¹⁴ *Reports of International Arbitral Awards*, Vol. 2.

838th MEETING

Tuesday, 25 January 1966, at 11.30 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-4, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 47 (Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty) (continued)¹

¹ See 836th meeting, preceding para. 21, and para. 21.

1. The CHAIRMAN invited the Commission to continue its consideration of article 47.

2. Mr. YASSEEN said that, in adopting article 47 in 1963, the Commission had shown that to some extent it recognized the doctrine of "estoppel". The principle underlying the rule was unquestioned, and governments had not challenged it in their comments. But now that the Commission had defined its attitude towards certain cases of nullity, it seemed that the scope of article 47 should be slightly different. In its new form it was based, not on the idea of tacit consent, but on that of tacit confirmation, and it was only applicable to cases where confirmation was possible.

3. Since the Commission had provided in article 35 that the effect of the personal coercion of representatives of States was to render the treaty in question absolutely void *ab initio*, a treaty obtained through coercion was incapable of being confirmed. Consequently, article 35 should be excluded from the scope of article 47.

4. The Special Rapporteur's new text for article 47 was an improvement, because it placed the rule on a much more acceptable basis, namely, the explicit or tacit confirmation of a voidable act.

5. Mr. TUNKIN said that he too preferred the Special Rapporteur's new text for article 47. It had been criticized on the ground that the clause "the State . . . must be considered . . . as having agreed to regard the treaty as valid or . . . as remaining in force" would involve difficulties of interpretation. In his opinion, the 1963 text might prove even more difficult to interpret, particularly because no criterion was laid down to determine what was meant by the phrase "so conducted itself as to be debarred from denying that it has elected . . .". At least the new text did contain some kind of criterion in sub-paragraph (a), even though it was rather general in character. Under its terms, only such acts as implied consent to the treaty as being valid or remaining in force would be taken into consideration, so that some limitation was imposed on the application of the rule.

6. He agreed with the proposal to insert the word "omissions" after the word "acts" in sub-paragraph (b).

7. The kind of case that would be covered by article 47 would be one where, despite the manifest violation of the provisions of internal law regarding competence to enter into treaties by a representative, the legislature of his country subsequently ratified or authorized the ratification of the treaty and the instruments of ratification were deposited. But for the same reasons as for articles 36 or 37, he was strongly opposed to including article 35 amongst those to which article 47 would apply.

8. Mr. VERDROSS said that he supported the Special Rapporteur's idea that the article should be based not on the theory of estoppel or "forclusion", but on a more general rule. Estoppel was a rule of procedure, whereas in international law the issue was not whether a right could no longer be invoked: the right ceased to exist if there was tacit recognition or implied agreement. That important distinction had been pointed out in an article by an Italian writer, published in *Diritto Internazionale* some years previously, in which he had clearly demonstrated that, in international law, it was unnecessary to rely on estoppel or "forclusion":

the whole matter could be solved by reference to tacit recognition or, as Mr. Yasseen had put it, tacit confirmation, or to other general principles.

9. Mr. AGO said he had some doubts concerning subparagraph (b) as at present worded. He had no objection to the idea that the fact that the parties tacitly agreed to recognize that a treaty remained in force would mean that its invalidity could not be invoked. He must, however, point out that, in 1963, the Commission had evolved a wider concept which it was now engaged in whittling down in a very special way.

10. Tacit agreement could be a convenient fiction for covering any kind of situation; but it was questionable whether the idea of tacit agreement gained anything from an attempt to apply it to particular cases. When the *Arbitral Award by the King of Spain* case had been before the International Court of Justice, reference had been made to “acquiescence”² rather than to tacit agreement. It was possible to imagine other cases. For instance, a State might wish to invoke a particular fact as a reason for terminating a treaty. It had had no intention of agreeing tacitly to the continuance in force of the treaty. It might then be met by the argument that, in the case of another treaty with a different country, it had not invoked the same fact or had even admitted that the particular fact was not a reason for terminating the treaty. In such a case there was certainly no tacit agreement, but the State had previously, in a like situation, so conducted itself that it could not follow a different course in the case in point.

11. For that reason, and although no particular supporter of the doctrine of estoppel, he had some doubts about the Commission’s idea of limiting considerably the operation of the principle and of the rule. If the word “acquiescence” were used, the scope would be broader, even if not as broad as the Commission had intended in 1963.

12. Mr. JIMÉNEZ de ARÉCHAGA said he fully endorsed Mr. Ago’s views. The introduction into the article of the requirement that there must have been agreement between the States or tacit consent, which many authorities regarded as the foundation of customary law, would restrict the scope of a doctrine which had already found acceptance in international law, and would cause great difficulties in application. Hitherto, in cases covered by article 47, the courts had confined themselves to examining the conduct of States in order to determine whether or not they were precluded from invoking the nullity of a treaty. If the new text of article 47 were adopted they would, in addition, have to draw inferences about whether or not some element of agreement existed, and that would be a highly subjective factor to establish.

13. He could accept the Special Rapporteur’s proposal to extend the application of article 47 to article 31. In the example given by Mr. Tunkin, the act of ratifying a treaty would clearly preclude the State concerned from invoking nullity, since the act of ratification expressed explicitly its intention to apply the treaty. What, however, would be the situation when a State entered into a treaty in violation of its own constitutional

law, applied it for many years and then discovered that a manifest violation had taken place? It would be inadmissible from the point of view of constitutional law to invoke the concept of tacit ratification, an issue that had arisen during the arbitration case between Costa Rica and Nicaragua in connexion with the question whether acceptance of the treaty had been valid.³ That had been done by one of the parties, but the arbitrator had only taken account of the conduct of one of them which had debarred it from invoking a ground of invalidity.

14. The provision on the lines now being suggested by the Special Rapporteur would be at variance with international precedents. However, he could accept a provision based on the criterion of acquiescence, which would be in accordance with the theory of estoppel and in line with the judgments of the International Court of Justice.

15. Mr. Reuter said that if, from the point of view of drafting, the use of the word “acts” in subparagraph (b) was to be questioned, he would be inclined to favour an even broader term such as “conduct” or “comportment”, which would imply that the undue delay was only a particular instance of the comportment.

16. It seemed that, for reasons that were in themselves honourable and correct, the Commission was limiting the scope of the procedures for stabilizing in law situations of irregular origin. He would give an example of such a situation, where the Commission’s attitude would produce consequences which—though he would not regard them as unacceptable—should be considered with care. The case he had in mind—which unfortunately was not of purely academic interest—was where a colonial power, State A, having colonized a territory that it regarded as its own, was confronted by State B, which was to some extent under the influence of State A but whose territory was not regarded as belonging to it. When the time came to delimit the frontier between the State B, which might exist only in name but nevertheless in law, and the colonial power, State A, events occurred which certainly came within the meaning of what several members of the Commission regarded as causes of absolute nullity. Subsequently, the colonized territory became fully independent, as did the neighbouring State B, but the agreement delimiting the frontier between them had certainly been made by irregular means. In the event, those two States agreed to regard the frontier, though drawn in dubious circumstances, as regular. Thus a situation was created by tacit agreement because it contributed to the maintenance of peace.

17. The Commission’s text, however, was hardly conducive to the legal stabilization of a situation which in every respect bore the marks of colonization, but which nevertheless was of value for the maintenance of peace. Of course, it might be that those who, like himself, were in favour of anything that helped to stabilize a given situation in the interests of peace were wrong. Since the Commission wished to delete the reference to article 35, he would not oppose such a change, but he could not help thinking of painful situations like that he had described, parallels to which were to be

² *I.C.J. Reports 1960*, pp. 198 and 218.

³ H. La Fontaine, *Pasicristie internationale, Histoire documentaire des arbitrages internationaux*, p. 332.

found in several continents. So far as those situations were concerned, the Commission was perhaps taking steps which were not quite what it intended. He had noted on several occasions that members of the Commission, for reasons with which he naturally sympathized, were adopting an attitude of reserve that would have the result of preventing, in certain cases, the stabilization of situations which, whatever their initial defects, were connected with the maintenance of peace.

18. Mr. BEDJAOUÏ said that the latest redraft of article 47 was an improvement on the 1963 text. A certain vagueness in the terminology was unfortunately unavoidable. He would not object to the use of the word "acquiescence".

19. For the same reasons as those given at the previous meeting by Mr. Yasseen, Mr. Tunkin, Mr. de Luna and the Chairman in connexion with article 46, article 47 should not apply to article 35, because the ethical content of international relations should be enhanced. The situations to which Mr. Reuter had referred were vestiges of the past; to maintain such situations in being would be an incentive for the State which had coerced the person of the representative of another State.

20. If the reference to article 35 were deleted, he could accept the Special Rapporteur's redraft of article 47.

21. Mr. AMADO said he hoped the Drafting Committee would endeavour to achieve a closer concordance between the English and French texts; in paragraph 1 of the new redraft, for example, the French word "*droit*" was used to translate the English word "ground", which seemed to him dangerous.

22. The term "acquiescence" was fully in keeping with the case-law and so was acceptable to him.

23. The effects which the article might have on historical situations like those referred to by Mr. Reuter were inevitable. The reality of the law was a living reality, and the creative impulse of life could not be halted by logic. Besides, it was impossible to draft a perfectly accurate and perfectly clear text.

24. The CHAIRMAN, speaking as a member of the Commission, said that for the reasons he had given during the earlier debate on article 46, he could not admit the proposition that situations created by coercion could be cured by some legal device. Consequently, he agreed with Mr. Bedjaoui concerning article 47.

25. Mr. Amado had, he thought, been right to draw the Drafting Committee's attention once again to the problem of the French translation of the word "ground".

26. Sir Humphrey WALDOCK, Special Rapporteur, said that the main problem in article 47 was how to formulate sub-paragraph (b). The general structure of the new text seemed to have found favour and he could not agree with the contention that it was the outcome of a fundamental change of approach. As he understood it, the application of the principle of estoppel in the present context raised essentially the question of good faith; what it meant, in other words, was that a State was not entitled to conduct itself in such a way that the other party believed the treaty to be in force, and

subsequently to go back on its position and invoke a ground of invalidity. At its fifteenth session, the Commission had tried to formulate the article in a negative form and the text that had emerged was somewhat clumsy. Even if that form were adopted, it would still be necessary to explain what kind of conduct would prevent a State from invoking a ground of invalidity, and there would be no escaping some reference to its having elected to consider itself bound by the treaty.

27. The new text had given rise to some misunderstanding, which perhaps indicated that it was not entirely satisfactory. He had tried to express the same idea as that of the original version, but in positive form. The phrase "having agreed to regard the treaty" designated something very like acquiescence. The real difficulty was a drafting one and there were good reasons for trying to achieve a text in positive form.

28. He could not subscribe to the view that the new text deviated from the jurisprudence of the International Court of Justice, which usually dealt with relinquishment of the right to invoke a ground of invalidity, both from the negative and the positive point of view, in other words, by examining it both from the angle of estoppel and from that of implied consent.

29. If the Commission finally decided that, in cases of personal coercion of representatives of States, a treaty would have no legal effect, article 47 would no longer apply to article 35.

30. In his opinion, article 47 could now be referred to the Drafting Committee.

31. Mr. BRIGGS said he agreed with the Special Rapporteur that in essence estoppel raised the issue of good faith. However, the new text did differ from that adopted at the fifteenth session in that it shifted the focus to implied agreement.

32. It was more important to bar States from inconsistent conduct than to provide for a second implicit consent to a treaty.

33. He was in favour of including the concept of acquiescence and thought the article could now be referred to the Drafting Committee.

34. Mr. JIMÉNEZ de ARÉCHAGA asked if he could have an answer to the question he had put at the 836th meeting,⁴ as to what the Special Rapporteur meant by "automatic avoidance" in paragraph 1 of his observations.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that the point was an important one. In the sentence in question he had not wished to prejudge the application of article 51, but to indicate that, where estoppel was concerned, in cases when a treaty conflicted with a rule of *jus cogens* or had been obtained by the coercion of a State, once the fact had been established, nullity followed automatically and there was no option open to the parties to maintain the treaty in force.

36. He appreciated Mr. Briggs's point of view, but must ask by what criterion it was possible to determine when a State was precluded from invoking a ground of nullity. In his opinion the answer was—and it was

⁴ Para. 32.

rather more definite than the answer given by some other members of the Commission—that a State was precluded from invoking a ground when the other Party must reasonably be allowed to have assumed that the treaty was valid and that the first State had consented to waive whatever objections it might have had to the validity of the treaty.

37. Whatever wording were chosen, it would be impossible to dispense altogether with the element of a presumption of consent. Perhaps the solution lay in using the term “acquiescence”, but that was a matter for the Drafting Committee.

38. The CHAIRMAN suggested that article 47 be referred to the Drafting Committee.

*It was so agreed.*⁵

ARTICLE 49 (Authority to denounce, terminate or withdraw from a treaty or suspend its operation)

Article 49

Authority to denounce, terminate or withdraw from a treaty or suspend its operation

The rules contained in article 4 relating to evidence of authority to conclude a treaty also apply, *mutatis mutandis*, to evidence of authority to denounce, terminate or withdraw from the treaty or to suspend its operation. (A/CN.4/L.107, p. 43)

39. The CHAIRMAN said that since article 48 had been dealt with at the first part of the session, where it had become article 3 (*bis*),⁶ he now invited the Commission to consider article 49, for which the Special Rapporteur had proposed a new title and text which read:

Evidence of authority to invoke or to declare the invalidity, termination or suspension of the operation of a treaty

1. The rules laid down in article 4 regarding evidence of authority to represent a State for the purpose of negotiating a treaty apply also to representation for the purpose of invoking a ground of invalidity, termination, withdrawal from or suspension of the operation of a treaty.

2. The rules laid down in article 4 regarding evidence of authority to represent a State for the purpose of expressing its consent to be bound by a treaty apply also to representation for the purpose of expressing the will of a State to denounce as invalid, terminate, withdraw from or suspend the operation of a treaty. (A/CN.4/183, p. 11)

40. Sir Humphrey WALDOCK, Special Rapporteur, said that in order to bring the redraft of article 49 into line with article 4 as adopted by the Commission in 1965, the words “evidence of authority to represent a State”, in the opening phrase of both paragraph 1 and paragraph 2, should be replaced by the words “the representation of a State”.

41. The purpose of article 49 was to deal, in connexion with the right to invoke the invalidity or to terminate or suspend the operation of a treaty, with the question

of the authority to represent the State, which was dealt with in article 4 in connexion with the conclusion of treaties.

42. Government comments on the 1963 text had indicated the need to draw a distinction between representation of a State for discussing grounds of invalidity, and representation for the definitive act of termination. To take those comments into account, he had redrafted the article in the form of two paragraphs: paragraph 1 now dealt with the representation of a State for the purpose of invoking a ground of invalidity, termination, withdrawal from or suspension of the operation of a treaty; paragraph 2 dealt with representation for the purpose of expressing the will of a State to denounce as invalid, terminate, withdraw from or suspend the operation of a treaty.

43. Mr. JIMÉNEZ de ARÉCHAGA said that he could not see exactly how the terms of article 4 could justify the system now proposed by the Special Rapporteur.

44. Paragraph 1 dealt with the question of the persons authorized to carry communications from one State to another and belonged more properly to the law of diplomatic relations than to the law of treaties; it had therefore no place in the present draft.

