

YEARBOOK
OF THE
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1966

Volume I
Part II

*Summary records
of the eighteenth session*

4 May - 19 July 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 figures in square brackets appearing against the draft articles on the law of treaties show the final numbering of those articles in the Commission's report on this session.

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

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Appendix: Table of references indicating the correspondence between the numbers allocated to the articles, sections and parts of the draft articles on the law of treaties in the reports of the Commission since 1962.

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 PAREDES	Ecuador
Mr. Gilberto AMADO	Brazil	Mr. Obed PESSOU	Togo
Mr. Milan BARTOŠ	Yugoslavia	Mr. Paul REUTER	France
Mr. Mohammed BEDJAOUI	Algeria	Mr. Shabtai ROSENNE	Israel
Mr. Herbert W. BRIGGS	United States of America	Mr. José Maria 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. Mustafa Kamil YASSEEN
First Vice-Chairman: Mr. Herbert W. BRIGGS
Second Vice-Chairman: Mr. Manfred LACHS
Rapporteur: Mr. Antonio de LUNA

*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.4/185]
[24 February 1966]

The Commission adopted the following agenda at its 844th meeting, held on 4 May 1966:

1. Law of treaties
2. Special missions
3. Organization of future work
4. Date and place of the nineteenth session
5. Co-operation with other bodies
6. Other business

YEARBOOKS OF THE INTERNATIONAL LAW COMMISSION

<i>Yearbook</i>	<i>United Nations publication Sales No.:</i>
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
1955, vol. II Documents of the seventh session	60.V.3, vol. II
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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1960, vol. I Summary records of the twelfth session	60.V.1, vol. I
1960, vol. II Documents of the twelfth session	60.V.1, vol. II
1961, vol. I Summary records of the thirteenth session	61.V.1, vol. I
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1964, vol. I Summary records of the sixteenth session	65.V.1
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1965, vol. I Summary records of the first part of the seventeenth session	66.V.1
1965, vol. II Documents of the first part of the seventeenth session	66.V.2

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE EIGHTEENTH SESSION

Held at Geneva from 4 May to 19 July 1966

844th MEETING

Wednesday, 4 May 1966, at 3.15 p.m.

Chairman: Mr. Milan BARTOŠ

Later: Mr. Mustafa Kamil YASSEEN

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

Opening of the Session

1. The CHAIRMAN, after declaring the eighteenth session of the Commission open, said that a message had been received from Mr. Cadieux to the effect that for the time being he was unfortunately prevented from coming to Geneva. A telegram had also been received from Mr. Pal, informing the Commission that he was unable to attend the session owing to ill-health. He (the Chairman) would send Mr. Pal a telegram conveying to him the Commission's good wishes for his speedy recovery and the regret felt by all the members at his absence.

Election of Officers

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

3. Mr. VERDROSS proposed Mr. Yasseen, whose eminence as a scholar and devotion to the Commission admirably qualified him for that office.

4. Mr. TUNKIN seconded the proposal.

5. Mr. TSURUOKA, Mr. BRIGGS, Mr. AMADO, Mr. AGO, Mr. PAREDES and Sir Humphrey WALDOCK supported the proposal.

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

6. The CHAIRMAN, thanking the members of the Commission for his election, said he regarded it both as an encouragement and as a sign of friendship. One

of the merits of the International Law Commission was precisely that it served to establish firm friendships based on lofty ideals in the service of the international community.

7. Mr. PALTHEY, Deputy Director-General of the United Nations Office at Geneva, said he would not address any formal welcome to the members of the Commission; it was more a pleasure than a duty for him to greet them and to be with them again.

8. In 1966 the Commission's work would be particularly important, as it had to complete its drafts on the Law of Treaties and on Special Missions. It was an all too common complaint that international law had lost some of its former prestige; but it was certain that no genuine organization of the world would be possible until rules of law and conduct were firmly established and respected. With the work of codification that it was pursuing in all scientific humility, the Commission was at the very heart of the work of the United Nations and its achievements were undoubtedly of fundamental value in that prodigious structure.

9. In order to spread knowledge of international law, a system of seminars had been initiated in 1965, and, thanks to the members of the Commission, had met with remarkable success. A second seminar was to begin the following week and it was to be hoped that it could count on the Commission's collaboration. Without the Commission, a project of that kind would not exist, for the Commission was the heart of it; the United Nations Office at Geneva was merely the modest organizer, responsible for gathering together the young lawyers who would subsequently go out and spread the doctrine and preach throughout the world, both in the developing countries and in Europe, the need to establish rules of law in human and in international relations. He thanked the members of the Commission for what they had done for the seminar the previous year and for what he was sure they would do in 1966. He wished the Commission every success in its work.

10. The CHAIRMAN said he was expressing the Commission's feelings in thanking the Deputy Director-General of the United Nations Office for coming to welcome them and for his kind words. The Commission had always been well received at Geneva, where it was surrounded with all the good will and all the attention it could hope for. As to the seminar, it was true that it was meeting on the occasion of the Commission's

session, but it would never have been held if the United Nations Office had not taken the initiative.

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

12. Mr. JIMÉNEZ de ARÉCHAGA proposed Mr. Briggs.

13. Mr. AGO seconded the proposal.

14. Mr. BARTOŠ, Mr. TUNKIN, Mr. VERDROSS, Mr. AMADO, Mr. de LUNA and Mr. TSURUOKA supported the proposal.

Mr. Briggs was unanimously elected First Vice-Chairman.

15. Mr. BRIGGS thanked the Commission for his election.

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

17. Mr. RUDA proposed Mr. Lachs.

18. Mr. REUTER seconded the proposal.

19. Mr. VERDROSS, Mr. BARTOŠ and Mr. AMADO supported the proposal.

Mr. Lachs was unanimously elected Second Vice-Chairman.

20. Mr. LACHS thanked the Commission for his election.

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

22. Mr. EL-ERIAN proposed Mr. de Luna.

23. Mr. AGO seconded the proposal.

24. Mr. ROSENNE, Mr. TUNKIN, Mr. RUDA, Mr. VERDROSS, Mr. AMADO, Mr. BARTOŠ, Sir Humphrey WALDOCK, Mr. REUTER, Mr. TSURUOKA and Mr. PAREDES supported the proposal.

Mr. de Luna was unanimously elected Rapporteur.

25. Mr. de LUNA thanked the Commission for his election.

Adoption of the Agenda

26. The CHAIRMAN suggested that the provisional agenda (A/CN.4/185) be adopted without discussion of the order in which the items would be taken up; it had already been decided at the previous session to start with the law of treaties.

It was so agreed.

Organization of Work

27. Sir Humphrey WALDOCK, Special Rapporteur, said that as the Commission had not been able to complete its work on Part II of the draft articles on the law of treaties at the second part of its seventeenth session, he presumed that it would wish to start work on that item of the agenda by considering article 51, on which he had commented in his fifth report (A/CN.4/183/Add.4). That article laid down the proce-

cedure for dealing with disputes arising from the invocation by one party of nullity as a ground for terminating a treaty. The Commission could then take articles 52, 53, and 54, dealing with the legal consequences of nullity, termination and suspension, which were discussed in his sixth report (A/CN.4/186), containing his observations and proposals in the light of the comments by governments. After that it could consider the articles in Part III.

28. The CHAIRMAN suggested that the Commission proceed with the articles on the law of treaties in that order.

It was so agreed.

29. Mr. WATTLES, Deputy Secretary to the Commission, said that the administration of the United Nations Office at Geneva had asked the Commission to hold its meetings on 5 and 10 May in the afternoon, because on those dates the interpreters would be required in the mornings for meetings of the Eighteen-Nation Committee on Disarmament.

30. Mr. AMADO asked whether other United Nations bodies had ever been asked to change their usual working hours in that way.

31. Mr. WATTLES, Deputy Secretary to the Commission, said there had been occasions when other bodies had been asked to change the times of meetings at the Palais des Nations, where the staff was not as numerous as at Headquarters.

The meeting rose at 4.45 p.m.

845th MEETING

Thursday, 5 May 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Special Missions

[Item 2 of the agenda]

1. The CHAIRMAN announced that a letter had been received from Mr. Elias informing the Commission that he had been appointed a Professor and Dean of the Faculty of Law of Lagos University, and that to his great regret he would be unable to attend the Commission's meetings until later in the session.

2. He invited Mr. Bartoš, the Special Rapporteur on special missions, to make a statement on the position with regard to that topic.

3. Mr. BARTOŠ, Special Rapporteur, said he had been slightly delayed in the preparation of his report

on special missions because he was anxious to take into account some comments by governments which he should be receiving shortly. He would, however, see that the report was distributed in good time during the session.

Law of Treaties

(A/CN.4/183/Add.4, A/CN.4/186 and Addenda;
A/CN.4/L.107 and L.115)

[Item 1 of the agenda]

ARTICLE 51 (Procedure in other cases) [62]

[62]

Article 51

Procedure in other cases

1. A party alleging the nullity of a treaty, or a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under a provision of the treaty, shall be bound to notify the other party or parties of its claim. The notification must:

(a) Indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;

(b) Specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Subject to article 47, the fact that a State may not have made any previous notification to the other party or parties shall not prevent it from invoking the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty.

4. The CHAIRMAN invited the Commission to consider article 51, for paragraph 5 of which the Special Rapporteur, in his observations (A/CN.4/183/Add.4), had proposed a rewording which read:

“5. Subject to article 47, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty”.

5. Sir Humphrey WALDOCK, Special Rapporteur, said that article 51 was the last article in section V of Part II. It dealt, with respect to cases other than those in which action was taken under a right provided for in the treaty itself, with the procedure governing disputes arising from an allegation of a ground for nullity, withdrawal, termination or suspension of a treaty.