45. With regard to paragraph 2, there were two possibilities. Either the expression of the will of the State in the matter would lead to the negotiation of a new agreement, in which case it was hardly necessary to say that the rules laid down in article 4 for the representation of the State would apply; or the treaty was extinguished or terminated because there was no objection or no reply, as indicated in paragraph 2 of article 51, or because of a decision by a court, arbitral tribunal or other competent body, in which case he saw no need to refer to the expression of the will of the State.

46. He was therefore forced to conclude that article 49 should be deleted.

47. Mr. ROSENNE, speaking on a point of order, said that at the first part of the session the Commission had decided to accept the Special Rapporteur's proposal to generalize the provisions in the former article 48 in the form of article 3 (*bis*).⁷ That decision had been taken to facilitate the discussion of the subsequent articles. However, there were still some significant government comments on the substance of article 48 itself, and he hoped that the Commission would deal with those comments at its forthcoming summer session.

48. The CHAIRMAN said that, in conformity with its decisions at the first part of the session, the Commission would review the whole draft at its eighteenth session. When reviewing article 3 (*bis*), it might deal with the problems raised in the debate on the former article 48.

49. Mr. ROSENNE said that the text of article 49 did not fully accord with the substance of many articles adopted by the Commission, especially those on termination; it was perhaps too formal and seemed to exclude informal agreements to terminate a treaty or to suspend its operation.

⁵ For resumption of discussion, see 842nd meeting, paras. 98-106.

⁶ *Yearbook of the International Law Commission, 1965, Vol. I, 780th and 820th meetings.*

⁷ *Ibid.*, 1965, Vol. I, 780th meeting, para. 18.

50. He had been impressed by the remark by Mr. Jiménez de Aréchaga that paragraph 1 belonged to the general law on diplomatic relations, but he would not go so far as to advocate the deletion of the whole article.

51. Perhaps the best solution would be to adopt a short provision on some such lines as:

“The rules laid down in articles 4 and 4 (*bis*) also apply to the representation of a State for the purpose of articles 50 and 51.”

That might have to be extended to cover such articles as 65 and 66, if the matter was not dealt with by implication by the reference in those articles to part I.

52. Care should be taken to avoid introducing by implication, through the provisions of article 49, the theory of the *acte contraire* which the Commission had so far consistently avoided.

53. Mr. de Luna had remarked that it was extremely rare to find in national constitutions provisions on treaty termination as such. In 1963, there had been a short discussion⁸ relating to that point and to the connexion between article 49 and article 5 of the Special Rapporteur's second report,⁹ which had now become article 31 on provisions of internal law regarding competence to enter into treaties. The Special Rapporteur had been right on that occasion in taking the view that there was no real connexion between articles 49 and 31, and consequently he (Mr. Rosenne) had doubts about the parallel with article 4.

54. Mr. de LUNA said that he too had doubts about the parallel. A study of national constitutions showed that most of them were silent on the question of who was authorized to express the will of the State in its external relations in the matter of invoking grounds of invalidity, termination or withdrawal from or suspension of the operation of a treaty.

55. The new division into two paragraphs seemed of doubtful merit. First, because authority to invoke a ground of invalidity or termination was usually combined with authority to negotiate a new agreement or to declare the old one terminated. And secondly, because paragraph 2 seemed to encourage States to denounce or to terminate the treaty without any prior negotiations.

56. The danger was all the more real seeing that no criterion had been laid down to determine in which cases the representative was authorized to negotiate and in which cases he was only empowered to express the will of the State to terminate the treaty.

57. Article 49 involved more dangers than advantages but with a more carefully worded text, it might be acceptable.

58. Mr. BRIGGS said that he could see no case provided for in the draft in which the action described in paragraph 2 could be taken, since the draft provided no right to denounce or withdraw but only a right to invoke certain grounds for denunciation or withdrawal. Certainly, paragraph 3 of article 51 did not contain any provision for the expression of the will of a State to denounce as invalid, terminate, withdraw from or

suspend the operation of a treaty. Paragraph 2, therefore, did not belong to the draft of the law of treaties.

59. Paragraph 1 could perhaps be kept, but with a different approach. An examination of article 4 showed that the rules on the representation of the State in the negotiation of treaties and the rules on representation in the conclusion of treaties were practically the same, except for the list of the persons who, “in virtue of their functions and without having to produce an instrument of full powers”, were considered as representing their State. For the purposes of negotiation of a treaty, all six categories of persons listed in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 2 of article 4 were deemed *ex officio* not to need full powers. For the purposes of the conclusion of a treaty, however, only the three categories indicated in sub-paragraph (*a*), Heads of State, Heads of Government and Ministers for Foreign Affairs, were regarded as so authorized. No such *ex officio* powers were recognized to the three other categories: Heads of diplomatic missions, representatives accredited by States to an international conference and representatives accredited to an organ of an international organization.

60. It was difficult to see why a head of diplomatic mission, or a representative to an international conference or to an organ of an international organization, should be regarded as entitled *ex officio* to invoke a ground of invalidity, termination, withdrawal from or suspension of the operation of a treaty, as was done in paragraph 2. Such representatives would be the persons least likely to have such powers.

61. The 1963 approach was more appropriate and he therefore suggested a formulation on the following lines:

“The rules laid down in article 4 regarding the representation of a State for the purpose of concluding a treaty shall apply to the representation for the purposes of invoking a ground of invalidity, termination, withdrawal from or suspension of the operation of a treaty.”

A formulation on those lines would exclude the categories of persons listed in sub-paragraphs (*b*) and (*c*) as having any *ex officio* powers to invoke grounds of invalidity or termination.

62. Mr. Rosenne had suggested that the terms of the article were perhaps too formal, but, personally, he was in favour of a measure of strictness in the matter; there would be no great harm in working on the lines of article 4.

63. Mr. AGO said he agreed with Mr. de Luna that it would be inadvisable to divide article 49 into two paragraphs. Since article 4, to which article 49 referred, dealt in one single paragraph with matters as diverse as the negotiation, adoption and authentication of the text of the treaty and the expression of the State's consent to be bound by a treaty, article 49 should likewise be unified. Besides, the two paragraphs of the redraft were not easy to read and could well give rise to doubt and ambiguity. What, for example, was the difference between “invoking a ground of invalidity . . . of a treaty” and the expression of “the will of the State to denounce as invalid, terminate, withdraw from or suspend the operation of a treaty”?

⁸ *Ibid.*, 1963, Vol. I, p. 164, paras. 15-17.

⁹ *Ibid.*, Vol. II, p. 41.

64. As Mr. Briggs had said, the provisions of paragraph 2 of article 4 could not apply as they stood to the situation dealt with in article 49. The expression *mutatis mutandis* was generally not really satisfactory, but it would no doubt be necessary to add a proviso in some form or other in article 49, notably regarding the representatives of States at international conferences or to international organizations. For example, while it was normal for the representative to an international organization to negotiate a treaty, it did not automatically follow that he was authorized to raise a question of nullity affecting a treaty which had not only been signed but ratified by the State he represented.

65. The language should be as strict as possible. Since article 4 described the conditions under which a person could be regarded as representing a State, article 49 could use that language and provide, for example, that the rules laid down in article 4 would likewise apply—subject to differences to be specified—to the circumstances in which a person could be regarded as representing a State for the purpose of invoking a ground of invalidity etc., of a treaty. The expression “invoking the invalidity” had been adopted by the Drafting Committee in all the articles dealing with the invalidity of treaties. The terminology should be standardized, for any difference in language might be interpreted as connoting a difference of substance.

66. The CHAIRMAN, speaking as a member of the Commission, said that from the point of view of theory, he had no criticism of the formula proposed by the Special Rapporteur. Experience showed, however, that in practice States were not so formalistic. In most cases, the expression of the will of the State, for the purposes contemplated in article 49, took the form of *notes verbales*, either from the Ministry of Foreign Affairs or from diplomatic missions, in which the writer stated that he was acting on instructions from the Minister for Foreign Affairs. Consequently, it was hardly ever necessary in practice to determine who had the authority to express the will of the State; in reality the decision was always taken by the authority competent to take it.

67. The Drafting Committee would therefore have to choose between two approaches: either it could follow the general practice, or else it could formulate a rule, on the lines proposed by the Special Rapporteur, modifying the practice in the interests of the stability and security of international relations.

The meeting rose at 1.5. p.m.

839th MEETING

Wednesday, 26 January 1966, at 11.30 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/183 and Add.1-4, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 49 (Authority to denounce, terminate or withdraw from a treaty or suspend its operation)
(continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 49.
2. Mr. YASSEEN said he had been struck by some of the remarks made during the discussion, notably those of Mr. Jiménez de Aréchaga, the Chairman and Mr. Briggs.
3. It was true, as Mr. Jiménez de Aréchaga had said, that article 49 touched on the law of diplomatic relations. But, after all, the law of diplomatic relations operated in all relations between States, whether in the matter of treaties or in other matters.
4. The Commission should certainly take notice of current practice in the matter, a point to which the Chairman had very properly drawn attention.
5. The article raised one very important issue, the validity and maintenance in force of treaties and, consequently, the stability of international relations. All the moves involved in action to declare a treaty void, suspended or terminated were even more important than those involved in the conclusion of treaties, and should be surrounded by even more safeguards. The processes used for terminating a treaty might precipitate a crisis between States and so jeopardize international relations. Accordingly, it was not excessive to say that a certain formality was needed for the purpose of the production of evidence showing that the representative of a State had the necessary authority to perform the acts mentioned in article 49; it would be correct to stipulate in that article that the representative must possess clear, and sometimes even formal, authority.
6. Like Mr. Briggs, he considered that the provisions of article 4 should not operate automatically in the cases dealt with in article 49, so far as certain representatives were concerned. Whereas an ambassador in the normal course of events had authority *ex officio* to negotiate with the State to which he was accredited, greater caution was needed in any case where it was intended to invoke a ground for annulling or terminating a treaty; in such a case the ambassador should possess express authority.
7. Without wishing to make a formal proposal, he thought that the Commission should look into all those questions more closely, for there was no more than an apparent parallel between the acts involved in the conclusion of a treaty and the steps leading to a declaration annulling or terminating or suspending the operation of a treaty.
8. Subject to those remarks, he considered that the Special Rapporteur's redraft was correct in that it drew a distinction between authority to invoke a ground for annulling or terminating a treaty or withdrawing from or suspending the operation of a treaty, and authority to express the State's will to declare a treaty void, to

¹ See 838th meeting, after para. 38, and para. 39.

terminate it, to cease to be a party to it, or to suspend its operation. While it should contain a cross-reference to article 4, article 49 should be so drafted as to make allowance for the difference between the two situations covered in the two articles.

9. Mr. RUDA said that the retention of article 49 was justified on both logical and practical grounds. From the logical point of view, the existence in the draft of article 4, which set out the categories of representatives from whom full powers were not required for the purpose of expressing the will of the State in the conclusion of a treaty, made it appropriate to have a corresponding article setting out the categories of representatives from whom full powers were required for the purpose of terminating the obligations of the State.

10. From the practical point of view, the provisions of article 49 would be of great assistance to Ministries of Foreign Affairs by laying down clear rules on the requirements for representing a State for the purposes of expressing the will of the State at the international level. The article related only to international effects and concerned the question whether a representative was required to produce full powers or not.

11. With regard to the contents of the article, he supported the approach adopted by the Special Rapporteur. Just as in article 4 a distinction was drawn between representation of the State for the purposes of, on the one hand, negotiating and adopting the text, and on the other hand, expressing the consent of the State to be bound, so it was proper to draw a distinction in article 49 between representation of the State for the purposes of, on the one hand, invoking a ground of invalidity or termination and, on the other hand, expressing the will of the State to denounce or terminate the treaty.

12. Article 49 presupposed the existence of a general rule to the effect that, both for the purpose of invoking a ground of validity and for the purpose of denouncing a treaty, all representatives were required to produce full powers. The article stated the exceptions to that general rule. A first group of exceptions related to those persons who were not required to produce full powers in any case: Heads of State, Heads of Government and Foreign Ministers. It was useful to make clear provision for that group because, in State practice, there had been some discussion on the question whether a Foreign Minister was required to produce full powers for the purpose of denouncing or terminating a treaty.

13. The second group of exceptions related to those persons who were not required to produce full powers for the purpose of invoking a ground of invalidity or termination, but were required to produce such powers for the purpose of expressing the will of the State to denounce or terminate a treaty.

14. Unlike Mr. Yasseen, he thought that there was a parallel with article 4 and that it was logical, in view of the functions performed by them as representatives, that heads of diplomatic missions and representatives accredited by States to an organ of an international organization should be deemed to have full powers to invoke grounds of nullity or termination. Representatives accredited by States to an international conference, however, should be required to produce full powers,

even for the purpose of invoking a ground of nullity or termination.

15. With regard to presentation, he would have no objection to the fusion of the two paragraphs of the Special Rapporteur's new draft.

16. Mr. TUNKIN said that the Commission did not have sufficient information on current practice with regard to the subject-matter of article 49; its position was therefore more difficult than over article 4. He was prepared to accept the Special Rapporteur's redraft in principle, although the simpler formulation of 1963 might have been preferable.

17. He agreed with Mr. Jiménez de Aréchaga that article 4 did not establish as clear-cut a separation between the negotiation and adoption of the text of a treaty on the one hand, and the expression of the final consent to be bound on the other. In article 49, a more definite line of demarcation had been drawn and that contrast with article 4 could give rise to some difficulties, a point which the Drafting Committee should take into account.

18. The difference in wording between paragraphs 1 and 2 would have to be adjusted. In the context of the denunciation or termination of a treaty, paragraph 2 referred to the "will of a State", but invoking a ground of invalidity or termination, to which paragraph 1 referred, also constituted an expression of the will of the State.

19. Mr. de LUNA said that life did not always abide by the rules of logic. Twenty-two years' experience as legal adviser to a Ministry of Foreign Affairs and four years' experience as ambassador had taught him that the practice of States was as described by the Chairman, and that very informal methods were used to express the will of the State to denounce or terminate a treaty. A mere *note verbale* from a Head of mission or from the Foreign Minister was sufficient to communicate the will to denounce, particularly in cases where the termination of the treaty was based on its own provisions.

20. In United States practice, it had been held by the legal advisers of the State Department that the President did not require the consent of the Senate to denounce a treaty² and that the foreign State to which the notification was made was not called upon to investigate whether the act thus performed by the President was constitutional or not.³ The United States had a rigid constitution, which contained provisions on the treaty-making power which specified that the President required the consent of a two-thirds majority of the Senate for the purpose of concluding treaties,⁴ but there was no parallel between the conclusion and the termination of treaties.

21. The fact that practice did not point to any parallel between the cases covered by article 4 and those covered by article 49 did not mean that the Commission could not adopt provisions which would have the effect of

² G. H. Hackworth, *Digest of International Law*, Vol. V, p. 319.

³ J. B. Moore, *Digest of International Law*, Vol. V, pp. 169 and 170.

⁴ Article II, Section 2, Clause 2: "... He [the President] shall have Power by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. ..."

changing the present practice, but, before doing that, it would have to examine the whole question thoroughly.

22. Personally, he did not think there was any real parallel between the situation where a State became bound by certain obligations, and the situation where those obligations came to an end. An extreme instance was provided by the minorities treaties concluded at the end of the First World War; the countries which then undertook the obligations for the protection of the minorities could not denounce those treaties without the consent of the Council of the League of Nations. It was true, of course, that those provisions on the protection of minorities had more the character of objective rules of law than of ordinary treaty provisions.

23. On the whole he preferred the 1963 text, with its saving qualification "*mutatis mutandis*". And, as he had already pointed out at the previous meeting, he did not favour the division of the article into two paragraphs because, although the distinction between negotiation and termination was not erroneous, it made the article cumbersome and could involve dangers.

24. Mr. AGO said that, the more he considered the matter, the more he thought it wrong to draw a parallel between the situations contemplated in article 4 and in article 49. Even if the Commission reverted to the 1963 formulation, there was always a danger that it might introduce an erroneous statement into the draft.

25. For example, article 4, paragraph 1 (a), stipulated that the person concerned must produce "an appropriate instrument of full powers"; but that provision did not appear to him to suit the circumstances of the termination of a treaty. Paragraph 2 (a) of that article, which dealt with Heads of State, Heads of Government and Ministers for Foreign Affairs, could at a pinch apply in the situation envisaged in article 49, but the same could not be said of paragraph 2 (b), since an ambassador, although authorized to negotiate with the State to which he was accredited, was certainly not empowered to raise so serious a matter as grounds for the invalidity, suspension or termination of a treaty. Even less could the rule in paragraph 2 (c), concerning representatives to an international conference or to an international organization, be transferred to article 49.

26. In his view, it was essential that the Commission should give further consideration to all those questions, and he therefore proposed that a decision on the substance of article 49 be postponed until the eighteenth session.

27. Mr. LACHS said that article 49 dealt with an important stage, albeit the last in the treaty-making process, and had its place in the draft.

28. There were similarities, but also differences, between the negotiation and the termination of a treaty. In the case of a multilateral treaty, some kind of negotiation might be necessary to bring it to an end, and questions of interpretation could then arise as to whether the right to invoke invalidity, termination or suspension had been properly understood. A case in point was that of the 1849 Treaty of Peace, Friendship, Commerce and Navigation between Guatemala and the United States,⁵

⁵ W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers*, Vol. I, p. 870.

under which the clauses concerning commerce and navigation could be terminated at one year's notice but all those relating to peace and friendship between the two parties were intended to last in perpetuity. In 1888, some of the clauses had been denounced and a dispute had arisen as to which group of articles they belonged to.

29. He shared the doubts expressed about paragraph 2 in the Special Rapporteur's new text. The Commission should re-examine the issues raised in the article. The provision ought to be simple and need not be divided into two paragraphs. Possibly the original text was clearer, but the United Kingdom Government's criticism of the use of the word "conclude" was justified.

30. Mr. CASTRÉN said that, despite the misgivings voiced by certain members, article 49 was of some value and should therefore be retained.

31. There was undoubtedly a close analogy between the situations dealt with in articles 4 and 49, even though they were not quite parallel. It was therefore arguable that those problems should be solved according to the same legal principles.

32. It could be contended that a person who possessed authority to conclude a treaty or to express the will of the State for the purpose of negotiating a treaty or adopting or authenticating its text generally also possessed the right to represent the State in a corresponding act whereby a treaty was to be terminated or in invoking grounds which would lead to the same result. In general, the conclusion of a treaty was a more important act than denunciation or the other acts necessary for terminating a treaty. Under the constitutions of several countries including Finland, the assent of Parliament was required for the conclusion or ratification but not for the denunciation of certain treaties; denunciation was usually a matter for the Executive. He was therefore prepared to accept the idea expressed in paragraph 2 of the Special Rapporteur's redraft.

33. So far as drafting was concerned, he preferred the new version to the 1963 text but, like several other members, he thought that the new draft could be still further improved, for example by amalgamating its two paragraphs, which were repetitive.

34. Article 49 should be placed at the beginning of part II of the draft, dealing with the termination of treaties.

35. Mr. BRIGGS said he was against postponing discussion of article 49 until the next session, as it was no more difficult than some others that the Commission had dealt with. A text could be formulated now and could always be modified subsequently, should new information on practice come to light or should that be required by the observations of governments.

36. The analogies between the process of terminating and of concluding a treaty should not be pressed too far, but there was clearly a need to stipulate that a person invoking the nullity, termination or suspension of a treaty was properly authorized, unless, where full powers were dispensed with, he was so empowered by virtue of his office.

37. Mr. AMADO said that strong arguments had been put forward by those members of the Commission who

took the view that the rule proposed in article 49 found no support in practice.

38. Several members of the Commission had said that the practice should be improved and that the Commission should help Foreign Ministries by providing them with guidelines which they could follow in cases of doubt.

39. That being so, the Commission would do well to adopt Mr. Ago's proposal that the formulation of article 49 should be postponed in order that the practice could be studied more thoroughly.

40. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Ago that further consideration of article 49 should be postponed. On the other hand, he shared Mr. Lachs's view that all the questions arising out of the article should first be settled.

41. Mr. TSURUOKA said that the Commission was faced with two requirements which in a sense were contradictory: it had to meet the wishes of those who were anxious about the stability of treaty relationships, and at the same time to provide for some flexibility in practice. If the Commission decided in favour of stability, it would need to formulate certain rules, which would have to be hedged about with precautions, lest a representative's authority to terminate a treaty be liberalized too much. Such a course would be in the interests of a State which, for whatever reason, wished to terminate the treaty, and also of the State receiving the notice of denunciation. Nevertheless, the Commission should not be too solicitous on that point. On the other hand, flexibility in the manner of action in diplomatic and international life in general should not be hampered and the Commission should avoid departing too much from State practice.

42. Current practice required further elucidation and the need for clear wording was perhaps even more important in article 49 than in others. The Commission should, therefore, endeavour to obtain the necessary data before the next session, when it would resume its consideration of the article.

43. Mr. BEDJAOUI said that he supported Mr. Tsuruoka's views; he too had been bothered by article 49. Many States considered that the conclusion of a treaty was more important to them than its termination. That was a fact which could be illustrated by many examples. For instance, he had known a case where a treaty had been terminated by a telephone call from an ambassador who himself had received his instructions by telephone. In other words, where denunciation and suspension were concerned, there was no question of undue ceremony.

44. He appreciated that some members thought that such a situation should be covered by stricter—though realistic—rules. The supporters of both the proposed solutions were agreed that there was no real analogy between article 4 and article 49. Mr. Ago's proposal should, therefore, be adopted.

45. Mr. YASSEEN, referring to Mr. Castrén's remark that the conclusion of a treaty was usually more important to States than its negotiation, said that, from the national point of view, both phases were usually of equal importance.

46. From the international point of view, however, and because it could lead to tension and even to disputes, denunciation was an operation which raised more problems than the conclusion of treaties; it was also more important in that it was more dangerous, since it might affect relations between States. Certain precautions were therefore necessary. Although the rule should not be unreasonably strict, it could nevertheless require that the will of the State should be expressed by its representative in due form, if only to avoid the recurrence of situations such as that mentioned by the Chairman, where the *note verbale* denouncing a treaty had subsequently been withdrawn.

47. Sir Humphrey WALDOCK, Special Rapporteur, said he was surprised that some members should regard article 49, which had already been discussed at the fifteenth session, as particularly difficult. He felt that some of the criticisms were misdirected, as they seemed to interpret the article as relating to matters with which it did not deal at all.

48. In 1963 the Commission had decided that such an article was highly desirable so as to achieve some kind of order in the process of bringing about the invalidity, termination or suspension of a treaty. The article did not deal with the form of the instrument to be used, the only provision regarding which was that in article 50, concerning notices of termination; and he could not therefore agree that it involved any risk of bringing in the theory of the "*acte contraire*" by the back door.

49. The Commission had been of the opinion, owing to the possibility of ministers purporting to proclaim the termination or invalidity of a treaty without proper authority or in an irregular way, that some provision was necessary concerning the evidence of the authority of the person from which the instrument of termination etc. emanated.

50. Article 49 had not provoked a single objection, apart from the justifiable criticism by the United Kingdom Government of the possible ambiguity of the word "conclude", which had not in fact been used in article 4.

51. In view of what seemed the general agreement that an article on the subject was needed, he would not have thought the difficulties of drawing it up very great, even if there were one or two drafting problems. It was not intended to deal with internal constitutional law, or with the form of the instrument, but only with the international representation of a State for purposes of invoking or declaring the invalidity, termination or suspension of a treaty.

52. He did not agree that the Commission had failed to draw a distinction in article 4 between international representation of a State for negotiating a treaty and representation for expressing its final consent to be bound. Close examination of the provisions of the article would show that it had done so.

53. It might prove unnecessary to specify who could invoke the invalidity of a treaty on behalf of a State. Perhaps paragraph 1 in his new draft went into too much detail, but he continued to think that it would be logical to separate the procedure from the power to invoke termination.

54. He was prepared to consider the suggestions made during the discussion for the amendment of the text, though he had been surprised at the enthusiasm shown for re-inserting the phrase *mutatis mutandis*, which the Commission was usually anxious to drop, and he questioned whether it was strictly necessary.

55. Mr. Tunkin's suggestion concerning paragraph 2 was acceptable.

56. As the article had been discussed at considerable length, it would be a pity to postpone its drafting until the eighteenth session. He was now in a position to put forward a new text to the Drafting Committee, which might be able to work out something acceptable, so that the results of the discussion would not be lost. He hoped, therefore, that the article could be referred to the Drafting Committee, whether its reconsideration by the Commission took place at the present session or was left over until the eighteenth session.

57. Mr. AGO said it was unfortunate that his proposal, intended to cut short the discussion, had in fact prolonged it. He was convinced that it was absolutely necessary that the draft should contain an article on the lines of article 49 and that it was a subject into which the Commission might well be able to introduce some order. He did not believe, however, that the difficulty could be overcome merely by inserting a reference to article 4. He proposed, therefore, that the Commission postpone further consideration of article 49 and refer the article to the Drafting Committee; the Committee would not have time to consider it forthwith but would do so in May.

58. The CHAIRMAN suggested that article 49 be referred to the Drafting Committee in accordance with Mr. Ago's proposal.⁶

It was so agreed.

ARTICLE 51 (Procedure in other cases)

59. Mr. JIMÉNEZ de ARÉCHAGA said that article 51 was an important one to which the Commission should do full justice, and as little time remained, he proposed that its consideration be deferred until the eighteenth session.

It was so agreed.

The meeting rose at 1.15 p.m.

⁶ For the decision with regard to further consideration of article 49, see 842nd meeting, para. 107.

840th MEETING

Wednesday, 26 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

[Item 2 of the agenda]

(continued)

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the texts of articles submitted by the Drafting Committee.

ARTICLE 4 (*bis*) [formerly paragraph 1 of article 32] (Subsequent confirmation of an act performed without authority)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee, following the Commission's decision to divide the former article 32¹ into two parts and to transfer the content of what had been paragraph 1 to a provision which would follow article 4 (concerning full powers), had prepared the following text for the new article 4 (*bis*):

Article 4 (bis)

Subsequent confirmation of an act performed without authority

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 4 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State.

3. The Commission had taken that decision because the case of an act by a person who could not be regarded as representing a State within the meaning of article 4 should logically be dealt with immediately after that article. The right place for a provision stating that, although such an act had no legal effect it could be subsequently confirmed, was not the section concerning the invalidity of treaties but that concerning the representation of a State for purposes of concluding a treaty.

4. The CHAIRMAN put article 4 (*bis*) to the vote.

Article 4 (bis) was adopted by 17 votes to none.

ARTICLE 32 (Specific restriction on authority to express the consent of the State)

5. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for what had formerly constituted the second paragraph of article 32:¹

Article 32

Specific restriction on authority to express the consent of the State

If the authority of a representative to express the consent of his State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating a consent expressed by him unless the restriction was brought to the notice of the other contracting States prior to his expressing such consent.

6. The main change was the greater emphasis on the point that the authority of a representative related to

¹ For earlier discussion on article 32, see 824th meeting, paras. 1-51.

the conclusion of a *particular* treaty was subject to a *particular* restriction.

7. Mr. CASTRÉN proposed that the words "a consent expressed by him" be replaced by the words "that consent".

8. Mr. ROSENNE said he doubted whether Mr. Castrén's amendment was justified.

9. Mr. TUNKIN said that the Drafting Committee had discussed the point and decided that the word "consent" should be qualified by the words "expressed by him".

10. Mr. YASSEEN said that the wording "a consent expressed by him" should stand, because the consent of the State did not correspond exactly with that expressed by the representative.

11. Sir Humphrey WALDOCK, Special Rapporteur, said that in the interests of clarity, the Drafting Committee's text, in both the English and the French versions, ought to be retained.

12. Mr. CASTRÉN withdrew his amendment.

13. The CHAIRMAN put article 32 to the vote.

Article 32 was adopted by 17 votes to none.

ARTICLE 33 (Fraud)²

14. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 33:

A State which has been induced to conclude a treaty by the fraudulent conduct of another contracting State may invoke the fraud as invalidating its consent to be bound by the treaty.

15. The new text was essentially the same as that in paragraph 1 of the 1963 version. The Drafting Committee had considered the question, raised at the fifteenth session, whether the phrase "fraudulent conduct" would cover a single act of fraud, and the majority view had been that it would.

16. The question of the separability of treaty provisions entered into under the influence of fraud, which had formerly been dealt with in paragraph 2, was to be covered in a general article on the subject of the separability of treaties.

17. Mr. YASSEEN said he still had some doubts as to the scope of the expression "fraudulent conduct". He would not, however, oppose the article as drafted if the majority of the Commission thought that the expression could mean one single act.

18. The CHAIRMAN put article 33 to the vote.

Article 33 was adopted by 17 votes to none.

ARTICLE 34 (Error)³

19. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 34:

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates

to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error, or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity, and article 26 then applies.

20. The phrase "an error respecting the substance of a treaty", used in paragraph 1 of the 1963 text, had been criticized on the ground that it might be read as including a wrong interpretation of the treaty, and the Drafting Committee had accordingly decided to replace it by the phrase "an error in a treaty".

21. The Thai delegation in the Sixth Committee had with some justification pointed out that the scope of the exception provided for in the former paragraph 2 was too wide and might have the effect of almost rendering paragraph 1 nugatory. The Drafting Committee had dropped the words "or could have avoided it", which seemed to it to be susceptible of rather wide interpretations, and a few minor drafting changes had been introduced in paragraph 3.

22. Mr. VERDROSS proposed that, in paragraph 2, the words "a possible error" be replaced by the words "the error", and that in paragraph 3 the word "and" be omitted and replaced by a semi-colon.

23. Mr. REUTER, with regard to Mr. Verdross's second amendment, proposed that in the French text of paragraph 3 the words "*est applicable*" be replaced by the word "*s'applique*".

24. Mr. AGO said he noted that the English expression "essential basis" in paragraph 1 was rendered in French by the words "*motif essentiel*", but in article 44 by "*base essentielle*". Since in a number of passages in the Commission's draft the English word "ground" was translated into French by "*motif*", some confusion was bound to arise unless the French translation were made uniform.

25. Mr. REUTER said that the word "*motif*" was the more usual; the adjective "*essentiel*" was very strong.

26. Mr. JIMÉNEZ de ARÉCHAGA, with regard to the first proposal by Mr. Verdross, said that the wording of the English text of paragraph 2 was taken from the judgment by the International Court of Justice in the case concerning the *Temple of Preah Vihear* and for that reason should be retained.