6. The question had been discussed at length in 1963 and the Commission had arrived at a text in five paragraphs (then article 25) which represented the maximum common ground that could be found.¹ The comments by governments on that text, which were analysed in his fifth report (A/CN.4/183/Add.4), reflected the differences of opinion in the international community on the question of independent adjudication, which had already become manifest in discussion in the Commission. Nine governments had called for a strengthening of the provisions of article 51, while seven had expressed approval of the text as it stood. A large number of governments had made no comment, thereby presumably indicating that they did not take exception to article 51 as adopted by the Commission.

7. Although he personally was in favour of as large a measure of independent adjudication as States could be persuaded to accept, it was his feeling that it would be preferable not to disturb the compromise reached in the 1963 text.

8. With regard to the specific proposals made by certain governments, he had not incorporated the suggestion put forward by the Government of Luxembourg, despite its superficial attraction, because it would almost certainly lead to great difficulties. The proposals made by the Governments of Finland and Italy represented a return to the formula which he himself had proposed in his second report as article 25.² The Commission had discussed that proposal, but had rejected it in favour of the present text of article 51. In the light of that decision, he did not feel that, as Special Rapporteur, he should reintroduce his original proposal.

9. He now proposed, however, a minor amendment to the wording of paragraph 5, designed to take into account a comment by the Swedish Government to the effect that the 1963 text of that paragraph could be interpreted as meaning that the party invoking the nullity or grounds for termination could at once act as though the treaty were invalid or terminated. His rewording ruled out that interpretation.

10. Mr. BRIGGS said that the Special Rapporteur's proposed new paragraph 5 was an improvement on the former text; it made the provision much clearer.

11. With regard to article 51 as a whole, he noted an important observation by the Special Rapporteur in his report, which read: “Governments in their comments appear to be unanimous in approving the general object of the present article, namely, the surrounding of the various rights to invoke grounds of invalidity or termination with specific procedural safeguards against arbitrary recourse to these grounds for the purpose simply of getting rid of inconvenient treaty obligations”. In order to ascertain whether article 51 as proposed achieved that object, it was necessary to examine the substantive articles on invalidity and termination that created the need for the provisions of article 51.

¹ *Yearbook of the International Law Commission, 1963*, vol. I, pp. 278 et seq. and p. 318.

² *Op. cit.*, vol. II, pp. 86-87.

12. In that connexion, he drew attention to Mr. Ruda's remarks at the previous session during the discussion on article 44, on fundamental change of circumstances, when he had said: "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".³ The question that arose there was who was to decide when a violation of internal law was "manifest", or when the character of obligations was transformed in "an essential respect".

13. Similarly, in article 33, on fraud, the question arose who was to establish whether a fraud had been committed. In article 34 the same problem arose with regard to error, and in article 35 with regard to coercion of a representative of the State. No doubt most members of the Commission would agree that a ruling on those questions could only be made by an impartial third party, but that was nowhere stated in the draft articles.

14. A striking example was furnished by article 36 as adopted at the previous session (A/CN.4/L.115). How would it be decided whether the words "threat or use of force in violation of the principles of the Charter of the United Nations" referred only to the principles set forth in Article 2 of the Charter, or even only to those in paragraph 4 of Article 2, or, whether they referred more generally to the many other principles included in the Charter? Even if the reference were to be limited to the principles set forth in Article 2(4) of the Charter, the question would still arise whether the term "threat or use of force" included measures of economic pressure or not.

15. It was important to bear in mind, moreover, that unlike articles 33 and 34, article 36 made no provision for invoking invalidity but merely proclaimed that: "A treaty is void if its conclusion has been procured by the threat or use of force...". Would the mere allegation that there had been such a threat or use of force be sufficient to release a State from its obligations under a treaty?

16. An equally grave problem arose in connexion with article 37 (treaties conflicting with a peremptory norm of general international law (*jus cogens*)), because no procedure was laid down for establishing what constituted a rule of *jus cogens*. The absence of such a procedure affected the application of the provisions of article 45 (Establishment of a new peremptory norm of general international law).

17. For those reasons, greater weight should be given to the proposals for additional safeguards put forward by the Governments of Finland and Luxembourg,

to the concern expressed by the Swedish Government and to the proposal by the Government of Turkey that provision should be made for adjudication by the International Court of Justice. The Government of the United Kingdom had also pointed out that paragraphs 3 and 4 of article 51 did not provide sufficient safeguards, and that view was shared by the United States Government, which had also suggested compulsory jurisdiction. The Italian Government had pointed out that the reference to Article 33 of the Charter of the United Nations was not sufficient protection. Some of those States might not accept the Commission's draft on the law of treaties if article 51 remained in its present weak and unsatisfactory form.

18. He also felt strongly that a State which was unwilling to submit to impartial adjudication its allegation that a treaty was void or terminated, should not be allowed to release itself from its obligations under the treaty.

19. The least that the Commission could do was to revert to the proposal put forward in 1963 by the Special Rapporteur in his second report as article 25, paragraph 4, which read:

"If, however, objection has been raised by any party, the claimant party shall not be free to carry out the action specified in the notice referred to in paragraph 1, but must first:

(a) seek to arrive at an agreement with the other party or parties by negotiation;

(b) failing any such agreement, offer to refer the dispute to inquiry, mediation, conciliation, arbitration or judicial settlement by an impartial tribunal, organ or authority agreed upon by the States concerned".⁴

20. He would urge the Commission to adopt that formula, which did not amount to compulsory jurisdiction, but represented the minimal procedural requirement or rather a condition that could be laid down to qualify the substantive rights set forth in the various articles which expressed grounds of invalidity or termination.

21. He was not making any specific proposal at that stage, but would submit a text if his general approach met with support.

22. Mr. REUTER said he thought that article 51 raised, first of all, a question of principle. In theory, he shared the opinion just expressed by Mr. Briggs, for every jurist must prefer a solution providing the safeguard of a legal procedure. But in practice, the question whether such a procedure should be established or not was a political question to be decided by governments. Some governments might be reluctant to approve the text proposed by the Commission because of the absence of any provision for compulsory jurisdiction; because of that omission, some might also be tempted to regard the Commission's draft as a sort of guide or model and prefer not to conclude a convention on the subject. Nevertheless, he agreed with the Special Rapporteur that a further debate on that point would serve no useful purpose.

³ Yearbook of the International Law Commission, 1966, vol. I, part I, 834th meeting, para. 9.

⁴ Yearbook of the International Law Commission, 1963, vol. II, p. 87.

23. The drafting of the article should be sufficiently flexible to cover either the omission or the inclusion of a compulsory jurisdiction clause. He accepted the amendment proposed by the Special Rapporteur, but had three comments to make on the drafting.

24. First, article 51 still contained traces of preference for a procedure in which the final decision in the event of a dispute would be taken by a third party. For example, the word "*demande*" in the French text was too strong if the dispute was not to be settled by an independent authority; the word "*prétention*" would be more suitable.

25. Secondly, it was doubtful whether it was right to give the State which made the notification the right to specify the period within which it must receive the reply. By the position it took, that State was disturbing the established order and was thus putting itself in the position of plaintiff at the outset, so that if it fixed the time limit for the reply itself, its action would appear unfriendly in diplomacy: it would be in the nature of an ultimatum. It was the State from which a reply was awaited that should be the judge of the period within which that reply should be made, and the Commission could not do better than specify that the period must be "reasonable". If the Commission supported his view, the drafting of the article could be simplified by deleting paragraph 1 (b) and substituting the words "within a reasonable period" for the words "before the expiry of the period" in paragraph 2.

26. Thirdly, article 51 should be co-ordinated with article 42. For neither in the form adopted in 1963⁵ nor as amended in January 1966 (A/CN.4/L.115) did article 42 deal with the particular case in which a State suspended the application of a provision of a treaty, but not of the whole treaty, because the other party was not applying that provision. By virtue of the principle of reciprocity and of the principle *inadimplenti non est adimplendum*, in that limited case the partial suspension of the treaty should be permitted without an obligation to notify. It might not be necessary to change the text of the articles to cover that situation, but if the Commission agreed that the derogation he had mentioned was acceptable, he thought it should at least make that clear in the commentary.

27. Mr. TUNKIN said that in 1963, article 51 had given rise to prolonged discussion both in the Commission and in the Drafting Committee; the text then arrived at with so much difficulty represented a compromise and the Commission should abide by it.⁶

28. With regard to the comments by governments, it would not be accurate to describe the position merely by reference to the views of the sixteen governments which had commented on article 51. To say that nine governments favoured some form of independent adjudication while seven supported article 51 as it stood would not reflect the true position. Experience showed that governments which had no objection to a particular article usually did not comment on it; a government very rarely submitted comments on an article it supported. It could therefore safely be assumed that most,

if not all, of the very large number of governments which had not commented were in fact in favour of article 51 as the Commission had adopted it in 1963.

29. In those circumstances, he urged that the Commission should adhere to the 1963 text, subject to drafting changes. In particular, he supported the Special Rapporteur's proposed redraft of paragraph 5.

30. He saw no need to reopen the discussion on the question of compulsory jurisdiction, which had been discussed at length several times by the Commission, most recently at the previous session. If the discussion on that point were reopened, there was every likelihood that members would merely repeat the same views as they had expressed in the past. In previous discussions on the subject, it had been emphasized that the question of compulsory jurisdiction and arbitration was a general problem which arose in connexion with every rule of international law. There was as yet no higher authority than States themselves to decide whether a rule of international law had been violated. If the Commission took the view that it should not accept a particular rule of international law because there was no authority to decide when it had been violated, that would mean giving up any attempt to codify and develop international law.

31. In conclusion, he reminded the Commission of the history of one of the articles on diplomatic relations, which had been adopted as a compromise after a difficult discussion. At the 1961 Vienna Conference, an attempt had been made to alter the text of that article and the delegations of the United Kingdom and the USSR had appealed to the Conference not to upset the delicate balance achieved by the compromise text. The Conference had finally accepted the original text as drafted by the Commission.

32. Mr. CASTRÉN said that the Commission had had a long discussion on the highly important article 51 in 1963 before deciding on the present text, which was in the nature of a compromise. Most of the amendments proposed by governments were designed to strengthen the safeguards against abuses which might result from the application of the rules of the draft permitting the termination of a treaty.