27. Mr. VERDROSS said that in that case he would withdraw his amendment to paragraph 2.

28. Mr. de LUNA said that the French and Spanish texts should be brought into line with the English.

29. Mr. REUTER said that, with all due deference to the International Court of Justice, in the particular context the Commission could depart somewhat from that wording in order to reflect faithfully what the Court had had in mind, which was clearly that the party in question should be aware of the risk of error.

² For earlier discussion, see 824th meeting, paras. 52-107.

³ For earlier discussion, see 825th meeting, paras. 1-50.

30. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Reuter; it was for jurists to take the degree of risk into account.

31. Mr. TSURUOKA said he had been about to propose the wording "*une erreur éventuelle*", but would support Mr. Reuter's suggestion.

32. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Verdross had raised a point of substance in connexion with paragraph 2. The question was whether the exception should apply when there had been notice of an error, or only when there was a possibility of error. The latter conception was wider.

33. Mr. YASSEEN said he thought Mr. Verdross was right. The error in question was one which had actually occurred but would not be invoked; it was not "a possible" error.

34. Mr. JIMÉNEZ de ARÉCHAGA said he still thought that the wording of the Court ought to be kept, not only because it was authoritative but because it was reasonable. The Court had stated: "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error".⁴

35. An example of a case where a party had been on notice of a possible error was the 1923 arbitration case between Costa Rica and Great Britain, in which Chief Justice Taft had been the arbitrator.⁵

36. Mr. AGO pointed out that, in the French text, the relevant passage from the advisory opinion of the International Court was not reproduced verbatim. Whereas the English text borrowed the language of the Court ("to put it on notice of a possible error"), the French text as proposed by the Drafting Committee did not convey exactly the same meaning.

37. Sir Humphrey WALDOCK, Special Rapporteur, referring to Mr. Ago's point about the expression "essential basis" in paragraph 1, said that in the English text the term "basis" was the correct one.

38. Mr. REUTER said he realized that the expression "*base essentielle*" was not very elegant but it was correct. Since the Commission was in agreement concerning the English text and since the Special Rapporteur did not object, the French text might follow the English, even though for once the French would be slightly less perfect.

39. The CHAIRMAN asked the Commission to decide whether in paragraph 2 it wished to follow the language of the Court and, if so, whether the English and French texts corresponded.

40. Mr. AGO said that the relevant passage in the French text of the Court's advisory opinion read "*les circonstances étaient telles qu'elle avait été avertie de la possibilité d'une erreur*".

41. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the wording used by the Court must be used in the French text.

42. Mr. REUTER said he would not press his point, provided it was explained in the commentary that the Commission had drawn on the language of the International Court of Justice.

43. Sir Humphrey WALDOCK, Special Rapporteur, said he could agree to that.

44. The CHAIRMAN put article 34 to the vote subject to amendment of the French version.

Article 34 was adopted by 17 votes to none.

ARTICLE 35 (Personal coercion of a representative)⁶

45. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 35:

Personal coercion of a representative

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him personally shall be without any legal effect.

46. It was substantially the same text as that he had proposed in his fifth report, but some modification had been made to its presentation. The rule was now stated in positive form.

47. The Drafting Committee had decided that it would be more appropriate to refer to the representative of a State in the singular, rather than in the plural as had been done in the 1963 text. The phrase "in his personal capacity" had now been replaced by the word "personally", but that did not involve any change of meaning.

48. After considerable discussion, the Drafting Committee had decided to use the words "without any legal effect" rather than the word "void", which had been favoured by some members of the Commission.

49. Mr. VERDROSS suggested that the words "acts or threats directed against him personally" be replaced by the words "acts or threats against his person or his family".

50. Mr. CASTRÉN suggested that, in the title, the words "of a State" be added after the word "representative".

51. Mr. de LUNA said that in Spanish the formula "*intereses personales*" ("personal interests") traditionally covered acts which affected the representative's reputation, material interests and family.

52. With regard to the concluding words, he saw no reason to use language different from that in article 36, particularly as "shall be without any legal effect" had the same meaning as "shall be void".

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission might need to give some thought to the question whether or not the corruption of a representative should be covered in article 35 as a possible ground of invalidity. It might be argued that it was included in the English concept of fraud, but as it was an act committed against a representative it probably fell within article 35.

⁴ *I.C.J. Reports 1962*, p. 26.

⁵ *American Journal of International Law*, Vol. 18, pp. 147-174.

⁶ For earlier discussion, see 825th meeting, paras. 51-87 and 826th meeting, paras. 2-58.

54. The CHAIRMAN, speaking as a member of the Commission, suggested that it might be advisable for consideration of the clause relating to corruption to be postponed until the eighteenth session, since the Commission was not yet in agreement on the subject, and a discussion might upset the entire text.
55. Mr. AGO said he would not object to the Chairman's suggestion. The Commission had considered the question of fraud, but corruption was an entirely different subject, even though it could occur in practice, and it would be dangerous to ignore it altogether.
56. Mr. RUDA pointed out that the titles of the English and French texts did not correspond.
57. If the word "personal" covered threats against the representative's person, professional career and family, then the scope of the text was clear.
58. Mr. YASSEEN said that the Commission's draft should definitely deal with the question of the corruption of a representative of a State. Corruption could hardly be said to be covered by the provisions concerning fraud or coercion. The Commission did not need to examine the question and its consequences immediately, but it should take an immediate decision on the principle that the question should be dealt with in the draft.
59. Mr. JIMÉNEZ de ARÉCHAGA said he was in favour of postponing consideration of whether or not to include a provision concerning corruption until the eighteenth session, because the matter was delicate and needed careful thought. Governments might object to widening the grounds of invalidity. In private law, corruption was not regarded as vitiating consent but as raising the issue of the responsibility of a representative to his principal.
60. The CHAIRMAN, speaking as a member of the Commission, said that his intention had been that the Commission should not act hastily in introducing the concept of corruption into its draft forthwith. Many civil codes did, however, provide that consent was vitiated if the representative had been corrupted to the prejudice of the interests of his principal. He suggested that the Special Rapporteur be asked to prepare a provision on the effect of corruption, in the context of the law of treaties, in time for the eighteenth session.
61. Mr. TSURUOKA said that he had some doubts concerning the words "of its representative". The representative in question was manifestly the one who would express a State's consent to be bound, but the expression might be misinterpreted to mean some unspecified representative who was more or less interested in the matter.
62. Sir Humphrey WALDOCK, Special Rapporteur, said that he would be reluctant to make corruption the subject of a separate article, because that would appear unduly to inflate the grounds of invalidity. If it was to be covered at all, it should preferably be in article 35, possibly in a separate paragraph.
63. The CHAIRMAN said that the Special Rapporteur had given very wise advice. The Commission should ask the Special Rapporteur to think about the matter and to submit for the eighteenth session a proposal for adding, either to article 33 or to article 35, a provision concerning corruption, a fraudulent act amounting to fraud properly so called. It was true that it might be slightly distasteful to States to include in the draft an article dealing with the corruption of their representatives, but cases of corruption, though rare, nevertheless did occur in practice.
64. Mr. TSURUOKA said he supported the suggestion that the Special Rapporteur be asked to prepare an article dealing with the question, in time for the eighteenth session. From the point of view of the apportionment of responsibility, allowance should be made for the fault of the State in giving full powers to a representative who was open to corruption.
65. Mr. de LUNA proposed that, in the Spanish version, the words "*contra él personalmente*" ("against him personally") be replaced by the words "*contra los intereses personales de éste*" ("against his personal interests").
66. The CHAIRMAN asked the Commission to reach a decision on the various amendments already proposed to the article.
67. Sir Humphrey WALDOCK, Special Rapporteur, said that he had no objection to adding the words "of a State" in the title of the article, as suggested by Mr. Castrén.
68. The word "personal" could be dropped from the English text of the title, as it created translation difficulties for the French version.
69. Mr. RUDA said he supported the Special Rapporteur's suggestions to drop the word "personal" from the title.
70. Mr. de LUNA said that his amendment contained the traditional language used to distinguish between coercion of a representative and coercion directed against a representative's personal interests.
71. The CHAIRMAN, speaking as a member of the Commission, said that the provision was concerned with the means employed to bring pressure to bear. He suggested that the passage in question be amended to read "acts or threats directed against the personal interests [of the representative]".
72. Mr. VERDROSS said he could support that wording.
73. Sir Humphrey WALDOCK, Special Rapporteur, said that the expression "personal interests" could not be used in the English text. The expression "in his personal capacity" would have been satisfactory, but in fact the word "personally" was quite sufficient.
74. Coercion of the family as such was not relevant. What mattered was coercion of the representative through pressure on the family.
75. Mr. REUTER said that Mr. de Luna's proposal affected the substance and would make for greater precision in the text.
76. The CHAIRMAN, speaking as a member of the Commission, said that the provision dealt with what was generally recognized to be a very real possibility, coercion by means of acts directed against the representative's interests. The expression "personal capacity" would convey the idea that the representative was

affected as a private person, whereas the case under discussion was that where the representative's interests were involved.

77. Mr. de LUNA said that the word "capacity" always had a legal meaning.

78. Mr. TUNKIN said it might be wise to accept the Drafting Committee's text, since nothing better had been suggested. The word "personally" was sufficiently comprehensive, and wider than the phrase "personal capacity".

79. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Tunkin. It was meaningless to speak of acts or threats directed against personal interests, because coercion was exercised against the person.

80. Mr. AMADO said he had never liked the formula "personal interests", which was at once too broad and too narrow. He could accept the formula "against him personally".

81. Mr. de LUNA said he would withdraw his amendment.

82. Mr. TSURUOKA said he would not press his objection to the words "of its representative", although he would have preferred the expression to be replaced by some such words as "of the representative who formulated the consent".

83. The CHAIRMAN put article 35, as amended by the addition to the title, to the vote.

Article 35, as thus amended, was adopted by 17 votes to none.

ARTICLE 36 (Coercion of a State by the threat or use of force)⁷

84. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by the Drafting Committee read:

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.

In substance it was identical with the one adopted by the Commission in 1963.

85. Mr. YASSEEN said he proposed, for reasons of substance, that article 36 be amended to read:

"A treaty is void if its conclusion has been procured by the coercion of a State by acts or threats in violation of the principles of the Charter of the United Nations".

86. Other means of coercion than the threat or use of force could be used to compel a State to express a will that was not its own. The use of such means was prohibited by several of the fundamental principles of the Charter, in particular by the principle of the sovereign equality of States and the principle of non-intervention in the domestic affairs of States. His proposal was thus in conformity with the development of international law and reflected the opinion of the majority of States.

87. The fact that he had made the proposal did not mean that, if it were rejected, he would not vote for the

Drafting Committee's text. His view was that, although the Drafting Committee's text reflected the position in international law, it did so incompletely.

88. The Commission's decision on his proposal would determine his attitude towards article 30, in which the Commission proposed to state that the grounds for the invalidity of a treaty were enumerated exhaustively in the draft articles.

89. Mr. REUTER asked whether the word "principles" as used in the Drafting Committee's proposal should be construed to mean "rules".

90. Sir Humphrey WALDOCK, Special Rapporteur, said that the expression "principles of the Charter of the United Nations" had been carefully chosen to indicate the fundamental underlying principles of the Charter, without bringing in every procedural rule embodied in it. For the purposes of the article, the words covered the essential principles of the Charter, including rules.

91. Mr. REUTER said he gathered from that explanation that the term "principles" was used to designate the fundamental rules of the Charter.

92. Mr. RUDA pointed out that, in the Charter itself, the term "Principles" with a capital "P" was used—for example in Articles 2, 6 and 24—to denote the principles set out in the seven paragraphs of Article 2. The question of the use of the initial capital had been discussed at length at the San Francisco Conference and it had been decided that "Principles" meant the principles set out in Article 2. If the initial capital was not used, the reference would be to the general philosophy of the Charter.

93. Mr. LACHS said he noticed that Mr. Yasseen's amendment omitted any reference to the "use of force". Perhaps he would explain that omission.

94. Mr. YASSEEN said that he had deliberately refrained from referring to the threat or use of force in his proposal because he took the view that article 36 should refer to coercion in a wider sense. The expression "the threat or use of force" inevitably made the reader think of Article 2, paragraph 4, of the Charter, but there were other principles of the Charter which prohibited other forms of coercion.

95. Mr. LACHS said that Mr. Yasseen's reply was satisfactory for an understanding of his proposal, but he still thought that article 36 should contain a specific reference to the use of force; it would not be satisfactory to mention minor forms of coercion and not major ones.

96. Mr. TUNKIN said that he sympathized with Mr. Yasseen's proposal but, like Mr. Lachs, thought it essential to retain the reference to the prohibition of the threat and of the use of force, which represented a major achievement of international law.

97. Opinions were divided on the meaning of the term "force"; like some other members, he considered that the term covered not only military force but also economic pressure and any other manifestation of force that violated the principles of the Charter.

98. Mr. YASSEEN said that he was prepared to alter the form, though not the meaning, of his proposal by amending it to read:

⁷ For earlier discussion, see 826th meeting, paras. 59-81 and 827th meeting, paras. 5-63.

“ A treaty is void if its conclusion has been procured by the coercion of a State by the threat or use of force or by any act or threat in violation of the principles of the Charter of the United Nations ”.

99. Mr. AGO said it would be dangerous to weaken the language of so solemn a rule by making it too cumbersome. What the Commission and the Drafting Committee wished to emphasize by referring to “ the principles ” rather than to “ the rules ” of the Charter was that the reference was to a general prohibition which applied even to States not Members of the United Nations, and even though the principles in question were enunciated in the United Nations Charter.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that there had been a very thorough discussion on article 36 at the present session. As a result, the Commission had agreed upon a formula which could be unanimously adopted. However, that formula represented a delicate balance between differing opinions and if any amendment were made to the text proposed by the Drafting Committee, the result might be very unimpressive. Some members might feel obliged to withdraw their support for the article and the value of the achievement represented by the unanimous adoption of that formula in 1963 would then be lost. The text was open-ended in the sense that any future interpretation of the law of the Charter would affect the rule embodied in article 36. The provision, which had been worked out so carefully in 1963 and very thoroughly discussed at the current session, represented the best that the Commission could achieve in the matter.

101. Mr. YASSEEN said that, for reasons of expediency, not of principle, he would not press his proposal to a vote, although he did not withdraw it.

102. Mr. de LUNA said that although he agreed with the spirit of Mr. Yasseen's proposal, he was satisfied with the text proposed by the Drafting Committee, which would leave to the interpretation of the Charter a problem which was not yet completely ripe.

103. As he understood it, the term “ force ” included economic force.

104. Mr. AMADO said that, while appreciating Mr. Yasseen's desire for precision, he considered that the Drafting Committee's text should be adopted. Article 36 was governed by Article 2, paragraph 4, of the Charter, the last phrase of which, “ or in any other manner inconsistent with the Purposes of the United Nations ”, seemed clear enough.

105. The CHAIRMAN, speaking as a member of the Commission, said that, while sharing Mr. Yasseen's sentiments, he would vote for the Drafting Committee's text because the expression “ the principles of the Charter ” did not just mean, as some States claimed, the principles enunciated in its preamble and Article 2, nor did it just mean the provisions of the Charter: it meant the general rules on which those provisions were based.