33. The Special Rapporteur had not been able to accept even the mildest of the proposals, such as those submitted by Finland and Italy; and the reasons he had given for his attitude—in particular, that the present text represented common ground beyond which it would be unwise to go—were quite understandable. The diplomatic conference convened to discuss the Commission's draft could, of course, reconsider the problem; and another possibility would be to annex to the convention an optional protocol providing more effective ways of settling procedural questions between States which were prepared to accept an arrangement of that kind.

34. He could also accept the reasons why the Special Rapporteur had rejected the proposal to set a time-limit in paragraph 1 (b) for the other party's reply in cases of special urgency.

35. On the other hand, he thought that the Swedish Government's comments on paragraph 5 were quite

⁵ *Ibid.* p. 204.

⁶ *Ibid.* p. 214.

justified, as that paragraph could be interpreted as allowing a State, on discovering an error or fundamental change of circumstances, immediately to cease to perform the treaty, and to invoke those grounds only if and when another party made a demand for the performance of the treaty or lodged a complaint alleging a violation. Neither article 51 as a whole nor paragraph (7) of the commentary could dispel the Swedish Government's fears. The new wording of paragraph 5 suggested by the Special Rapporteur was hardly likely to discourage the interpretation to which he had referred. It was difficult to deny that a State which had ceased unilaterally to perform a treaty without complying with the procedure laid down in article 51, paragraphs 1 to 3, had acted in a reprehensible manner and might thereby have impaired the rights of other parties. Hence it should not be allowed to evade its responsibilities merely by making a notification at some later date. He therefore proposed that paragraph 5 should be deleted, or, if that solution seemed too radical, that the question should be dealt with in the commentary.

36. Mr. VERDROSS said he supported Mr. Tunkin's proposal that the text adopted in 1963 be retained. Personally, he was inclined to share the views of Mr. Briggs; but, as a member of the Commission, he thought that it ought not, on the second reading of the draft, to reopen discussion on a compromise text which had been adopted after long debates, unless there were serious grounds which might induce the majority of the members to change their views. If the Commission were to engage in a fresh discussion of article 51 at the present stage, it would probably end by reaching the same conclusions as it had in 1963. It would therefore save time by adopting the Special Rapporteur's proposal.

37. Mr. AGO said that he had been convinced by the arguments put forward by Mr. Briggs in his plea for the development of the international law of procedure and the establishment of compulsory jurisdiction for the settlement of disputes relating to the application of rules of law. On the other hand, as he had already had occasion to point out, care should be taken not to confuse questions of substance and questions of procedure.

38. If international law were compared with private law—a perfectly valid comparison, since error, fraud and coercion were also grounds for alleging the invalidity or nullity of acts in private law—it would be found that it was not the existing rules which showed what authority was responsible for settling possible disputes relating to their application. The procedure for settling such disputes was laid down in a separate code relating solely to procedure. In international law, too, there were rules of substance and rules of procedure. The latter were certainly far from satisfactory, but they did exist; and any effort to combine the two kinds of rule might lead to dangerous confusion. The Commission tended too often, perhaps, to think that it was breaking new ground: in fact, some of the rules incorporated in the draft were as old as the law of treaties itself, and no one had ever contested them on the ground that there was no established means of settling disputes relating to their application. Moreover, even when the Commission affirmed the existence of mandatory rules or *jus cogens*, it was only defining a principle which

already existed and had already been recognized by the conscience of States. Thus rules of substance did not lose any of their validity merely because there were no corresponding rules of procedure, even though the development of substantive international law was bound to demonstrate more clearly the need for parallel development of the international law of procedure. Hence, it was not only for practical reasons that he was in favour of retaining the text adopted in 1963, but also for reasons of principle, since the draft under consideration stated rules of substance, and was not the place for settling questions of procedure. It was to be hoped that the Commission would one day draft rules of procedure, not only on the particular point under discussion, but for the settlement of all international legal disputes.

39. Perhaps the use of the word "Procedure" as the title of Part II, section V, of the draft had led to some confusion. What the Commission was trying to do in that section was not really to establish a procedure, but to place certain limits on the conduct of States in order to prevent abuses. The title should therefore be amended to make it more accurate.

40. At first sight, he was inclined to favour the amendment proposed by the Special Rapporteur; he would like time to reflect on the proposals put forward by Mr. Castrén and Mr. Reuter, which might be considered by the Drafting Committee.

41. Mr. AMADO said he had not expected a discussion on article 51, which, in the words of the Special Rapporteur (A/CN.4/183/Add.4) "represented the highest measure of common ground that could be found in the Commission at the fifteenth session" on procedural safeguards. He recalled the disagreement he had had with Sir Gerald Fitzmaurice over the expression "reasonable period", the use of which seemed to him inconceivable in a legal text. Many members of the Commission, however, had expressed themselves in favour of that strange expression, which seemed, in their opinion, to meet a real need.

42. A conflict might arise between those who were considering law as it *might* be and those who were concerned with law as it *could* be. The Commission's task was to reduce law as it *could* be to formulas acceptable to States, which were motivated by perfectly logical reasons. It was true that the idea of States submitting to compulsory jurisdiction was an ideal to which many aspired, but if States themselves were unable to reach agreement on the matter, there was nothing to be done except dream of the day when compulsory jurisdiction would be accepted; but that day was still a long way off.

43. As he had expected quite a simple exchange of views, he had been surprised by the vigorous attack launched by Mr. Briggs. In support of his thesis, Mr. Briggs had used arguments that were justified on scientific and practical grounds. Some of those seeds would perhaps germinate, but not for some time. While Mr. Reuter's observations provided food for thought, he (Mr. Amado) took a position similar to that of Mr. Tunkin and Mr. Verdross, and applauded Mr. Ago's criticism of procedure.

44. Mr. de LUNA said he agreed that the Commission should abide by the 1963 compromise; it was not possible to embody in the draft articles a greater measure of institutionalization than was warranted by the present stage of international solidarity. For that reason, although he sympathized with the ideas behind Mr. Briggs's proposal, he could not support it. He recalled the failure of the draft on arbitral procedure adopted by the Commission under the generous inspiration of Mr. Scelle; because it had tried to anticipate the international law of the future and to replace diplomatic arbitration by compulsory arbitration, it had proved unwelcome to States.

45. The wording adopted by the Commission in 1963 for article 51 had clearly met with the approval of the majority of States; it could be safely assumed that those States which had not commented on that important article had no objection.

46. All international disputes were both legal and political. There was no conflict that was not amenable to settlement in accordance with rules of law. At the same time, any dispute could be charged with political implications, even one relating to a purely technical matter. It was for the State concerned to decide whether any particular dispute had political implications and whether it was or was not prepared to submit it to judicial settlement or arbitration.

47. He supported the rewording proposed by the Special Rapporteur and hoped that at some future time the Commission would be able to go further in the direction proposed by Mr. Briggs.

48. The CHAIRMAN, speaking as a member of the Commission, said he wished to state his view on the attitude the Commission should adopt with regard to the draft article. From the procedural point of view, there was no reason to reopen the debate: in 1963 the Commission had adopted a solution which, though not ideal, nevertheless represented a balanced compromise in the present state of international law and a formula which could be accepted as a general rule. He did not think the Commission could modify that solution, which was the only one that would be acceptable to States as a general rule in a convention on the law of treaties.

49. As to the principle, he endorsed the comments of Mr. Tunkin and Mr. Ago. Two such different problems as the question of substance and the question of procedure or institutions should not be linked together. The international community was still primitive compared with a national community, and the international order was not as developed as a national order. It would therefore be dangerous to make the development of international law and its codification conditional on the acceptance of compulsory jurisdiction. Such a step would impede the movement towards codification and, indirectly, the extension of compulsory jurisdiction. For one of the reasons why States distrusted compulsory jurisdiction was that they were not certain what law was applicable. Codification was one means of giving international law certainty and precision, and the movement towards codification would thus facilitate the early acceptance of compulsory jurisdiction.

50. It would therefore be advisable to retain the text adopted in 1963, subject to drafting changes.

51. Mr. EL-ERIAN said that every member of the Commission had stated his views on article 51 in detail at the fifteenth session and the text finally formulated after arduous work in the Drafting Committee represented what the Special Rapporteur had described as the highest measure of common ground. The object of the article was to provide procedural safeguards against the arbitrary invoking of certain grounds in order to secure the nullity of a treaty. The Commission could not go any further or attempt to solve the problem of independent adjudication and compulsory jurisdiction. No consensus of opinion on those two difficult issues had been reached in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, and the experience of the diplomatic conferences on the law of the sea and on diplomatic and consular relations had shown that it was not practicable at the present juncture to insert compulsory jurisdiction clauses as *clauses de style* in general multilateral law-making treaties. He had, of course, been very interested by Mr. Briggs's comments and looked forward to the day when the structure of international institutions would be completed and authoritative interpretation and enforcement of international law would become possible.

52. With regard to the argument developed by Mr. Briggs, he asked whether it would be right to impose on the party invoking the nullity of a treaty on the ground that it had been procured by fraud, that it violated a peremptory norm, whether old or new, or that a fundamental change of circumstances had taken place, the obligation to continue to apply the treaty until its claim had been found valid by an independent third party decision.

53. He agreed with the Special Rapporteur's conclusion on the Swedish Government's comment and could accept the proposed change in paragraph 5, if that would meet the Swedish Government's point.

54. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission and the Drafting Committee ought to examine article 51 very carefully, since it was a key provision to which States obviously attached importance, and not simply retain the text adopted at the fifteenth session merely because it was a compromise. The result of their scrutiny might be that the 1963 text would have to be retained, subject to drafting changes, but the very fact that discussion of article 51 had been postponed during the second part of the seventeenth session⁷ implied that the Commission had intended to consider all its implications at the present session.