106. Mr. REUTER said that, in the light of the explanations he had received, he would vote for the Drafting Committee's text. Nevertheless, he noted that the members of the Commission were not in agreement on what the text meant.

107. Mr. BRIGGS said that the idea of a treaty being procured by the threat or use of force was repugnant to him. However, he would be obliged to abstain from voting on article 36 because the discussion had shown that members were not agreed on the meaning of the words used in the text which the Commission was about to adopt.

108. Before the Commission adopted any provisions such as articles 36 or 37 providing for the absolute nullity of treaties, two conditions would, in his opinion, have to be fulfilled. First, there would have to be precision in the criteria for determining in what cases a treaty was void; the proposed text of article 36 was an omnibus clause or open-ended formula which he could not accept. Secondly, provision would have to be made for adjudication by an international court.

109. Mr. TUNKIN said that the opinion had been expressed, sometimes very sincerely, that States were agreed only on a few rules of international law; that opinion, which had been held by the late Sir Hersch Lauterpacht, did not seem to him correct. Even in municipal law, it was rare to find two jurists who placed exactly the same interpretation on a particular rule of law; there was always room for disagreement on interpretation.

110. As far as the substance of article 36 was concerned, there was general agreement in the Commission that a treaty was void if it had been procured by the threat or use of force in violation of the principles of the Charter. The Principles set out in Article 2 of the Charter had been accepted by all States. Despite unavoidable differences of opinion on interpretation, it could not be said that the members were not agreed on what they accepted. In a sense, article 36 was a consequence of Article 2, paragraph 4, of the Charter, in so far as the law of treaties was concerned.

111. Mr. JIMÉNEZ de ARÉCHAGA said that the description of article 36 as an omnibus clause or as an open-ended provision should not lead anyone to the conclusion that the Commission was approving an article that was open to subjective interpretation. The Commission had decided to use in article 36 wording taken from Article 2, paragraph 4, of the Charter, not because of any inability to arrive at a more precise formulation, but because it was codifying the law of treaties and not the law of the Charter on international security.

112. The Commission would adopt article 36, confident in the interpretation and application of the Charter as a living instrument. There could be no question of a unilateral interpretation of article 36; it was for the competent organs of the United Nations to interpret the principles of the Charter, and any such interpretation would be taken into account in settling any disagreement on the application of the rule embodied in article 36.

113. Mr. RUDA said that he would vote in favour of article 36 in any event. He would, however, like to know the true meaning of the provision for which he was going to vote. If the intention was to refer to the Principles of the Charter, with a capital “ P ”, then article 36 was governed by the provisions of Article 2 of the Charter. If the intention was to refer to the principles of the Charter, with a small “ p ”, then the article was

governed by the general philosophy of the United Nations.

114. Mr. TUNKIN said that not all the principles of the Charter which applied in the article were to be found in Article 2 of the Charter; those in Article 5, for example, on self-defence and the legal use of force, were also applicable.

115. Sir Humphrey WALDOCK, Special Rapporteur, said that it was not possible to use the initial capital and refer to the "Principles of the Charter" in article 36; such a formulation might even involve a violation of the Charter, which referred, in Article 2, paragraph 4, to the "Purposes" of the United Nations. The expression "principles of the Charter of the United Nations" in the text proposed by the Drafting Committee was intended to refer to the essential rules underlying the relevant Charter provisions, in other words to the law of the Charter governing the use of force.

116. Mr. TUNKIN said that the principles in question would be in the first place those set out in Article 2, paragraph 4, of the Charter, which referred specifically to the "Purposes" of the United Nations.

117. Mr. RUDA, thanking the Special Rapporteur for his explanation, said he would vote for article 36 in the knowledge that it referred to the general philosophy of the United Nations.

118. The CHAIRMAN put article 36 to the vote.

Article 36 was adopted by 15 votes to none, with 1 abstention.

119. Mr. TSURUOKA said that he had voted for article 36 because he approved the text as it stood, without reading into it any more or any less than it said.

ARTICLE 37 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*))⁸

120. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by the Drafting Committee for article 37 read:

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The article had been left in the form in which the Commission had adopted it in 1963.

121. There had been some discussion in the Commission on the advisability of retaining the adjective "peremptory" before "norm", but the majority of the members had thought that its deletion would create language difficulties. It was better to resort to a pleonasm in one or other of the languages than to risk an incomplete statement in one of them. Moreover, the text had not attracted any objection from governments in their comments.

122. Mr. VERDROSS said that the wording of the article was too repetitive; he suggested that it would

be less pleonastic if it read "... a norm of general international law from which no derogation is permitted" with, after that, the words "a peremptory norm which can be modified only ..." in brackets.

123. Mr. REUTER said that, despite some hesitation, he had voted for article 36 because he was convinced that, in a specific case, all the members of the Commission would be in agreement on its interpretation. In the case of article 37, however, it seemed to him that there was too great a difference of opinion on what was meant by "a peremptory norm of general international law". For that reason he would have abstained in the vote on article 37 if it had consisted only of the opening sentence.

124. The second part of the article, ("and which can be modified only by a subsequent norm of general international law having the same character"), raised difficulties of an even more serious nature. It was impossible to set down such a notion without explaining how a subsequent norm of general international law could come into being. If the majority held that the Commission could not deal with such a problem of constitutional law, he would abide by that decision; but he personally could not ignore the problem, and consequently would vote against article 37.

125. Mr. TUNKIN said that there was no need to reopen the discussion on the substance of article 37, which had been fully discussed in 1963 and again at the beginning of the current winter session.

126. Mr. AGO said that it seemed to him that Mr. Reuter's objection applied rather to article 45, on the emergence of a new peremptory norm, than to article 37, which dealt with the situation where a treaty conflicted with a peremptory norm existing at the time of its conclusion.

127. The CHAIRMAN said that he had understood Mr. Reuter to have asked how a peremptory norm could be modified by a subsequent norm having the same character. The question of the development of international law and of the modification of peremptory norms had been discussed at length at the Commission's fifteenth session and the discussion could not now be reopened.

128. Mr. REUTER said that his remarks should be regarded as an explanation of vote.

129. The CHAIRMAN put article 37 to the vote.

Article 37 was adopted by 14 votes to 1, with 1 abstention.

130. Mr. BRIGGS explained that he had abstained from voting on article 37 for reasons similar to those stated by him in explanation of his abstention on article 36.

131. Mr. TSURUOKA said that he had voted for article 37 despite the fact that he was not fully satisfied with it. He reserved the right at the appropriate time to submit further observations on both the substance and the form of the article.

The meeting rose at 5.30 p.m.

⁸ For earlier discussion, see 828th meeting, paras. 3-64.

841st MEETING

Thursday, 27 January 1966, at 11 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen.

Law of Treaties

[Item 2 of the agenda]

(continued)

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

(continued)

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

1. The CHAIRMAN asked whether any other members wished to explain their vote on article 37.
2. Mr. RUDA said that he had voted in favour of article 37 because he believed that, in keeping with logic and because the law was normative, there was no reason why international rules of law should not come into existence from which there could be no derogation, just as in municipal law rules had come into existence which had the character of rules of "public order"
3. There was nothing in international law to prevent such rules from coming into existence by means of a universal treaty, or through the formation of an international custom arising out of a practice that was generally accepted practice and consequently had the force of law. That possibility was taken into account by the very careful drafting of article 37.
4. Failing unanimous agreement, the question whether a norm had or had not the character of *jus cogens*—and if it did, could be invoked as a ground for invalidating a treaty—would in the final analysis have to be submitted to compulsory adjudication.

ARTICLE 38 (Termination or suspension of the operation of a treaty by application of its own provisions)¹

5. Sir Humphrey WALDOCK, Special Rapporteur, said that after discussing whether to maintain article 38 or to leave its provisions to be implied from other parts of the draft, the Drafting Committee had decided to drop paragraph 1 of the earlier text and to transfer to other articles certain elements of the remainder. Thus the new article 39 (*bis*) now stated the rule which had formerly appeared in paragraph 3 (*b*).
6. The Drafting Committee had also decided that the content of paragraph 2 should be incorporated in article 50,² which dealt with the procedure whereby a notice

¹ For earlier discussion, see 828th meeting, paras. 65-91, but see also 836th meeting, paras. 53-55.

² For the consideration of article 50, see 836th meeting.

of termination, denunciation or withdrawal would take effect.

7. Consequently, what the Drafting Committee now proposed was that article 38 in its present form be deleted.

8. The CHAIRMAN, speaking as a member of the Commission, said that he would not vote for the deletion of article 38; even if it stated the obvious, a rule of that kind would still be useful in the draft.

9. Speaking as CHAIRMAN, he put the Drafting Committee's proposal for the deletion of article 38 to the vote.

The Drafting Committee's proposal for the deletion of article 38 was adopted by 14 votes to 1 with 3 abstentions.

10. Sir Humphrey WALDOCK, Special Rapporteur, said that he had abstained because it seemed somewhat meaningless to vote when certain elements of the article were to be retained and their fate could not be finally determined until the Commission had completed its work on part II of the draft.

11. Mr. AGO said he associated himself with what had been said by the Special Rapporteur.

ARTICLE 39 (Denunciation of a treaty containing no provision regarding termination)³

12. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 39 :

Denunciation of a treaty containing no provision regarding termination

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it otherwise appears that the parties intended to admit the possibility of denunciation or withdrawal.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article.

13. In essence, the new text was the same as that approved in 1963, but it had been divided into two paragraphs. The Drafting Committee had avoided going into detail about the interpretation of the intention of the parties and had simply used the general phrase "the parties intended". Possibly that point might need reconsideration when the Commission came to review the provisions concerning interpretation in part III.

14. The CHAIRMAN put article 39 to the vote.

Article 39 was adopted by 18 votes to none.

15. Mr. de LUNA said that he had voted in favour of article 39 although he was not satisfied with the Spanish and French texts of paragraph 1. The expressions "*a no ser que se desprenda*" and "*à moins qu'il ne découle par ailleurs*" were not very felicitous. The passage might have said that the treaty did not provide expressly for possible denunciation or withdrawal, but that the intention of the parties could have been inferred from the context or from, say, the preparatory work.

³ For earlier discussion, see 829th meeting, paras. 1-61.

16. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. de Luna should be reassured by the fact that the article would be re-examined in connexion with the articles dealing with interpretation. He did not suppose that anyone was fully satisfied with the present text of article 39.

17. The CHAIRMAN pointed out that the Commission had already decided that it would review all the articles during its summer session and amend them if necessary.

ARTICLE 39 (*bis*) [formerly part of article 38] (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force)

18. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 39 (*bis*) which, as he had explained at the 836th meeting,⁴ was based on paragraph 3 (*b*) of article 38, which had been discussed at the 828th meeting:⁵

Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

A multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

19. The Drafting Committee had accepted his view that that rule should be stated as a general provision which affected not only the termination of treaties through the operation of their own provisions, but also cases where no provision existed in the treaty for termination or denunciation.

20. The CHAIRMAN put article 39 (*bis*) to the vote.

Article 39 (bis) was adopted by 18 votes to none.

ARTICLE 30 (Validity and continuance in force of treaties)⁶

21. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 30:

Validity and continuance in force of treaties

1. The invalidity of a treaty may be established only as a result of the application of the present articles.

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

22. At the present session, the Commission had decided that the 1963 formulation of the article in the form of a presumption was not very satisfactory and it had been criticized for stating the obvious. On the other hand, the article would serve a definite purpose and state a definite rule if it provided that invalidity, termination, etc., could only be established in accordance with the

provisions of the draft articles. The Commission had accordingly decided to reformulate the article in that sense.

23. The Drafting Committee considered that a distinction must be made between invalidity on the one hand, and termination, denunciation or withdrawal on the other, because invalidity could not be established under the terms of the treaty, as could the other three. That was the reason why the article was now divided into two paragraphs.

24. Mr. ROSENNE suggested that the Special Rapporteur consider splitting article 30 into two when he came to review the order of the articles in the whole draft. Paragraph 1 might go into the section on invalidity and paragraph 2 into the section on termination.

25. He regarded article 30 as essential and exhaustive when applied to cases in which the *sedes materiae* of invalidity or termination lay in the law of treaties itself, but not exhaustive when the *sedes materiae* belonged to another branch of international law, such as the law of State succession.

26. Mr. YASSEEN said that he could not accept paragraph 1 for the reasons he had given at the previous meeting. He did not believe that the draft exhausted all the causes of nullity. He still thought that article 36, as now worded, left room for doubt; indeed, it was not certain from that wording that coercion by economic or political pressure could be considered as a cause of nullity. But according to existing positive international law, treaties concluded under such conditions were void. Coercion by economic or political pressure was incompatible with certain principles of the United Nations Charter such as the principle of the sovereign equality of States and the principle of non-intervention in the domestic affairs of States.

27. He therefore requested that article 30 be put to the vote paragraph by paragraph. He would abstain on paragraph 1.

28. Mr. BEDJAOUÏ said that he too would abstain on paragraph 1.

29. Mr. de LUNA said the Drafting Committee and the Special Rapporteur were to be commended for their successful efforts to produce a precise and valuable text which no longer confined itself to stating the obvious.

30. He had no reservations on paragraph 1; it seemed to him that Mr. Yasseen's remarks would apply rather to the interpretation of another article. It should be remembered that Article 2, paragraph 4, of the Charter not only prohibited the threat or use of force against the territorial integrity or political independence of any State but also prohibited the threat or use of force "in any other manner inconsistent with the Purposes of the United Nations". Once the Commission had incorporated in the draft a blanket rule referring to the principles of the United Nations, it could be said that the list of causes of invalidity was complete.

31. With regard to paragraph 2, he agreed with Mr. Rosenne's remarks, which should be mentioned in the commentary. There were indeed other cases, such as failure to register a treaty with the United Nations

⁴ See 836th meeting, para. 53.

⁵ See 828th meeting, paras. 65-91.

⁶ For earlier discussion, see 823rd meeting, paras. 1-65.

Secretariat. But it was not worth altering the clear and concise text of the article merely in order to make it applicable to such cases.

32. Mr. TSURUOKA said he noticed that the English words "only as a result of" were translated by the French expression "*que sur la base des présents articles*" in paragraph 1, and by "*qu'en application des dispositions du traité ou des présents articles*" in paragraph 2. He wished to know whether that difference was intentional. His own preference was for the second rendering.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that the English text was certainly correct; the fact that the French deviated from it was due to inadvertence.

34. Mr. BRIGGS asked whether the French text was correct in referring to "*nullité*".

35. Mr. REUTER said that it was the invariable custom in the Drafting Committee to translate "invalidity" by "*nullité*". For the purpose of the Commission's work, the two terms could be considered to correspond exactly.

36. Mr. de LUNA, confirming Mr. Reuter's explanation, said that Spanish legal terminology never referred to the "*invalidéz*" of contracts, although the word existed, but to their "*nulidad*".

37. Mr. VERDROSS said that he did not see how the Commission could vote on article 30 when its members did not agree on the subject of invalidity as a result of the corruption of a representative of a State; that meant that its list of cases of invalidity was incomplete.

38. The CHAIRMAN said that the Commission had decided to consider the question of the corruption of the representative of a State at its summer session. Since paragraph 2 referred to "the application of the terms of the treaty or of the present articles", instances of such corruption would be covered.