55. At the risk of repeating what he had said about article 51 in the past, he felt bound to emphasize that it gave a substantial measure of protection against unilateral action and arbitrary assertions by a State wishing to release itself from treaty obligations. The provisions of paragraphs 2 and 3 did not exonerate a party from its general obligations under the treaty or allow it to act as judge in its own case. Only when no

⁷ *Yearbook of the International Law Commission, 1966*, vol. I, part I, 842nd meeting, para. 107.

objections had been lodged against a claim or when the period for the reply had expired could the claimant act unilaterally. The difference between the provisions of paragraph 2 and those of paragraph 3 clearly showed that unilateral action was excluded. If an objection were made against a claim or the facts on which it was based were challenged, a dispute would arise. It could be argued that that did not go very far, but in his opinion the recognition of the existence of a dispute in such circumstances represented progress that was not without significance, because one way in which powerful States had sought to suppress the claims of weaker ones had been to deny the existence of a dispute altogether and thereby deprive the latter of any recourse to a means of settlement.

56. Like the Special Rapporteur and Mr. Briggs, he had always thought that the application of article 51 should be subject to a third party decision and compulsory jurisdiction by the International Court of Justice, and he held to that view; the argument that substance must be kept separate from procedure could be pushed too far and some safeguards were necessary. That view had not received the support of the majority in the Commission, however, and States were evidently opposed to a rigid requirement concerning judicial determination. Therefore, because of practical considerations he would support the compromise reached in 1963, whereby the parties would seek a solution of any dispute through the means indicated in Article 33 of the Charter.

57. A new factor in favour of keeping the compromise text reached in 1963 was the resolution on the peaceful settlement of disputes recently adopted by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,⁸ the terms of which were not far removed from certain provisions in the Commission's draft. The proposal by the representatives of Dahomey, Italy, Japan, Madagascar and the Netherlands in that Committee to include a provision requiring legal disputes to be referred to the International Court of Justice had not obtained a consensus, although it was rather more timid than Article 36(3) of the Charter itself.

58. At the present stage of development, it seemed that the Commission had been right in its conclusion that a proposal to go beyond the obligations laid down in the Charter would have little chance of success. It should be recalled, however, that under Article 36(3) one of the obligations of the Charter was that legal disputes should as a general rule be referred to the International Court, and most of the disputes that could arise in the cases covered by article 51 would be of a legal nature.

59. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that there was a clear consensus of opinion in the Commission that the compromise reached in 1963 should be retained, but that the text of paragraph 2 should be reviewed to see what drafting improvements were possible. The Drafting Committee should certainly consider Mr. Reuter's

criticism of the word "*demande*" ("claim") and of the time-limit specified in paragraph 1 (b).

60. Personally, he would like to reflect further on Mr. Reuter's proposal to cover the case of one party suspending the operation of part of a treaty because of the failure of another party to apply that part.

61. He himself had always been in favour of a provision that went as far as possible towards requiring disputes to be submitted to independent adjudication, but the attitude of governments and the present state of international relations seemed to indicate that the article approved in 1963 went as far as it would be wise to go.

62. The inter-relationship between substance and procedure had caused him some anxiety when trying to draft the article, as would be seen from his observations on the proposal by the Government of Luxembourg, which was quite unacceptable because its effect would be to divide States into different categories under the régime of a treaty intended to codify general rules of international law.

63. Another delicate problem raised by article 51 was that if, as had been argued, it was procedural in character, it ought to be transferred to the end of the draft as a general "disputes" article and might then suffer excision at the diplomatic conference. If the article was to survive at all, the Commission would be unwise to press for independent adjudication, and in its present place article 51 should certainly provide a safeguard against abuse in respect of a particular series of provisions in the draft. Therefore, albeit reluctantly, he had come round to the view that caution was essential and that, generally speaking, the article should be handled in the way decided upon at the fifteenth session.

64. The article could now be referred to the Drafting Committee for consideration in the light of the discussion.

65. The CHAIRMAN suggested that article 51 be referred to the Drafting Committee, together with the various suggestions for its modification.

*It was so agreed.*⁹

ARTICLE 52 (Legal consequences of the nullity of a treaty) [65]

[65]

Article 52

Legal consequences of the nullity of a treaty

1. (a) The nullity of a treaty shall not as such affect the legality of acts performed in good faith by a party in reliance on the void instrument before the nullity of that instrument was invoked.

(b) 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.

2. If the nullity results from fraud or coercion imputable to one party, that party may not invoke the provisions of paragraph 1 above.

3. The same principles shall apply with regard to the legal consequences of the nullity of a State's consent to a multilateral treaty.

⁸ A/AC.125/6.

⁹ For resumption of discussion, see 864th meeting, paras. 1-50.

66. The CHAIRMAN invited the Commission to consider article 52, for which the Special Rapporteur, in his sixth report (A/CN.4/186), had proposed a new text reading:

“*Legal consequences of the invalidity of a treaty*”

“1. (a) The invalidity of a treaty shall not by itself affect the legality of acts performed in good faith by a party in reliance on the void instrument before the invalidity of the instrument was invoked.

(b) However, a party to the void instrument may require any other party to establish as far as possible the position that would have existed between them if the acts had not been performed.

“2. A party may not invoke the provisions of paragraph 1 if the invalidity results

(a) under articles 33, 35 or 36 from fraud or coercion imputable to that party;

(b) under article 37 from the conflict of the treaty with a peremptory norm of general international law;

(c) under article 45 from the emergence of a new peremptory norm of general international law in which case article 53 applies.

“3. The same principles apply with regard to the legal consequences of the invalidity of an individual State’s consent to be bound by a multilateral treaty.”

67. Sir Humphrey WALDOCK, Special Rapporteur, said that the first part of his sixth report dealt with articles 52, 53 and 54, which were concerned with the legal consequences of invalidity, termination and suspension of the operation of a treaty. In his introduction he had put forward some points that might be left to the Drafting Committee, as well as a proposal concerning the title of section VI. In the interests of consistency with the language of earlier articles, it was desirable to substitute the word “invalidity” for “nullity” in the title; so far as the English language was concerned, the meaning was the same.

68. The main difficulty in article 52, as the Government of Israel had pointed out, was that it dealt both with invalidity *ab initio* and with invalidity resulting from the subsequent emergence of a rule of *jus cogens*; that had led to some clumsiness in drafting which he had tried to eliminate in the new wording.

69. In response to the desire of the Government of Israel that the exceptions—when the benefits of the general provisions in paragraph 1 could not be invoked—should be stated more explicitly, he had referred to the relevant articles by number in the new paragraph 2.

70. He had also completed that paragraph by the addition of the new sub-paragraph (c). At the fifteenth session the Commission had decided that it was unnecessary to make an express reference to the fact that the provisions of paragraph 1 could not be invoked if the invalidity resulted from the emergence of a new peremptory norm, because that was self-evident.

71. Mr. TUNKIN pointed out that, in the new text of paragraph 1, the Special Rapporteur had still used the words “was invoked”, although presumably the paragraph was intended to cover invalidity in general, including invalidity by reason of a treaty being void

ab initio. He wondered whether that supposition was correct.

72. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Tunkin’s supposition was correct. If a treaty conflicted with a rule of *jus cogens* at the time of its conclusion it was void *ab initio* and had never had any proper legal existence, provided there was no dispute as to whether the rule in question was in fact one of *jus cogens*. He agreed that the words “was invoked” were not appropriate to cover that case.

73. Mr. REUTER said he had not taken part in the drafting of article 52 in 1963, and he congratulated the Commission and the Special Rapporteur on their efforts to draw up a text on what was certainly a very difficult subject. He thought, however, that delegates to an international conference might perhaps have some difficulty in understanding the exact meaning of article 52.

74. One of the difficulties related to the substance of the article, which, among other things, touched on the problem of the inter-temporal law, which was dealt with in greater detail in articles 53 and 56.

75. Another difficulty arose from the fact that the Special Rapporteur had had the expression “nullity *ab initio*” in mind, but had wished to avoid using it, which had led to some ambiguity on several points. In the first place, he did not think that the word “*légitime*” in the French text was the right term. If he understood paragraph 1 correctly, the Commission had merely wished to say that acts performed in good faith could not give rise to international responsibility; it had not intended to take a position on the question of the inter-temporal law. Paragraph 1 (a) did not mean that the acts in question were upheld, as paragraph 1 (b) stated the contrary. It was important to be quite clear on that point. He could think of only one word in French which would convey that it was solely the problem of responsibility that was at issue: the word “*licite*”. For where responsibility was concerned, it was generally recognized that an act which gave rise to responsibility was “*illicite*”. Thus the situation was one in which an act, although lawful—paragraph 1 (a)—and giving rise to no responsibility, might become void—paragraph 1 (b). However, the text provided, not that the act “must” become void, but that it “might”. It thus offered the two parties the possibility of agreeing not to insist on that consequence.

76. With regard to the drafting of paragraph 2, although it was understandable, on reflection, that the guilty party could not invoke the provisions of paragraph 1 (a), it was rather less clear why it could not invoke the provisions of paragraph 1 (b).

77. With regard to paragraph 2 (c), he could agree to the case of the new rule of *jus cogens* being included in the interests of simplification. But the present wording implied that if a new norm emerged, the party concerned could no longer invoke paragraph 1 (a), and that was going too far. If a new norm emerged, acts performed in accordance with the earlier norm were lawful; whether they became void was another question, which could not be decided in an absolute sense.

78. With regard to article 45, it might be desirable to combine article 52, paragraph 2 (c), with the relevant paragraph of article 53 and make them into a separate provision. He did not wish to reopen the discussion on article 45, which had already been adopted, but he would raise that point when the Commission took up article 53.

79. Mr. CASTRÉN observed that the Special Rapporteur's new text did not differ greatly from the text adopted by the Commission in 1963;¹⁰ the changes made to the earlier text were only drafting amendments. He approved the replacement of the expression "the nullity of a treaty" by "the invalidity of a treaty". The addition of two new sub-paragraphs in paragraph 2, and the inclusion in paragraph 2 (a) of a specific reference to articles 33, 35 and 36 were also improvements.

80. He noted that the Special Rapporteur, in his observations, had dealt almost exclusively with the comments of the Government of Israel and had left aside those of other governments, such as El Salvador, Sweden and the United Kingdom. The latter two Governments had pointed out that the article dealt with problems of great complexity and that the operation of some of its provisions might be difficult in practice, which appeared to be the case.

81. The relationship between paragraphs 1 (a) and 1 (b) should be studied more thoroughly and more clearly defined, as there seemed to be a contradiction between them. In any case, paragraph 1 (b), particularly in the very weak terms in which it was now couched in the French text, had no practical value as a legal rule. Was it necessary to specify, in a legal document, that one party to a treaty "*peut demander*" (may request) the others to establish as far as possible the position that had existed earlier without referring to the obligation, in certain conditions, to comply with such a request? Requests were always permissible. In that respect, the 1963 French text was slightly more satisfactory since, instead of saying "*une partie peut demander*", it provided that the parties might be "*tenués*" (required) to establish the previous position.

82. He therefore proposed that paragraph 1 (b) be amended to read: "However, at the request of a party to the void instrument, any other party shall be required to establish, provided it can be done without causing undue difficulty for these parties, the position that would have existed between them if the acts had not been performed".

83. Sir Humphrey WALDOCK, Special Rapporteur, said it was not correct to say that he had omitted to take account of the comments of the Governments of El Salvador and the United Kingdom. In fact they had prompted him to change the wording of paragraph 1 (b).

84. Mr. BARTOŠ asked whether the reference to "undue difficulty" in Mr. Castrén's proposal should be taken to mean that if a party was grossly guilty it would be placed in a very favourable position because the harm caused by its guilty action would place it in danger of "undue difficulty", whereas the position of the party which had acted in good faith would be

very unfavourable if it was to lose the right to compensation.

85. Mr. BRIGGS said that, in principle, paragraphs 1 and 2 of the new text were acceptable, subject to some drafting changes. The word "void" in paragraph 1 (a) was unnecessary and should be dropped. Perhaps the meaning would be clear if the words "in relation to another State party" were inserted after the words "the legality of acts" in the same paragraph.

86. It would be well to make clear that the acts referred to in paragraph 1 (a) were acts in international law, otherwise they might be understood to include acts in municipal law.

87. Mr. AMADO said that the Drafting Committee should carefully examine the expression "*caractère légitime*", used in the French text to render the English word "legality"; he had serious doubts about it.

88. Sir Humphrey WALDOCK, Special Rapporteur, said that article 52, like articles 53 and 54, was much more intricate than appeared at first sight and would probably require further discussion at the next meeting.

Appointment of a drafting committee

89. The CHAIRMAN said it had been agreed by the officers of the Commission that a drafting committee of eleven should be appointed.

90. Mr. BRIGGS, First Vice-Chairman, said it was proposed that the Drafting Committee should consist of the two Vice-Chairmen, the General Rapporteur, the Special Rapporteur and the following members of the Commission: Mr. Ago, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Reuter, Mr. Rosenne and Mr. Tunkin.

It was so agreed.

The meeting rose at 5.55 p.m.

846th MEETING

Friday, 6 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 52 (Legal consequences of the nullity of a treaty) *(continued)*¹

¹⁰ *Yearbook of the International Law Commission, 1963, vol. II, p. 216.*

¹ See 845th meeting, preceding para. 66.

1. The CHAIRMAN invited the Commission to continue consideration of article 52.

2. Mr. JIMÉNEZ de ARÉCHAGA said that the provisions embodied in paragraph 1 (a) of article 52 constituted a specific application of the legal maxim *tempus regit actum*. If a State exercised a right conferred by a treaty—for instance, the right to fish in the territorial sea of another State—and it subsequently transpired that the treaty granting that right was invalid because of a substantial error or manifest violation of municipal law, that invalidity would not affect the legality of acts performed or of rights exercised before it was invoked. It was only after the beneficiary State had been put on notice of the fact that the other's consent was vitiated that its good faith disappeared. If, after the invalidity had been invoked, the beneficiary State continued to exercise the treaty rights, the legality of its acts would be open to question; the treaty as such would no longer be a title to justify its conduct. That rule was properly stated in article 52 and the introduction of the words "by itself" improved the text: it showed that the provision did not prejudice other possible grounds of legality or illegality of the conduct of the State in question.

3. He did not think it necessary to insert the words "in relation to another State party" in paragraph 1 (a) as suggested by Mr. Briggs;² all the provisions of the draft articles referred to the conduct of States under international law. Article 52 referred to acts performed by a party to a treaty and, by virtue of the definition in article 1, a "party" meant a State bound by a treaty, so that paragraph 1 (a) could not be understood as referring to the legality of acts under municipal law.

4. Paragraph 1 (b) introduced a necessary limitation to the rule embodied in paragraph 1 (a). A party might already have performed an act under a treaty, such as the performance of a treaty obligation, and such performance could unbalance the position of the parties, so that one of them derived a benefit or an enrichment. It was natural then that the party which had benefited from partial execution should be called upon to restore the *status quo ante*. Personally he would like to see that provision made more imperative and precise, providing for an obligation to restore the balance between the parties instead of re-establishing the previously existing situation in every respect. A rewording along those lines might perhaps solve the difficulties experienced by the United Kingdom and a number of other governments.

5. Paragraph 2 governed the cases in which the rules set out in paragraph 1 could not apply because, by definition, there would be no good faith. The expression "A party may not invoke" should perhaps be replaced by a more direct formula, such as "The provisions of paragraph 1 do not apply when . . .". A party could always invoke certain provisions, but in the particular case referred to its invocation would be without legal effect. That change of wording might help to remove the drafting difficulties created by the use, in the two paragraphs, of the same verb "to invoke" with two different meanings: a lawful invocation and an unlawful invocation.

² *Ibid.*, para. 85.

6. With regard to the Special Rapporteur's proposed new paragraph 2 (c), he agreed with many of the remarks made by Mr. Reuter. The Special Rapporteur himself also agreed with Mr. Reuter on the substance of the matter, since he stated in paragraph 3 of his observations on article 53 that "it would be inadmissible to regard the emergence of the new rule of *jus cogens* as retroactively rendering void acts done at a previous time when they were not contrary to international law" (A/CN.4/186). He therefore suggested that paragraph 2 (c) be deleted. The Special Rapporteur had only included it in article 52 as a cross-reference to article 53. In fact, the position was made sufficiently clear by the provision in paragraph 2 of article 53, with its explicit reference to article 45. The emergence of a new rule of *jus cogens* was a case of termination and the proper place for a specific provision on the effects of termination under article 45 was article 53, not article 52.

7. Mr. VERDROSS said he thought paragraph 1 (a) was ambiguous. Mainly because of the expression "legality", it could be interpreted as meaning either that acts performed in good faith by a party, in reliance on the instrument, before the invalidity of the instrument had been invoked, were valid, not void; or that those acts did not engage the responsibility of the State which had performed them. If the Commission chose the first interpretation, he proposed that the word "legality" be replaced by the word "validity"; but if it chose the second, then paragraph 1 (a) was unnecessary, since an act performed in good faith could not be contrary to international law. An act could only be contrary to international law itself if the State which performed it had been at fault, that was to say, if it had had some reprehensible intention (*dolus*) or if it had been negligent (*culpa*). If the Commission chose the second interpretation, it should therefore delete paragraph 1 (a) and explain in the commentary why there was no need to state such a rule in the article.

8. Mr. PAREDES said that the doubts and objections expressed by governments could be partly met by avoiding the use of the expression "invalidity of a treaty"; the term "invalidity" was more general than "nullity".

9. Both in legal doctrine and in practice, a clear distinction was made between nullity and voidability. An instrument was a nullity when it lacked from the start one of the elements essential to the valid expression of the will and intention of the parties. Thus, fraud or coercion vitiated consent from the outset: there was no meeting of the wills of the parties and the treaty was void *ab initio*. By contrast with a void instrument, which had never been legally in existence, a voidable treaty was one whose invalidity resulted from a subsequent event, such as a fundamental change in the circumstances existing at the time when it was entered into. A distinction should therefore be made in article 52 between treaties that were void and treaties that were merely voidable. The first category could not give rise to any legal relationship, and any performance—whether in good or in bad faith—was incapable of having legal effect. Since there was no basis on which to establish a relationship between the States concerned, nothing that had been done within the context of the treaty could possibly have any legal force. The position was different in cases of voidability.

In those cases, acts performed in good faith should be deemed valid and have effect until the treaty was declared void.

10. In view of the statement in paragraph 1 (a) that the acts referred to therein were deemed lawful, he could not accept the proposition in paragraph 1 (b) that the parties to the treaty could be required "to establish as far as possible the position that would have existed between them if the acts had not been performed". If, as was stated in paragraph 1 (a), those acts had been performed within the framework of a legally existing situation, there could be no question of *restitutio in integrum*.

11. The two situations contemplated in article 52 did not represent a rule and an exception to that rule, but two different categories. Those categories should be kept apart, possibly by having two separate articles, one dealing with void instruments and another with voidable instruments.

12. Mr. LACHS said the Special Rapporteur was to be commended for his excellent analysis of government comments.

13. He supported the Special Rapporteur's suggestion that the term "nullity" be replaced by the clearer term "invalidity", but was troubled by the reference in paragraph 1 (a) to the "legality of acts". An act might well be legal and yet be devoid of effect in relation to the other party to the treaty. In fact, the expression "legal consequences" used in the title of section VI and in the various articles in that section was not altogether appropriate. There was undoubtedly an inherent conflict between paragraphs 1 (a) and 1 (b), and the Commission should try to minimize the complications arising from that conflict, perhaps by adopting a form of words which avoided the use of the term "legality".

14. He supported Mr. Jiménez de Aréchaga's suggestion for strengthening the provisions of paragraph 1 (b), and making them more imperative than was suggested by the words "may require".