39. Sir Humphrey WALDOCK, Special Rapporteur, said that, as there seemed to be general agreement that corruption would have to be covered, perhaps Mr. Verdross could vote on article 30 on that understanding.

40. The CHAIRMAN put article 30 to the vote paragraph by paragraph.

Paragraph 1 was adopted by 14 votes to none, with 4 abstentions.

Paragraph 2 was adopted by 16 votes to none, with 2 abstentions.

Article 30 as a whole was adopted by 14 votes to none, with 4 abstentions.

41. Mr. REUTER said that he had provisionally abstained from voting, but reserved the right to change his position later. As a result of the many explanations given and of a certain amount of reflection, he had gained the impression that the question of the relationship between the draft articles and the United Nations Charter was highly complex. Some members seemed to think that the draft did not cover everything covered by the Charter, whereas others appeared to consider that it would involve a revision of the Charter.

ARTICLE 31 (Provisions of international law regarding competence to conclude a treaty)⁷

42. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 31:

Provisions of internal law regarding competence to conclude a treaty

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating that consent unless the violation of its internal law was manifest.

43. The text represented a delicate compromise, based on the agreement reached in 1963, but had been considerably shortened. As there had been general agreement that the reference to article 4 was inappropriate, it had been dropped. The Drafting Committee had maintained the limitation decided on in 1963, that the provision of internal law should be one regarding competence to conclude a treaty.

44. Mr. VERDROSS said that the text had been greatly improved by the Drafting Committee's revision. Even so, the idea would be brought out more clearly if the words "of such a provision" were inserted after the word "violation" in the last line, because the expression "its internal law" covered the whole of internal law; the point was thus left vague.

45. Mr. PESSOU said it seemed hardly likely that a State would give its consent in actual and manifest violation of its own constitutional law. Such a situation seemed inconceivable from a psychological standpoint. Consequently, he could not accept the text of the article and noted that it could be re-examined later.

46. Mr. CASTRÉN, supporting Mr. Verdross's amendment, suggested that it could be still further improved by the use of the expression "unless such violation of its internal law . . .".

47. Mr. VERDROSS said he accepted Mr. Castrén's suggestion.

48. Mr. BEDJAOUÏ said that Mr. Castrén's suggestion would be less cumbersome if the words "of its internal law", which were redundant, were omitted.

49. It would also be better if the last words in the French text were to read "*que si cette violation a été manifeste*", instead of "*à moins que cette violation n'ait été manifeste*".

50. Mr. AGO pointed out that the words "*à moins que*" were a standard form which the Commission had decided on after several attempts to find a suitable expression on the lines suggested by Mr. Bedjaoui. The words "*à moins que*" defined the circumstances in question as closely as possible and should be retained in article 31, as elsewhere.

51. Mr. BEDJAOUÏ said that he withdrew his second suggestion.

52. Mr. de LUNA said he supported Mr. Verdross's amendment as revised by Mr. Bedjaoui. The Spanish text should follow the English and French texts and the words "expressed" and "*exprimé*" should be rendered by the Spanish word "*expresado*" instead of "*manifestado*".

⁷ For earlier discussion, see 823rd meeting, paras. 80-104.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not think the meaning of the sentence was in doubt, though the idea behind Mr. Verdross's amendment could be accepted. As far as the English text was concerned, it would suffice to substitute the words "such consent unless that" for the words "that consent unless the".

54. The CHAIRMAN put article 31, with the amendments accepted by the Special Rapporteur, to the vote.

Article 31, as thus amended, was adopted by 16 votes to none, with 2 abstentions.

55. Mr. RUDA, explaining his abstention, said that failure to comply with a provision of internal law regarding competence to conclude treaties did not affect the validity of the consent given to a treaty. He could not therefore accept the exception embodied in the proviso, "unless that violation of its internal law was manifest".

56. Mr. BRIGGS said that he also had abstained from voting because he was opposed to the proviso, "unless that violation of its internal law was manifest".

ARTICLE 40 (Termination or suspension of the operation of treaties by agreement)⁸

57. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that article 40 be amended to read:

1. A treaty may at any time be terminated by agreement of all the parties.

2. The operation of a treaty may at any time be suspended by agreement of all the parties.

3. The operation of a multilateral treaty may not be suspended as between certain parties only except under the same conditions as those laid down in article 67 for the modification of a multilateral treaty.

58. The Drafting Committee had decided to drop the former paragraph 2, protecting the rights of the parties to a treaty against its premature termination by a few parties, on the ground that it would unduly complicate the article, and that it covered a somewhat unlikely contingency.

59. Paragraphs 1 and 2 represented a simplification of the former paragraphs 1 and 3. The new paragraph 3 had been introduced to deal with the question, raised by Mr. Ago during the discussion, whether the agreement of all the parties was always necessary for the suspension of the operation of a treaty.⁹

60. In 1964, the Commission had adopted articles 65, 66 and 67 on the amendment of treaties. With regard to multilateral treaties, articles 66 and 67 made an important distinction. In normal cases, the modification of a multilateral treaty required the consent of all the parties. Article 67, however, made provision for the exceptional, but not uncommon, case of an agreement to modify multilateral treaties between certain of the parties only. That same article laid down very precise and strict conditions for such an agreement.

61. In the light of those provisions on the modification of treaties, the Drafting Committee now proposed to

include in article 40 a provision, in the form of the new paragraph 3, which would cover the case of an agreement to suspend a multilateral treaty between certain of the parties only. Paragraph 3 made such agreements subject to the same strict conditions as those laid down in article 67 for modifying agreements in similar circumstances.

62. Mr. JIMÉNEZ de ARÉCHAGA asked that the three paragraphs of article 40 be voted upon separately, as he wished to vote against paragraph 3.

63. The Commission had not had sufficient time to study that very important new provision and there was not a sufficient body of State practice to support the *inter se* suspension of the operation of a treaty.

64. It was true that, from the logical point of view, it could be argued that since the Commission had adopted article 67, it would be possible to arrive at an *inter se* suspension of the operation of a treaty under the guise of *inter se* modification, since the meaning and scope of the term "modification" had nowhere been defined.

65. Article 67 had a limited purpose and scope and could not be enlarged in the manner proposed. Many members had accepted article 67 because there existed an important body of State practice which allowed for the non-unanimous revision and bringing up to date of such multilateral treaties as the conventions which had been revised after the Second World War when, largely for political reasons, it was not possible to bring all the pre-war parties to the conference table.

66. The system of *inter se* modification provided a solution to a very real difficulty and served the purpose of modernizing international relations and advancing co-operation among States. That, however, did not authorize outright *inter se* suspension of the operation of a multilateral treaty, because the result could well be anything but progressive. If a group of States agreed to suspend *inter se* the operation of important multilateral conventions, that might constitute a step backward in international co-operation. Modification, if applied in good faith, should result in a new and improved treaty to replace the old one. Suspension *inter se* of the operation of a treaty would lead to the disappearance of important treaty relations.

67. Under the proposed provision, a group of States parties to a free trade association might be able to agree to suspend *inter se* the operation of the treaty, while continuing to apply it in their relations with the parties which had not participated in the arrangement for suspension. Even if the rights of those latter parties were not affected, they could well have an interest in the integral application of the treaty among all the contracting parties. Paragraph 3 would be less objectionable if the words "under the same conditions as those laid down in" were replaced by the words "as a result of the application of". With a formulation of that type, the suspension of the operation of the treaty would be a consequence of the *inter se* modification under article 67.

68. But a third paragraph was not really necessary, even from a logical point of view, because the application of article 67 did not contradict either paragraph 1 or paragraph 2 of article 40. In fact, article 67 dealt with a matter that was different from suspension, just as it was different from termination; a new agreement re-

⁸ For earlier discussion, see 829th meeting, paras. 62-95.

⁹ See 829th meeting, para. 84.

placed an old treaty for some of the parties. In several cases an *inter se* modification had consisted in the establishment of new machinery, precisely in order to put an end to the *de facto* suspension of the operation of pre-war multilateral treaties.

69. The CHAIRMAN, speaking as a member of the Commission, said that he too was opposed to the provision in paragraph 3 and therefore supported the request for a separate vote on that paragraph.

70. Mr. YASSEEN said that paragraph 3 raised what could be described as a new problem which the Commission had not examined thoroughly.

71. He therefore proposed that paragraph 3 be reserved for further study and referred to the eighteenth session.

72. He would not be able to vote for paragraph 3 because he had not yet made up his mind concerning the point with which it dealt.

73. Mr. de LUNA said that he was unable to agree with Mr. Jiménez de Aréchaga. The Commission had already accepted the principle of separability and had therefore disposed of the question whether multilateral treaties should be treated as indivisible.

74. The proposed paragraph 3 did not involve any danger, because its provisions were made specifically subject to the requirements laid down in article 67. Accordingly, no agreement to suspend the treaty between certain of the parties was possible in the following three cases: first, if the suspension affected "the enjoyment by the other parties of their rights under the treaty or the performance of their obligations"; secondly, if it related "to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole"; and thirdly, if such suspension was "prohibited by the treaty".

75. Since the Commission had accepted the notion of separability in other cases, he saw no reason for not accepting it also in the present case, subject to the safeguards specified in article 67.

76. Mr. TUNKIN, pointing out that paragraph 3 did not appear either in the 1963 text of article 40 or in the Special Rapporteur's fifth report, said that since the question had not been discussed in the Commission and since there was certainly no time to deal with it now, he supported Mr. Yasseen's proposal to refer paragraph 3 to the summer session.

77. Mr. PESSOU said he agreed with Mr. de Luna. He could not see why it was thought that paragraph 3 would give rise to difficulty: States were free at any time to conclude or not to conclude a treaty. Moreover, the safeguards provided in article 67 should be sufficient to allay the misgivings aroused by paragraph 3.

78. He approved article 40, which was very well drafted.

79. Mr. CASTRÉN said that, at first sight, he was inclined to agree with Mr. de Luna on the subject of paragraph 3. However, he would not object to a postponement of the decision on that paragraph, since the problem with which it dealt had not really been discussed at all.

80. With regard to paragraph 1 and 2, he asked whether the Drafting Committee had had any special reason for separating the provisions dealing with termination from those dealing with suspension. An amalgamation of those two paragraphs would avoid repetition.

81. Mr. ROSENNE said that, without prejudice to his position on the substance, he was now persuaded that paragraph 3 needed further reflection. He therefore gladly supported Mr. Yasseen's proposal to refer paragraph 3 to the summer session.

82. Mr. TSURUOKA said that he accepted Mr. Yasseen's proposal that the consideration of paragraph 3 be deferred until the eighteenth session. His first impression was, however, that paragraph 3 could easily be dispensed with, since in practice, paragraphs 1 and 2 and article 67 achieved the same purpose as that envisaged in paragraph 3.

83. Sir Humphrey WALDOCK, Special Rapporteur, said he should explain that paragraph 3 had been introduced somewhat abruptly as a result of a point which had arisen during the discussion. It had been pointed out that it might not be entirely accurate to say that, in order to suspend the operation of a multilateral treaty, it was always necessary to have the agreement of all the parties.

84. The question arose of the relationship between the provisions of article 40 and those of article 67. In adopting article 67 in 1964, it had been the Commission's intention to allow *inter se* modification of a multilateral treaty only where the treaty established a régime which operated bilaterally. If the conditions specified in article 67 were observed, the rights of the other parties would not be affected. Therefore, although he appreciated the point made by Mr. Jiménez de Aréchaga, he saw no great danger in allowing for *inter se* suspension, subject to the conditions specified in article 67. Those conditions were very strict; if they were not strict enough for purposes of suspension, they would be equally inadequate for purposes of modification.

85. He would have no objection to the postponement of paragraph 3 until the summer session in order to give members more time for reflection.

86. The CHAIRMAN put to the vote Mr. Yasseen's proposal to defer consideration of paragraph 3 until the 1966 summer session.

Mr. Yasseen's proposal was adopted by 14 votes to none, with 4 abstentions.

87. Mr. JIMÉNEZ de ARÉCHAGA said he withdrew his request for a separate vote on each paragraph.

88. Mr. ROSENNE said he would urge Mr. Castrén to withdraw his proposal for the amalgamation of paragraphs 1 and 2; the question could be decided when the Commission dealt with paragraph 3.

89. Mr. CASTRÉN said that he would not press his proposal.

90. Sir Humphrey WALDOCK, Special Rapporteur, proposed that consideration of the whole of article 40 be deferred until the summer session.

It was so decided.

ARTICLE 41 (Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty)¹⁰

91. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title and text of article 41 be amended to read:

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

1. A treaty shall be considered as terminated if all the parties to it conclude a further treaty relating to the same subject-matter and:

(a) it appears that the parties intended that the matter should thenceforth be governed by the later treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. However, the earlier treaty shall be considered as only suspended in operation if it appears that such was the intention of the parties when concluding the later treaty.

92. There had been a proposal to combine articles 40 and 41, but the Drafting Committee had decided to keep the provisions of the two articles separate.

93. Much of the discussion in the Commission at the present session had centred on the provisions of paragraph 1 (b). Those provisions had to be considered in relation to those of article 63, which laid down the rule that, where two treaties had incompatible provisions, those of the later treaty superseded those of the earlier one. The purpose of paragraph 1 (b) was to state that the earlier treaty would be terminated if the provisions of the later treaty were so far incompatible with those of the earlier one that the two treaties were not capable of being applied at the same time.

94. Mr. VERDROSS proposed the deletion of the word "However" at the beginning of paragraph 2. The paragraph did not state an exception: it dealt with a different situation.

95. Mr. ROSENNE said that he still considered the whole article to be unnecessary and asked that a separate vote be taken on paragraph 1 (b). In practice, the situation envisaged in that sub-paragraph was covered by the provisions of article 63. He would therefore vote against paragraph 1 (b) because he regarded it as otiose, and if it were adopted, he would abstain on the article as a whole.

96. Mr. CASTRÉN asked why the Drafting Committee had deleted the paragraph on separability, which had appeared in the text submitted by the Special Rapporteur at the 830th meeting.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that it seemed an unnecessary complication to cover in article 41 the question of partial suspension. Article 63 stated the rule that where the provisions of two treaties were incompatible, those of the later treaty prevailed. The fact that the provisions of the later treaty were applied meant that those of the older treaty were suspended.

98. Mr. LACHS said he supported Mr. Verdross's amendment to delete the opening word, "However", of paragraph 2.

99. Sir Humphrey WALDOCK, Special Rapporteur, said that he had no objection to that proposal.

Mr. Verdross's amendment was adopted unanimously.

100. The CHAIRMAN put to the vote paragraph 1 (a), and paragraph 2 as amended.

Paragraph 1 (a), and paragraph 2 as amended, were adopted by 16 votes to none, with 2 abstentions.

Paragraph 1 (b) was adopted by 15 votes to 1, with 2 abstentions.

Article 41 as a whole, as amended, was adopted by 15 votes to none, with 2 abstentions.

The meeting rose at 1 p.m.

842nd MEETING

Thursday, 27 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cast-rén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen.

Law of Treaties

[Item 2 of the agenda]

(continued)

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the articles submitted by the Drafting Committee.

ARTICLE 42 (Termination or suspension of the operation of a treaty as a consequence of its breach)¹

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 42:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) The other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either (i) in the relations between themselves and the defaulting State or (ii) as between all the parties;

¹⁰ For earlier discussion, see 830th meeting, paras. 40-89.