15. The Special Rapporteur's new wording for paragraph 2 was a great improvement on the previous text, in that it made a clear distinction between subjective and objective elements. The subjective elements resulted from acts of the parties themselves; the objective elements were independent of the parties and were outside the operation of the treaty.

16. He could accept paragraphs 2 (a) and 2 (b), though with regard to paragraph 2 (a) he shared Mr. Reuter's doubts on the question of retroactivity. A new peremptory norm of international law could, and indeed should, in some cases, have retroactive effect. However, the processes by which it came into operation differed from one another; some rules might emerge suddenly, but others would grow slowly, maturing gradually and inconspicuously. That was the rich pattern of law-making. For the purposes of article 52, the time-factor was of the utmost importance, since it was essential to determine when the new rule entered into force. At the time of the conclusion of the treaty the rule might still be relatively inchoate, but it could subsequently become fully operative while the treaty was in the course of performance. He did not, however, support Mr. Jiménez de Aréchaga's

radical suggestion that paragraph 2(c) should be deleted, since some of the cases it envisaged could be more than a matter of termination. He would prefer paragraph 2 (c) to be retained, but efforts should be made to improve its wording in order to meet the various objections raised.

17. Mr. BRIGGS, referring to the words "the legality of acts performed in good faith" in paragraph 1 (a), said that if such acts did not result in the establishment of rights or obligations, they would be of no concern in the present context. He therefore suggested that paragraph 1 (a) be reworded to read:

"The invalidity of a treaty shall not of itself affect any rights acquired or any obligations incurred in relation to another State in reliance on the instrument before its invalidity was invoked".

18. Unlike Mr. Jiménez de Aréchaga, he thought it was necessary to make it clear, by including the words "in relation to another State", that the provision under discussion concerned the position in international law, not in municipal law. He agreed with Mr. Jiménez de Aréchaga, however, that paragraph 2 (c) could be deleted.

19. Mr. de LUNA said he agreed with the general approach of article 52, which was in keeping with the present state of international law. Until 1900, adherence to the principle of the efficacy of international law and the desire to protect the security of international relations had led to solutions very different from those embodied in article 52. Since that date, writers like de Lapradelle and Politis had begun to recognize that a declaration of the invalidity of a treaty could operate *ex tunc*.

20. It would of course be convenient if it were possible to adopt, in the draft articles, the distinction between non-existence, nullity and voidability, which was so familiar to continental lawyers; but he realized that English common law concepts must also play a part in the development of international law. Moreover, the draft had now reached a stage when it was desirable not to alter it too radically. Hence he would not press for a change in the terminology used, which was essentially drawn from English law.

21. He was not altogether satisfied with the term "legality"; in other similar contexts he had pressed for the use of the term "*licito*" (lawful) in the Spanish version. That was a drafting problem, but it was relevant to the relationship between paragraphs 1 (a) and 1 (b); an act could be lawful, but have no legal effect.

22. He could not support the proposal to delete paragraph 2 (c), but was inclined to agree with Mr. Reuter that it should be clarified. The problem was one of inter-temporal law and arose in municipal law in connexion with the effects of newly enacted legislation. He was in favour of transferring the provisions of paragraph 2 (c) to article 53, which dealt with cases of termination in which acts performed while the treaty was valid remained lawful.

23. Lastly, he did not like the expression "as far as possible" in paragraph 1 (b). If it was impossible to re-establish the position existing before the treaty was invalidated, then clearly the provisions of paragraph 1 (b) could not be applied. The elastic qualification "as

far as possible" would be dangerous, however, and he would prefer it to be dropped.

24. The CHAIRMAN, speaking as a member of the Commission, said that, from the logical point of view, any act performed in reliance on an instrument which was void *ab initio*, would itself also be void. But, from the practical point of view and to safeguard treaty relations, there was every justification for the exception provided for in paragraph 1, particularly in the case of acts performed in good faith. Nevertheless, although the consequences of such acts could be tolerated, it would probably be going too far to say that they were lawful; he hoped the Commission would be able to find a form of words which would mitigate that difficulty and at the same time meet practical requirements.

25. Paragraph 2 (c) did not really refer to the consequences of the nullity of a treaty, since the case in question was one in which the treaty was not void *ab initio* but became void subsequently, so that acts performed in reliance on the treaty were valid. It might happen, however, that situations which had developed gradually on the basis of the treaty were affected by the new peremptory norm of international law. The question which would then arise was not what were the consequences of the nullity of the treaty, but what were the scope, the binding force and the effect of the new norm—whether the situation was or was not compatible with the new norm. Consequently, paragraph 2 (c) had no place in article 52.

26. Mr. BARTOŠ said he too wished to emphasize that article 52 dealt with two very different cases: the case in which a treaty was void *ab initio* and the case in which a treaty became void as a result of the emergence of a new rule of *jus cogens*. Those two cases should be the subject of two parallel, but not identical rules.

27. The second case raised the question of the consequences of acts performed on the basis of a treaty which had been valid before the emergence of the new rule of *jus cogens*. The answer to that question depended on whether *jus cogens* was regarded as a purely normative institution or as a body of rules of public order whose legal force extended to already established situations. For instance, if a treaty on the slave trade had been concluded before the abolition of slavery, would rights acquired under that treaty have to be taken into account, or would it be considered that the change in public order necessitated the revision of acts performed before the emergence of the new rule, which would be equivalent to denying the rights acquired? Quite recently, after the rules embodied in the United Nations Charter had come into force, it had still been argued by some that established rights must be maintained, despite the change in the international public order. It was thus an extremely important matter, since it was a question not only of the validity of treaties, but possibly of the validity of situations created under a treaty that had lapsed, even though it had not been void *ab initio*. The Drafting Committee and the Special Rapporteur would have to try to find the best solution of that delicate problem.

28. As to the point dealt with in paragraph 1 (b), namely, *restitutio in integrum*, the use of the expression "as far as possible" was well-advised. Logic might

perhaps require that it be dropped, but formal and abstract logic was far removed from the realities of everyday life. He appreciated the concern for equity which lay behind Mr. Castrén's proposal³ and was himself in principle opposed to any confusion of the legal and practical aspects of a question, but he thought that, in the case in point, it was essential to consider the objective possibility of taking certain action.

29. Mr. TUNKIN said that he had serious doubts about the advisability of the purely pragmatic approach adopted in article 52. As the article was drafted, paragraph 1 stated a general proposition and paragraph 2 stated the exceptions. But the cases covered by the exceptions were more numerous than those governed by the rule; and furthermore, the exceptions related to the most important cases of invalidity, namely, those arising under the provisions of articles 35, 36, 37 and 45. There was a logical inconsistency in that presentation.

30. It was also difficult to see what was the basis for the validity of the acts envisaged in paragraph 1 (a). An invalid treaty was void *ab initio*. There being no treaty in existence, it was difficult to see the foundation on which the validity of the acts in question rested. The provisions of article 52 shed no light on that point.

31. For those reasons, he suggested that the order of paragraphs 1 and 2 be reversed and their contents treated not as a rule and a set of exceptions, but as two separate categories of cases.

32. With regard to paragraph 2, he supported Mr. Jiménez de Aréchaga's suggestion that it should be strengthened.

33. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Tunkin that the exceptions were too important and too numerous to remain exceptions, and should become the rule; the exception should be the maintenance of situations created on the basis of a treaty subsequently found to be void. He had not mentioned that point when he had spoken earlier, because he had not wished to raise it during the last stages of the Commission's work, but he was in favour of the change proposed by Mr. Tunkin.

34. Mr. REUTER observed that the Commission had the choice between an empirical and a theoretical approach; it was not merely a drafting problem. Whatever his personal preferences might be, he would support the empirical system adopted by the Special Rapporteur, for at the present stage as little change as possible should be made in what had already been adopted.

35. Article 52 attempted to answer three specific questions. First, who could invoke the invalidity of a treaty? Secondly, was it possible to ignore that invalidity and refrain from invoking it? Thirdly, what were the effects of the invalidity? In his opinion, article 52 should deal more clearly with the first two questions—particularly the second, which in the present text was almost entirely obscured—and everything relating to the effects of invalidity should be transferred to article 53.

36. Two kinds of cases could arise: those in which all the parties could invoke the invalidity of the treaty,

³ *Ibid.*, para. 82.

and those in which all the parties but one had that right. The members of the Commission would probably agree that, in cases of the first kind, it was also permissible not to invoke the invalidity of the treaty; but some members were opposed to allowing the option not to invoke the invalidity in cases of the second kind, especially where the treaty became void as a result of the emergence of a new rule of *jus cogens*. Personally, he thought that such an attitude could even be contrary to the interests of a State which had been the victim of fraud or coercion; for after the conclusion of the treaty the situation sometimes changed in favour of the injured State. The text would certainly gain in clarity if it answered those questions very simply, while keeping to the line laid down by the Special Rapporteur.

37. Mr. JIMÉNEZ de ARÉCHAGA said he could not support Mr. Tunkin's suggestion that the order of paragraphs 1 and 2 be reversed. It was true that the cases covered by paragraph 2 were more numerous than those governed by paragraph 1, but that was not sufficient reason for changing the presentation of the article. It was essential to bear in mind that paragraph 2 (a) dealt only with the situation of a party guilty of fraud or coercion. The other party might well have already performed its obligations under the treaty; if the order of the paragraphs were reversed, the position of the party victim of fraud or coercion would be made more difficult. The victim should be able to recover what had been executed as provided in paragraph 1.

38. Mr. de LUNA said he agreed with the Chairman and Mr. Bartoš that, with respect to the inter-temporal law, a distinction should be drawn between vested or acquired rights and mere expectations.

39. Perhaps he could illustrate that distinction by taking as a hypothetical example the revision of the constitution of a country, whereby the age of eligibility for the Presidency was raised from 30 to 35. Persons between the ages of 30 and 35 were thereby deprived not of a vested or acquired right, but of a mere expectation. An example in international law was provided by the abolition of slavery and the slave trade; the slaves in bondage at the time of abolition had become free, but the sellers who had received payment for the slaves sold did not have to refund the money.

40. Mr. Tunkin's proposal was connected with a point which had been discussed by the Commission before. He (Mr. de Luna) had already stressed on a number of occasions how dangerous it would be to leave the way open for the validation of a void treaty through the consent—expressed or implied—of the victim of fraud or coercion. Any provision of that type would be an invitation to the stronger party—which was almost invariably the one responsible for the fraud or coercion—to bring pressure to bear on the victim to acquiesce in the treaty. It was in every respect preferable to make it clear that a treaty vitiated by fraud or coercion was an absolute nullity.

41. It was worth noting that the municipal law distinction between absolute nullity and relative nullity was not suited to international law. The main difference between the two types of nullity was that absolute nullity could be declared by a court of law on its own

initiative, while relative nullity could only be pronounced as a result of a claim by the injured party. In the absence of compulsory jurisdiction, no such distinction could be made in international law. The only safe way of protecting the victim of coercion or fraud was to proclaim the treaty null and void *ab initio* and to rule out any possibility of subsequent validation by the injured party.

42. Mr. EL-ERIAN said he had some difficulty in accepting article 52, although the Special Rapporteur's new text was a great improvement on the 1963 version; he would have to reserve his final position until the Drafting Committee had examined the wording.

43. He was uncertain whether it was desirable to reverse the order of paragraphs 1 and 2. In the interests of uniformity, the Special Rapporteur's substitution of the word "invalidity" for the word "nullity" should be accepted. One of the difficulties to which article 52 gave rise was due to its dealing both with invalidity *ab initio* and with other forms of invalidity.

44. In cases of absolute nullity, municipal law distinguished between the parties to a contract and third parties, and recognized that the latter had the right to rely upon the legal validity of acts performed under the contract if they were able to prove title and good faith. The main problem raised by article 52 was what should be the legal basis for recognizing the legal effect of acts performed by virtue of a treaty which had been void *ab initio* and had therefore never possessed any validity.

45. Mr. JIMÉNEZ de ARÉCHAGA said that Mr. de Luna had misunderstood his remarks. He had never contended that the victim of fraud or coercion should be permitted to consent to the execution of the treaty thus procured. Such a treaty was absolutely invalid. The present structure of the article should be maintained, because it would enable the victim in such circumstances to recover what had been paid or executed.

46. Mr. AMADO said he found himself in the same difficulty as Mr. El-Erian. No doubt the layman would think that paragraph 1 of article 52 stated an undeniable truth; namely, that acts performed in good faith by a party in executing a treaty retained their legal force (*efficacité juridique*)—an expression which he would prefer to "legality" (*caractère légitime*)—so long as no party invoked the invalidity of the treaty. But the problem became more complicated when one considered the consequences of those acts and what should be done to solve the problem created in practice by the voidance of a treaty. Before taking any definite position, he would wait to hear what conclusions the Special Rapporteur would draw from the discussion.

47. Sir Humphrey WALDOCK, Special Rapporteur, said it would be impossible in a brief statement to elucidate all the points raised during the discussion and the Drafting Committee would have to give careful thought to the way in which article 52 might be revised.

48. For him, much of the difficulty arose from the fact that at its fifteenth session the Commission had accepted certain conceptions that belonged to continental rather than common law systems. In his own country the conception of a voidable contract was one under which everything done was valid until the voidance took place.

But as Special Rapporteur he was bound by the approach which the Commission had decided to adopt, and which he fully accepted, namely, that when a treaty was voided by an act of one of the parties having a right to invoke a ground of invalidity, then the legal result was voidance *ab initio*. Thus the treaty was apparently valid for a time and then suddenly was rendered void, but *ex tunc* not *ex nunc*.

49. Mr. JIMÉNEZ de ARÉCHAGA had rightly pointed out that the problem to which paragraph 1 gave rise related not only to articles 31, 32 and 34, but also to articles 33 and 35, and possibly even 36, because, owing to ignorance of the facts or for some other reason, there might be a period during which the treaty was apparently in force and being acted upon by the parties. Even the victim of a fraud might have carried out acts under the treaty which would be contrary to international law had they not been protected by the treaty clauses, in which case the victim might need the benefits of the rule set out in paragraph 1.

50. The way in which Mr. Tunkin had presented the problem, arguing that the Commission had stated the major principle in the form of an exception, was not altogether justified. It was true that the cases of conflict with rules of *jus cogens* invalidating a treaty were extremely important, but they were exceptional, and in paragraph 1 the Commission had sought to formulate a principle that applied in the more normal cases, in which a treaty that had apparently been in force for a time was suddenly found void *ab initio*; it was there that the problem of acts done in good faith might arise.

51. At its fifteenth session, the Commission had adopted a pragmatic approach in an attempt to avoid injustice, and that had been the underlying purpose of the article as drafted.⁴ In drafting paragraph 1 the Commission had been confronted by the inherent contradiction between the two notions of acts being, as it were, valid, while the treaty itself became invalid as soon as the ground of its invalidity had been invoked. Possibly the Commission had not yet found the right way of expressing the idea that invalidating a treaty did not render illicit, or deprive of legal character, acts performed in good faith in reliance on the treaty, which was believed to be valid at the time they were performed. Perhaps the phrase "the legality of acts" was not well chosen; when he had been redrafting the text he had contemplated using the expression "licit character" instead of the word "legality", but had abandoned that idea because the word "licit" was not in common use in English legal parlance. The solution might lie in framing paragraph 1 in the negative and having recourse to some such phrase as "invalidity shall not render illicit the act...".

52. Paragraph 1 (b) contained a principle on which all members had agreed: that where a treaty was void *ab initio*, a party must have the right to call for, or legally oblige, the other party or parties to restore as far as possible the situation to what it would have been if the acts had not been performed. He was uncertain whether he could agree with the suggestion that

that clause should be made more imperative, because, at least as far as the English text was concerned, the wording was as strong as it should be. The clause could not be made obligatory, because both or all the parties might agree to allow certain effects of acts performed under the treaty to continue. Such a measure of option of the parties to determine their course of conduct in the light of developments as time went on, was necessary.

53. The phrase "as far as possible" had been discussed at some length at the fifteenth session and its weaknesses recognized, but the Commission had decided to keep it for realistic reasons. He agreed with Mr. Bartoš that it would be undesirable to impose an unrealistic obligation on the parties.

54. In the main, comments on paragraph 2 had centred on sub-paragraph (c), which he had only inserted for drafting reasons in order to avoid misinterpretation, but apparently he had not been very successful. The terminological difficulty was partly due to the Commission having chosen the forceful expression "a treaty becomes void" in article 45, and if it had used some such wording as "the development of a new rule of *jus cogens* renders illegal the further performance of the agreement and terminates the treaty..." it would have been easier to draft article 52. By dealing with the effects of the emergence of a new peremptory norm in terms of invalidity, the Commission had opened the way for the inference that such cases would fall under the provisions of article 52, and paragraph 2 (c) should make it clear that they would fall under the provisions of article 53, paragraph 3. However, a way might be found of adjusting the wording of article 52 so as to make that paragraph 2 (c) unnecessary, or else it could form a separate article. The comments on the substance of paragraph 2 (c) should be taken up in conjunction with article 53.

55. With regard to Mr. Briggs's suggestion at the previous meeting, a provision was to be inserted at the beginning of the draft excluding its application to municipal law. He would hesitate to mention the point expressly in article 52.

56. The Drafting Committee could consider the suggestion that the order of paragraphs 1 and 2 be reversed, though it would make the drafting of the article more difficult; the order adopted in the 1963 text was not very logical. However, he did not have a closed mind on the subject and would carefully examine all the suggestions made.

57. The CHAIRMAN suggested that article 52 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁵

ARTICLE 53 (Legal consequences of the termination of a treaty) [66]

[66]

Article 53

Legal consequences of the termination of a treaty

1. Subject to paragraph 2 below and unless the treaty otherwise provides, the lawful termination of a treaty:

⁴ *Yearbook of the International Law Commission, 1963, vol. II, p. 216.*

⁵ For resumption of discussion, see 864th meeting, paras. 83-95.

(a) Shall release the parties from any further application of the treaty;

(b) 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.

2. If a treaty terminates on account of its having become void under article 45, a situation resulting from the application of the treaty shall retain its validity only to the extent that it is not in conflict with the norm of general international law whose establishment has rendered the treaty void.

3. Unless the treaty otherwise provides, when a particular State lawfully denounces or withdraws from a multilateral treaty:

(a) That State shall be released from any further application of the treaty;

(b) The remaining parties shall be released from any further application of the treaty in their relations with the State which has denounced or withdrawn from it;

(c) The legality of any act done in conformity with the provisions of the treaty prior to the denunciation or withdrawal and the validity of any situation resulting from the application of the treaty shall not be affected.

4. The fact that a State has been released from the further application of a treaty under paragraph 1 or 3 above shall in no way impair its duty to fulfil any obligations embodied in the treaty to which it is also subjected under any other rule of international law.

58. The CHAIRMAN invited the Commission to consider article 53, for which the Special Rapporteur, in his sixth report (A/CN.4/186), had proposed a new text reading:

“ 1. Subject to paragraph 3, and unless the treaty otherwise provides, the lawful termination of a treaty shall:

(a) release the parties from any obligation further to apply the treaty;

(b) not affect the legality of any act done in conformity with the treaty or that of a situation resulting from the application of the treaty;

(c) not affect any rights accrued or any obligations incurred prior to such termination, including any rights or obligations arising from a breach of the treaty.

“ 2. In the case of a particular State's denunciation of or withdrawal from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

“ 3. If a treaty terminates on account of its having become void under article 45, a situation resulting from the application of the treaty may be maintained in force only to the extent that its maintenance in force does not conflict with the norm of general international law the establishment of which has rendered the treaty void”.