¹ For earlier discussion, see 831st meeting, paras. 16-80, and 832nd meeting, paras. 1-27.

(b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) Any other party to suspend the operation of the treaty with respect to itself or to withdraw from the treaty if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article consists in:

(a) An unfounded repudiation of the treaty; or

(b) The violation of a provision essential to the accomplishment of any of the objects or purposes of the treaty.

4. The foregoing paragraphs are without prejudice to any provisions in the treaty applicable in the event of a breach.

3. No change had been made in paragraph 1, but the order of sub-paragraphs (a) and (b) in paragraph 2 had been reversed in order to emphasize the different degrees of interest that parties might have in the observance of a treaty.

4. Sub-paragraph (c) was new and dealt with a special category of treaties, such as disarmament agreements, where a breach might upset the whole basis of the treaty for all the parties. The action that they could take in such a situation was confined to suspension or withdrawal.

5. Some discussion had taken place in the Drafting Committee concerning paragraph 3 (a), and the conclusion had been that the point would be adequately expressed by the word "unfounded".

6. Paragraph 4 was slightly different from the former paragraph 5, which had been regarded as too wide in scope; it had been decided to restrict the paragraph to cases when a treaty contained provisions which would automatically regulate the situation if a breach occurred.

7. Mr. ROSENNE said that, during the discussion on article 42, he had objected² to the reference in the Special Rapporteur's new text (A/CN.4/183/Add.2, p. 26) to the interests of a party being affected by a breach, but he found the Drafting Committee's text of paragraph 2 (b) satisfactory.

8. The purpose of paragraph 5 in the 1963 text had been not to limit the application of the article to the provisions of any given treaty, lest that prejudice the provisions of any independent instruments, such as an acceptance of compulsory jurisdiction or a treaty for arbitration or judicial settlement, which might be in force between the parties and which would become applicable in the case of breach. That safeguard must be preserved and he was uncertain whether the new text would achieve that aim.

9. Mr. CASTRÉN said that, on the whole, he was satisfied with the new text. Paragraph 2 (c), however, differed greatly from the former text, especially in the French version. It referred to a material breach of the provisions of the treaty which radically changed the position of every party with respect to the further

performance of "its obligations" under the treaty, whereas the Special Rapporteur's previous text had referred to conduct which frustrated the objects and purposes of the treaty. There seemed to him to be a danger that, under the new text, a party would lose its rights but would retain its obligations. Would that party still be bound by the treaty or would it have the right to withdraw from it?

10. With regard to Mr. Rosenne's comments on paragraph 4, he noted that the latter part of the Special Rapporteur's text of that paragraph had been omitted and he wondered why.

11. Mr. AGO, pointing out that the English and French texts of article 42 as given in Conference Room Document No. 24, the document now before the Commission, were defective, said that, in order to restore the text adopted by the Drafting Committee, it would be sufficient, so far as the English version was concerned, to restore paragraph 4. In the French version, however, paragraph 3 would have to become paragraph 1 and paragraph 2 would have to become paragraph 3.

12. Furthermore, in the French text of paragraph 2 (a)(i) the word "*eux*" should read "*elles-mêmes*". In paragraph 2 (c) of the French text, the word "*telle*" in the second line should be deleted; in paragraph 4 of the French text, the words "*ne préjudicient pas*" should be replaced by the words "*ne portent pas atteinte*".

13. Mr. YASSEEN, referring to paragraph 2 (c), said that, in his view, although suspension was fully justified, it was going too far to allow a State to withdraw from the treaty, even in the circumstances described. Suspension should be sufficient to enable a State to protect its vital interests. He therefore proposed that the words "or to withdraw from the treaty" be deleted.

14. Mr. VERDROSS said that the reference in paragraph 3 (a) to "an unfounded repudiation" was too vague; there could be reasons which were not of a legal nature. It would be better to say "a repudiation not permitted by the provisions of this convention".

15. Sir Humphrey WALDOCK, Special Rapporteur, said that he had proposed to the Drafting Committee a text very much on the lines of the old paragraph 5 in article 42, but had come round to the view that the change introduced by the Committee was justified and would not endanger treaties concerning arbitration or the compulsory settlement of disputes. Article 42 dealt with the substantive consequences of breach, and the question of independent adjudication was a separate one. The procedural aspects of breach were covered in article 51 and the provisions of article 42 could only be brought into operation by the application of the regular procedures laid down in that article. Consequently, it was with reference to article 51, rather than to the present article, that instruments for the acceptance of compulsory jurisdiction had their importance.

16. As far as Mr. Verdross's amendment was concerned, he had suggested rather similar wording to the Drafting Committee but it had been rejected on the ground that the wording of paragraph 3 (a) made it clear that the repudiation was unfounded in law.

17. He was prepared to accept Mr. Yasseen's amendment to delete the words "or to withdraw from the

² See 831st meeting, paras. 24-32.

treaty” in paragraph 2 (c), since the right of any individual State would be sufficiently protected by allowing it to suspend the operation of the treaty.

18. Regarding the point made by Mr. Castrén concerning paragraph 2 (c), he said that the Drafting Committee had been of the opinion that the wording he had proposed in his fifth report, namely, “is of such a character that its violation by one party frustrates the object and purpose of the treaty”, was not correct. The point that had to be brought out was that the breach would fundamentally alter the position of every party in regard to the treaty.

19. Mr. ROSENNE said he thanked the Special Rapporteur for his explanation concerning the new paragraph 4, but reserved his right to raise the matter again in connexion with article 51, paragraph 4.

20. Mr. BRIGGS said he supported Mr. Yasseen’s amendment, because the text would still provide sufficient safeguard without the words “or to withdraw from the treaty”.

21. Mr. CASTRÉN said that he was not in a position to propose a new text for paragraph 2 (c). He had thought of suggesting that the passage beginning “radically changes . . .” be replaced by the words “destroys one of the fundamental bases of the treaty”, but that situation might come under the heading of “change of circumstances”, already dealt with in article 44. What he had in mind was the case of a treaty of demilitarization and neutrality that was accompanied by an international guarantee; if the guarantee ceased to exist because the guarantors had not complied with their obligations, was the territorial State still under an obligation to comply with the demilitarization clauses?

22. Mr. de LUNA said that in the Spanish text, the words “*a invocar*” in paragraph 1 should read “*para invocar*” while the word “*modifique*” in paragraph 2 (c) should read “*modifica*”.

23. Mr. VERDROSS said it still seemed to him that the words “an unfounded repudiation” opened the door to excuses of a non-legal character, since there might be reasons of an economic, political or moral nature. It would be better to say “a repudiation not permitted by a provision of the convention”.

24. The CHAIRMAN, speaking as a member of the Commission, said he did not agree with Mr. Verdross that repudiation had to be based on the provisions of the treaty: it could be based on some other peremptory rule of international law.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that he would be prepared to insert something in the commentary on the point made by Mr. Verdross.

26. Mr. AGO said that Mr. Verdross had raised a very interesting point. It was quite true that, especially in the French text, the expression “an unfounded repudiation” might be interpreted to mean that a repudiation accompanied by any kind of justification would be sufficient. In the draft articles, however, the Commission had been careful to say that repudiation could be brought about either because a peremptory norm of international law had come into being or because the treaty itself so provided. Accordingly, if the passage

read “a repudiation not authorized by the present articles”, all possible situations would be covered and a useful safeguard would have been introduced.

27. Mr. VERDROSS said he accepted Mr. Ago’s suggestion.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 3 (a) could be redrafted to read “a repudiation of the treaty not sanctioned by the present articles”, as he had in fact suggested to the Drafting Committee.

It was so agreed.

29. The CHAIRMAN put to the vote Mr. Yasseen’s amendment to delete the words “or to withdraw from the treaty” in paragraph 2 (c).

Mr. Yasseen’s amendment was adopted by 12 votes to 1.

30. The CHAIRMAN put article 42, as amended, to the vote.

Article 42, as amended, was adopted by 14 votes to none.

31. Mr. CASTRÉN said that the fact that he had voted against part of the article had not prevented him from voting in favour of the article as a whole, since he was prepared to accept the majority view.

New article on termination or denunciation of multilateral treaties embodying general rules of international law³

32. Sir Humphrey WALDOCK, Special Rapporteur, said that he had prepared for the Drafting Committee a new article to take account of the concern expressed by Mr. Tunkin and other members of the Commission that the termination of suspension of general multilateral treaties should not impair the duty of any party to fulfil any obligation embodied in the treaty to which it was also subjected under any other rule of international law. A provision on that matter had been included in article 53 but not in articles 52 or 54. The new article would have to be placed close to article 30.

ARTICLE 43 (Supervening impossibility of performance)⁴

33. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 43:

A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

34. The article had been considerably abbreviated. Exception had been taken to the phrase “the subject-matter of the rights and obligations contained in a treaty”, used in his fifth report, on the ground that the impossibility of performance might be due to the destruction of some ancillary element.

35. Mr. de LUNA said that, although he approved the text of the article, he was not very satisfied with the word “*Superveniencia*” in the Spanish version of the

³ See paras. 71-78 below.

⁴ For earlier discussion, see 832nd meeting, paras. 28-66 and 833rd meeting, paras. 1-48.

title. In his view, the idea would be conveyed equally well by the expression “*Nueva situación que hace imposible la ejecución*”.

36. The CHAIRMAN put article 43 to the vote.

Article 43 was adopted by 13 votes to none, with 1 abstention.

37. The CHAIRMAN, speaking as a member of the Commission, said that he had abstained from voting because, in his view, impossibility did not result solely from the disappearance or destruction of an object indispensable for the performance of the treaty; there might be other cases of impossibility that did not involve any fundamental change of circumstances.

ARTICLE 44 (Fundamental change of circumstances)⁵

38. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 44:

1. A fundamental change which has occurred with regard to a circumstance existing at the time of the conclusion of a treaty and which was not foreseen by the parties may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) The existence of that circumstance constitutes an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked:

(a) as a ground for terminating or withdrawing from a treaty establishing a boundary;

(b) if the fundamental change is the result of a breach by the party invoking it either of the treaty or of another international obligation owed to the parties to the treaty.

39. The drafting changes in paragraph 1 did not affect the substance. The phrase “fact or situation” had been dropped in favour of the words “a circumstance”.

40. The content of paragraph 3 (b) of the 1963 text had been transferred to paragraph 1.

41. The wording of paragraph 1 (b) had caused some difficulties and the French-speaking members of the Drafting Committee were probably more satisfied with the French version than the English-speaking members were with the English.

42. The earlier drafts had referred to a treaty fixing a boundary, a term which he had criticized as being too narrow. The Drafting Committee had accordingly substituted the word “establishing” for the word “fixing” so as to cover a delimitation or a cession of territory. The phrase seemed sufficiently general for the purpose.

43. The Drafting Committee had thought it useful to include a provision concerning a fundamental change resulting from a breach by the party invoking it.

44. Mr. AGO pointed out that, both in the title and in the body of the article, the French text should read

“*changement fondamental de circonstances*” instead of “*des circonstances*”.

45. Secondly, he suggested that it was inappropriate to use the phrase “a circumstance” in paragraph 1, since it might cover an event of very minor importance, whereas what the Commission had in mind was a real change of circumstances. It would therefore be better if the paragraph opened with the words “a fundamental change of circumstances which has occurred in relation to those which existed at the time . . .”. The words “that circumstance” in paragraph 1 (a) would then have to be replaced by “those circumstances”.

46. The closing words of paragraph 2 (b) should read “owed to the other parties to the treaty”; the words “another international obligation” should thus be altered to read “a different international obligation”.

47. Mr. CASTRÉN said that, in his view, the new text was an improvement on the old. He had, however, suggested that the word “fundamental” in the first line of paragraph 1 should be deleted, since it was clear from sub-paragraphs (a) and (b) that the reference was purely to fundamental changes. The word “fundamental” was redundant and might even lead to misunderstanding. So far as the rest of the article was concerned, he supported Mr. Ago’s suggestions.

48. The CHAIRMAN pointed out that Mr. Tunkin had advocated the insertion of the word “fundamental” as a safeguard against the invoking of changes that were not of a fundamental character.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that the drafting changes suggested by Mr. Ago were acceptable.

50. He was not sure whether it would be wise to delete the word “fundamental” at the beginning of the article, as suggested by Mr. Castrén, because the intention had been to stress the exceptional character of the article.

51. Mr. CASTRÉN said that if the majority of members were in favour of retaining the word “fundamental”, he would not oppose it.

52. The CHAIRMAN put Mr. Ago’s amendments to the vote.

Mr. Ago’s amendments were adopted.

53. The CHAIRMAN put to the vote article 44, as amended.

Article 44, as amended, was adopted by 13 votes to 1, with 1 abstention.

54. The CHAIRMAN, speaking as a member of the Commission, said that he had voted for the article, although he agreed with the Special Rapporteur that the expression used in paragraph 2 (a) was too restrictive.

55. Mr. RUDA said that he had voted against the article for the reasons of substance he had given at the 834th meeting.

56. Mr. VERDROSS said that, although he had voted for the Drafting Committee’s text, he wished to point out that there were other treaties to which that text did not apply—namely, treaties which had been completely executed.

⁵ For earlier discussion, see 833rd meeting, paras. 49-84, 834th meeting, paras. 1-81 and 835th meeting, paras. 1-21

57. Mr. BRIGGS said that he had abstained from voting on article 44 for the reasons he had given at the 833rd meeting.

ARTICLE 45 (Establishment of a new peremptory norm of general international law)⁶

58. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 45:

Establishment of a new peremptory norm of general international law

If a new peremptory norm of general international law of the kind referred to in article 37 is established, any existing treaty which is incompatible with that norm becomes void and terminates.

59. The new formulation of article 45 was substantially the same as that of 1963, but the order of the sentence had been reversed to avoid the use of the word "when", which was ambiguous in English and might suggest that the emergence of a new norm of general international law occurred frequently. The Drafting Committee had decided that it was preferable to use the words "incompatible with" rather than "conflicts with".

60. Mr. VERDROSS said that the expression "becomes void and terminates" was tautological. It would be sufficient to say "becomes void".

61. Mr. CASTRÉN said that, at the 835th meeting, he had proposed the deletion of the words "becomes void and". He realized, however, that that was a minority view and he would accept the text submitted by the Drafting Committee.

62. Mr. ROSENNE said he considered that the amendments proposed by Mr. Verdross and the one proposed earlier in the session by Mr. Castrén were dangerous and raised a question of substance. If the words "and terminates" were eliminated, the application of article 45 would be governed by article 52, but if the words "becomes void and" were eliminated, it would be governed by article 53.

63. Mr. BRIGGS said that he would abstain from voting on article 45, for the same reasons as had compelled him to abstain on article 37.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that if either of the amendments proposed were accepted he would be unable to vote for the article, because the observations of governments showed that there was much misunderstanding about the effects of a treaty becoming void. The greatest precision was needed in the text.

65. Mr. VERDROSS said that he would not press his amendment.

66. The CHAIRMAN said that the expression "becomes void and terminates", although it might be repetitious, had the advantage of making it quite clear that the treaty was void *ex nunc*.

67. Mr. RUDA said that the words "a new peremptory norm of general international law of the kind referred to in article 37" might give the impression that there

were other peremptory norms which were not of the kind referred to in article 37.

68. Sir Humphrey WALDOCK, Special Rapporteur, replied that so far as the English text was concerned, the expression "a new peremptory norm" was not self-explanatory and had to be qualified in such a manner as to make it clear that it was a rule from which no derogation was permitted. If it were not so qualified, a cross-reference to article 37 was essential. Such a cross-reference was probably preferable, as it would bring out the link between the two articles, which dealt with a particularly delicate matter, and would also call attention to the fact that the earlier article was concerned with invalidity and the later one with termination.

69. Mr. RUDA suggested that, in the Spanish text, the word "clase" be replaced by the word "naturaleza".

It was so agreed.

70. The CHAIRMAN put article 45 to the vote.

Article 45 was adopted by 13 votes to none, with 2 abstentions.

ARTICLE 30 (*bis*) [formerly paragraph 4 of article 53] (Obligations of parties under other rules of international law)⁷

71. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a new article 30 (*bis*), reading:

Obligations of parties under other rules of international law

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present articles or of the terms of the treaty, shall not in any way impair the duty of any party to a treaty to fulfil any obligation embodied in the treaty to which it is subjected under any other rule of international law.

72. That new provision was partly inspired by paragraph 4 of article 53 but expressed the rule in general terms so as to cover not only cases of termination but also cases of invalidity, withdrawal and suspension.

73. Mr. AGO suggested that it was necessary to restore the word "also" before the word "subjected". The word "also" was used in paragraph 4 of article 53 but had been deleted from article 30 (*bis*) by the Drafting Committee, with the result that the text had become ambiguous.

74. Mr. LACHS said that the word "also" had been deleted on his proposal because it confused the source of the obligation. As he had pointed out in 1963, a treaty could well be declaratory, so that the real source of the obligation would be found in customary international law.⁸

75. Sir Humphrey WALDOCK, Special Rapporteur, said that the point had been discussed at length in 1963, when the Drafting Committee had decided that the word "also" was necessary before "subjected". He could therefore agree to its reintroduction.

⁷ See para. 32 above.

⁸ *Yearbook of the International Law Commission, 1963, Vol. I, p. 235, para. 32.*

⁶ For earlier discussion, see 835th meeting, paras. 22-80.

76. The CHAIRMAN put article 30 (*bis*) to the vote, as amended by the inclusion of the word "also".

Article 30 (bis), as amended, was adopted by 13 votes to 1, with 1 abstention.

77. Mr. LACHS explained that he had voted against article 30 (*bis*) because, for the reasons he had given, he was opposed to the retention of the word "also".

78. Mr. RUDA explained that he had abstained from voting for the reason given by Mr. Lachs.

ARTICLE 46 (Separability of treaty provisions)⁹

79. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title and text of article 46 be amended to read:

Separability of treaty provisions

1. A right of a party under a treaty to denounce, withdraw from or suspend the operation of the treaty may only be exercised with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty may only be invoked with respect to the whole treaty except as provided in the present articles.

3. If the ground relates to particular clauses alone, it may only be invoked with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application; and

(b) acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole.

4. In cases falling under article 33, the State entitled to invoke the fraud may do so with respect either to the whole treaty or to the particular clauses alone.

5. In cases falling under articles 35, 36 and 37, no separation of the provisions of the treaty is permitted.

80. The article, as redrafted, had two governing provisions: paragraph 1 related to the right of a party under a treaty provision to denounce, withdraw from or suspend the operation of a treaty; paragraph 2 related to the invoking of a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty otherwise than under its own provisions.

81. Slight changes had been made in the wording of paragraph 3, which corresponded to the former paragraph 2. In particular, the expression "essential basis" was used instead of "essential condition" in subparagraph (b).

82. Paragraph 4 set forth the option in cases of fraud, which had formerly been covered by paragraph 2 of his redraft of article 46.

83. In paragraph 5, the Drafting Committee had listed cases falling under articles 35, 36 and 37 as those in which no separation was permitted, so as to enable the Commission to take a decision on whether to include article 35 in that list or not.

84. Mr. AMADO said it was unfortunate that the English word "separability" should have to be translated in French by the word "*divisibilité*".

85. Mr. ROSENNE said that although he still had some doubts regarding the text of article 46, he was prepared to vote in favour of it, while reserving the right to change his position at a later stage.

86. Mr. CASTRÉN said that the new text was somewhat complicated and there were a few points he wished to clarify.

87. First, should not paragraph 1 contain a proviso in respect of paragraphs 3 and 4?

88. Secondly, did the words, "in the present articles", in paragraph 2, refer to paragraphs 3 and 4 of article 46 or to the draft articles as a whole?

89. Paragraph 5 was perhaps unnecessary, since its subject-matter could be said to be covered by the new wording of paragraph 1.

90. The CHAIRMAN said that paragraph 5 embodied the Commission's view that articles 35, 36 and 37 should be excluded from the scope of article 46.

91. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 1 dealt with a right exercised under the treaty itself and was therefore quite different from the rest of the article; in the cases covered by that paragraph, the treaty itself would indicate the scope of separability.

92. The Drafting Committee had considered the possibility of using the words "in the following paragraphs" instead of "in the present articles", at the end of paragraph 2. There were, however, certain other provisions, such as those on breach, which might result in the suspension of the treaty in whole or in part. The Committee had therefore chosen the wider reference.

93. In his view, both paragraph 4 and paragraph 5 were essential and should be retained.

94. Mr. AGO said he thought that the wording of paragraph 2 should make it clear that the paragraph referred to cases where a treaty contained no provision concerning termination, withdrawal or suspension of operation.

95. In reply to a question by Mr. CASTRÉN, Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions on separability formerly contained in a number of articles would be eliminated.

96. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Ago that paragraph 2 should be amended to bring out the fact that its provisions applied only to cases arising otherwise than under the treaty.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that, at the next meeting, he would propose a redraft of article 46 in which paragraph 2 would be reworded to make it clear that the grounds covered by that paragraph were those arising from the various provisions of article 46 and from article 42. It would be necessary to consider whether any other articles should be mentioned.¹⁰

⁹ For earlier discussion, see 836th meeting, paras. 2-20, and 837th meeting, paras. 1-79.

¹⁰ For resumption of discussion, see 843rd meeting, paras. 1-13.

ARTICLE 47 (Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty)¹¹

98. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title and text of article 47 be amended to read :

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 31 to 34 inclusive or articles 42 to 44 inclusive if, after becoming aware of the facts :

(a) it shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation; or

(b) it must by reason of its conduct be considered as having acquiesced, as the case may be, in the validity of the treaty or in its maintenance in force or in operation.

99. The main rule was that contained in sub-paragraph (b). It would be noted that the term "acquiesced" had been used in deference to the wishes of those members who did not favour placing the provision on the basis of consent.

100. Mr. de LUNA suggested that the words "as the case may be" in paragraphs (a) and (b) were unnecessary.

101. Mr. AGO said that those words were essential to make it clear that paragraphs (a) and (b) applied to a series of different situations.

102. Mr. YASSEEN said that he agreed with Mr. Ago. The words "as the case may be" were necessary in paragraph (a) to make it clear that a State could no longer invoke a ground for invalidating a treaty if it had agreed that the treaty was valid, could no longer invoke a ground for terminating or withdrawing from a treaty if it had agreed that the treaty remained in force, and could no longer invoke a ground for suspending the operation of a treaty if it had agreed that the treaty continued in operation. The words "as the case may be" had a similar import in paragraph (b).

103. Mr. de LUNA said that he would not press his suggestion.

104. Mr. CASTRÉN pointed out that the words "*de l'application du traité*" should be inserted in the French text of the title in order to bring it into line with the English text.

105. Sir Humphrey WALDOCK, Special Rapporteur, said that in the English title the words "the operation of" were used after "suspending". He would have no objection to the French title being brought into line with the English.

106. The CHAIRMAN put article 47 to the vote.

Article 47 was adopted by 15 votes to none.

¹¹ For earlier discussion, see 836th meeting, paras. 21-51, 837th meeting, paras. 80-95, and 838th meeting, paras. 1-38.

Report of the Chairman of the Drafting Committee on Articles 49 and 50

107. Mr. JIMÉNEZ de ARÉCHAGA, Chairman of the Drafting Committee, said that the Drafting Committee had decided to report to the Commission on articles 49¹² and 50¹³ at the 1966 summer session; those articles were closely connected with article 51, which the Commission had been unable to consider at the present session.

Draft Resolution submitted by Mr. Amado

(A/CN.4/L.114)

108. Mr. AMADO, submitting the draft resolution in document A/CN.4/L.114, said that it expressed in very restrained terms the Commission's gratitude to H.S.H. Prince Rainier III of Monaco and his Government for their hospitality and for the attentions it had been shown. Thanks to the welcome it had received, to the beauty of the scenery and to the mildness of the climate, the Commission had been able to do fruitful work.

The draft resolution was adopted by acclamation.

The meeting rose at 5.30 p.m.

¹² For earlier discussion, see 838th meeting, paras. 39-67 and 839th meeting, paras. 1-58.

¹³ For earlier discussion, see 836th meeting, paras. 52-91.

843rd MEETING

Friday, 28 January 1966, at 9 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

[Item 2 of the agenda]

(continued)

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE
(continued)

ARTICLE 46 (Separability of treaty provisions) (continued)¹

1. The CHAIRMAN invited the Commission to resume its consideration of article 46.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, following the discussion at the previous meeting, he had prepared a redraft of paragraph 2 of article 46, reading :

¹ For earlier discussions, see 836th meeting, paras. 2-20, 837th meeting, paras. 1-79, and 842nd meeting, paras. 79-97.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty admitted in the present articles may only be invoked with respect to the whole treaty except as provided in the following paragraphs or in article 42.
3. In the interests of uniformity of language, he proposed that the phrase "under a treaty" in paragraph 1 of the article be replaced by the phrase "provided for in a treaty". A contrast would thus be established between a right provided for in the treaty itself—the subject of paragraph 1, and a ground provided for in the draft articles—the subject of paragraph 2.
4. The new formulation of paragraph 2 was intended to stress that the paragraph referred to cases not provided for in the treaty; that result was achieved by the insertion of the words "admitted in the present articles", after the words "of a treaty".
5. The former concluding words of paragraph 2, "in the present articles", had been replaced by the words "in the following paragraphs or in article 42", in order to meet a point raised at the previous meeting by Mr. Castrén. As he himself had pointed out at that meeting, a reference to article 42 was necessary because a ground for terminating or suspending the operation of a treaty could arise under the provisions on breach contained in that article.
6. Mr. BRIGGS suggested that the word "admitted" in paragraph 2 be replaced by a better term, possibly "envisaged".
7. Mr. ROSENNE suggested that it be replaced by the word "recognized". The term "admitted" had several different connotations in law and could lead to confusion.
8. Mr. TSURUOKA suggested that the word "contemplated" might be used.
9. Sir Humphrey WALDOCK, Special Rapporteur, said that the term "admitted" had been used in order to show that the paragraph referred to a ground accepted as a valid legal ground under the draft articles. He could accept Mr. Rosenne's suggestion that the word "recognized" be used instead.
10. Mr. CASTRÉN said that the new text of paragraph 2 was much clearer than the one proposed at the previous meeting.
11. Mr. REUTER said that the French text of paragraph 3 (b) was liable to be misunderstood. He therefore proposed that it be amended to read: "*si l'acceptation des clauses en question n'a pas constitué, pour l'autre partie ou les autres parties, une base essentielle de leur consentement au traité dans son ensemble*".
12. Sir Humphrey WALDOCK, Special Rapporteur, said that although he considered that the principle of separability ought to apply to cases falling under article 35, he would nevertheless vote in favour of article 46 as a whole.
13. The CHAIRMAN put to the vote the amended text of article 46 as a whole, which read:

Separability of treaty provisions

1. A right of a party provided for in a treaty to denounce, withdraw from or suspend the operation of the treaty may only be exercised with respect to the whole

treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may only be invoked with respect to the whole treaty except as provided in the following paragraphs or in article 42.

3. If the ground relates to particular clauses alone, it may only be invoked with respect to those clauses if:

- (a) the said clauses are separable from the remainder of the treaty with regard to their application; and

- (b) acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole.

4. In cases falling under article 33 the State entitled to invoke the fraud may do so with respect either to the whole treaty or to the particular clauses alone.

5. In cases falling under articles 35, 36 and 37, no separation of the provisions of the treaty is permitted.

Article 46 as a whole, as amended, was adopted by 14 votes to none.

Report of the Commission on the Work of the Second Part of its Seventeenth Session

(A/CN.4/L.112)

14. The CHAIRMAN invited the Commission to consider the draft report on the second part of its seventeenth session (A/CN.4/L.112).

15. Mr. de LUNA, referring to paragraphs 6-11, said that he again wished to point out that the correct terms in Spanish for "Rapporteur" and "Special Rapporteur" were "*Relator*" and "*Ponente*" respectively. He asked that the term "*Ponente*" be used in the Spanish text as the equivalent of "Special Rapporteur" in paragraph 11 and in all future documents of the Commission.

It was so agreed.

16. Mr. TSURUOKA asked whether the text of the Commission's resolution of thanks to the Government of Monaco, referred to in paragraph 13, had been transmitted to that Government.

17. The CHAIRMAN replied that, in his capacity as representative of the Secretary-General, the Secretary to the Commission would ensure that the resolution was transmitted that day.

18. In paragraph 14 of the report, the Secretariat would insert a statement to the effect that the Commission had decided to consider the following topics at its eighteenth session: first, the law of treaties, secondly, special missions, and, thirdly, the organization of future work on other topics.

19. Paragraph 18 would be expanded to give a fuller account of co-operation with the Inter-American Council of Jurists, thus ensuring a better balance between that part of the report and the previous paragraphs dealing with the European Committee on Legal Co-operation.

20. At the beginning of paragraph 19, the Secretariat would insert a sentence to the effect that the General

Assembly, in its resolution 2045 (XX), had noted with appreciation that the European Office of the United Nations had organized a seminar on international law during the first part of the Commission's seventeenth session and had expressed the wish that other seminars should be organized in conjunction with future sessions of the Commission.

Subject to those changes, the draft report was adopted.

Closure of the Seventeenth Session

21. The CHAIRMAN said that, as it was the last occasion on which he would be taking the Chair, he wished to take the opportunity of thanking the members of the Commission for the assistance they had given him in discharging his duties.

At the Chairman's invitation, Mr. Novella, Secretary-General for Cultural Affairs and Congresses of the Principality of Monaco, took a place at the Commission table.

22. The CHAIRMAN, speaking on behalf of the Commission, requested Mr. Novella to convey to H.S.H. Prince

Rainier and his Government the Commission's thanks for the hospitality extended to it.

23. Mr. NOVELLA, Secretary-General for Cultural Affairs and Congresses of the Principality of Monaco, said it was the hope of the authorities of the Principality that the Commission would hold another session in Monaco in the near future.

24. Mr. AMADO said he was sure that he was expressing the feelings of every member of the Commission in paying a tribute to the Chairman, who had shown that he possessed great qualities of leadership as well as erudition.

25. He again expressed his satisfaction that circumstances had enabled the Commission to meet in Monaco and said that it would certainly wish to return there.

26. After the customary exchange of courtesies, the CHAIRMAN declared the seventeenth session of the Commission closed.

The meeting rose at 10.25 a.m.

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