59. Sir Humphrey WALDOCK, Special Rapporteur, said that he had considerably rearranged the text of article 53, on which not many governments had commented. He had adopted the Swedish Government's proposal (A/CN.4/186) concerning paragraph 1 (a) as he agreed that it was preferable to speak of releasing the parties “ from any obligation further to apply a treaty ” than “ from any further application of the treaty ”.

60. The comment by the Government of Israel, in connexion with article 52, that insufficient account had been taken of rights accrued and obligations incurred before termination, was relevant to article 53, and he had tried to meet the point in paragraph 1 (c), so as to safeguard the legality of acts performed in execution of the treaty and to protect such rights and obligations.

61. There was force in the Netherlands Government's contention that there might be a time-lag between denunciation and withdrawal from a multilateral treaty and that the operative date for termination should be the moment when the notice took effect.

62. He had reversed the order of paragraphs 2 and 3 of the 1963 text, so as to deal with the more usual types of termination before the exceptional case of termination by reason of conflict with a new peremptory norm, now dealt with in paragraph 3. The old paragraph 4 had become unnecessary, as its subject-matter was now covered in the new article 30 (*bis*) adopted during the second part of the seventeenth session (A/CN.4/L.115).

63. Mr. JIMÉNEZ de ARÉCHAGA said that paragraphs 1 (a) and 1 (b) were acceptable and their content had received the assent of many governments. Those two provisions were all that was necessary and the Special Rapporteur's new wording was certainly an improvement. However, the phrase “ obligations still to be performed under the treaty ” now used in article 44, paragraph 1 (b) (A/CN.4/L.115) was preferable to the words “ from any obligation further to apply the treaty ”.

64. There was no need for the Special Rapporteur's paragraph 1 (c), as sub-paragraphs (a) and (b) were sufficiently explicit. Moreover, it introduced the new concepts of accrued rights and incurred obligations. The former was already controversial in municipal law, but was even more so in international law and nothing would be gained by mentioning it in the article, as it might be interpreted to refer to rights acquired by nationals or individuals. The notion of incurred obligations was even less acceptable and its meaning was not clear. So far, the draft had been restricted to obligations performed, or still to be performed, under the treaty and those two categories were sufficiently covered in paragraphs 1 (a) and 1 (b).

65. He presumed that what was meant by obligations incurred were those which had to be performed, but had not been performed in time, and would engage the State's international responsibility: that question did not belong in a codification of the law of treaties. When a State became responsible for failure to perform treaty obligations, the fact that the treaty terminated after such a violation did not extinguish the resulting international responsibility; on that point some cogent observations had been made by Lord McNair in his dissenting opinion in the *Ambatielos Case*, where he had said “ I do not see how the provisions of the Treaty of 1926 could prejudice claims ‘ based ’ on the Treaty of 1886 because, in my opinion, such claims acquire an existence independent of the treaty whose breach gave rise to them ”.⁶

⁶ *ICJ Reports*, 1952, p. 63.

66. The proviso "subject to paragraph 3", in the introductory sentence of the article, might be misunderstood and indeed had been construed by two governments to mean that paragraph 1 would not apply to termination in the circumstances covered by article 45; that had not been the intention either of the Special Rapporteur or of the Commission. The provisions of paragraph 1 (a) and (b) would apply to termination resulting from the emergence of a new peremptory norm, and a situation resulting from the application of the treaty could only be maintained to the extent that it did not conflict with the new rule of *jus cogens*.

67. Some drafting changes would therefore be needed in the Special Rapporteur's new text of article 52 in order to avoid misinterpretation and it might be found desirable to reverse the order of paragraphs 2 and 3 or to incorporate the content of paragraph 3 in paragraph 1 (b).

68. Mr. REUTER said that the structure of the article was very clear, since it dealt in turn with two cases, that of ordinary law and that of *jus cogens*. With regard to the former, the Special Rapporteur had evidently sought to limit the retroactive effects of a new treaty, whence his paragraphs 1 (b) and 1 (c).

69. With regard to the case of *jus cogens*, the solution proposed was in fact correct, but the way it was expressed was surprising. For paragraph 3 stated the retroactive effects, which seemed more important than those stated in paragraph 1, but immediately set a limit to those effects by providing, in very vague wording, that they did not necessarily follow in every case. In other words, paragraph 3 simultaneously stated two conflicting rules—that there were, and that there were not, retroactive effects—the choice between which would depend on whether or not they conflicted with the peremptory norm. That simultaneous statement of two conflicting rules was less clear in the first part of the article, which related to the general case.

70. What could the Commission reasonably propose? In his opinion, it could not state all the rules applicable and should confine itself to indicating a very general line. To understand that view it was necessary to consider for a moment the situation in municipal law, where there was an all-powerful legislator, which was not yet the case in international law. In municipal law, the legislator was always faced with the question what would be the retroactive effect of a new rule he enacted. That was always an extremely complicated problem, and it could only be solved by recourse to terminology taken sometimes from statute law, often from case law, and more often from legal writers, which varied from country to country. He had little hope that the members of the Commission would be able to improvise in three languages, a wording they all understood and whose content was more or less clear.

71. But there was another, even more important point. In the vast works devoted to that problem in municipal law, it could be seen that the solutions put forward varied according to the object of the rules, not according to whether they applied to the present or the future, to whether they were procedural rules or substantive rules, rules affecting States or rules affecting

individuals, commercial rules or rules which were nowadays called humanitarian rules or rules of social law. Consequently, he thought the Commission could only give two general directives, which were complementary, but contradictory, so as to make it clear to States that it was a question which must be carefully regulated in the texts of treaties. If the solution was not given in the text of the Convention, it would be necessary to resort to directives for interpretation, which could only be suggested in the draft articles.

72. Those considerations had two consequences so far as the presentation of the article was concerned. The first, which members of the Commission would no doubt be able to accept quite easily, related to the general rule stated in paragraph 1. The Special Rapporteur had made a very praiseworthy effort. The method he had adopted to fix the difficult boundary between retroactive effects and future effects had been to use such terms as "act", "situation" and "rights accrued or obligations incurred prior to such termination". While that wording could perhaps be improved, it could certainly not be radically changed. It was mainly the use of the word "situation" that would call for some modification of the text of the draft articles. It would be necessary to distinguish between the creation and the effects of a situation, and probably also between situations having immediate effects and situations having successive effects. It was necessary to say, somehow or other, that a new treaty did not affect the creation of a situation, an act, the effects of an act or the effects of a situation. He would therefore propose stating a second and contrary rule, using the same terms, or at least referring to the same concepts, which would read approximately: "However, the treaty may have such effects if the object or the nature of the rule so requires". There were in fact cases in which everyone would agree that the treaty must have more retroactive effects than the present wording allowed.

73. The second consequence, which might surprise the Commission, was that there was no need for any special mention of *jus cogens*. He could understand the reasoning behind the view that if a rule had the character of *jus cogens*, it must have more far-reaching retroactive effects than any other rule because it had more force. But that reasoning was not always justified since, as he saw it, certain rules of *jus cogens* were not only based on justice, but must also take account of questions of stability.

74. He would give a few examples. Suppose there was a rule of *jus cogens* that annulled territorial changes obtained by force or by other means contrary to the Charter. Would that rule apply only to treaties concluded after its emergence, or could it also apply to earlier treaties, such as treaties establishing a colonial protectorate? It would be agreed that nullity of that kind could not be extended into the past *ad infinitum*.

75. Then there was the example of certain colonial treaties which would become void. Did such nullity entail *ipso facto* the nullity of a frontier treaty concluded by the protecting Power in virtue of the voided treaty? Consideration of that question of the validity of the treaties by which colonial frontiers had been established was enough to suggest that, even on that point, the

Commission probably did not wish to lay down a rule whose consequences would be so absolute.

76. A final example would illustrate the contrary case in which stability should be disregarded as far as possible and the retroactive effects should be the greatest. That was the case in which the rule—whether of *jus cogens* or not—related to questions of humanitarian or social law. For instance, there was not yet any rule of *jus cogens* imposing equality of the sexes, but supposing such a rule were one day to exist, a prior treaty relating to social questions or wages would not merely cease to have any effect in the future, but would reach far back into the past to ensure the application of those humanitarian rules. At the present time, when a new treaty concerning humanitarian questions, human rights or social rights was concluded, States always recognized that it had a strongly retroactive character.

77. That last example clearly showed that, as had already been suggested, the general rule stated in paragraph 1 must be relaxed to admit the possibility of a different solution. International jurisprudence already recognized that possibility, for instance, for interpreting the effects of treaties relating to social questions. In making that comment, he had no intention of contesting that, in fact, rules of *jus cogens*, being the expression of progressive law, would have retroactive effects more often than ordinary rules of law.

78. He hoped he had convinced the members of the Commission that there were many cases in which, even where *jus cogens* applied, the requirements of stability were important. He accordingly believed that the present formulation of paragraph 3 was quite right, but he was still convinced of the need for a paragraph 1 setting out the two complementary and contradictory statements he had arrived at. If the Commission accepted the idea that it was the nature or object of the rule which required its application to be extended into the past in certain cases, it would not be necessary to include a special provision for the case of *jus cogens*; it could be mentioned in the commentary that, obviously, where *jus cogens* was concerned, the requirements of justice would very often be more peremptory than in other spheres, without, however, necessarily excluding considerations of stability.

The meeting rose at 12.50 p.m.

847th MEETING

Monday, 9 May 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Second Seminar on International Law

1. The CHAIRMAN, on behalf of the Commission, welcomed the participants in the second Seminar on International Law, which was being held in connexion with the Commission's current session. At its twentieth session, the General Assembly had regretted the absence from the first seminar of participants from the developing countries, so it was with satisfaction that he noted that the developing countries were well represented on the present occasion.

Law of Treaties

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

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 53 (Legal consequences of the termination of a treaty) (resumed from the previous meeting)¹

2. The CHAIRMAN invited the Commission to resume consideration of article 53.

3. Mr. ROSENNE said he had some difficulties with article 53; in particular, he was not certain that its provisions really dealt with the consequences of termination. The one consequence of termination was that the treaty was no longer applicable as between the parties. The other questions dealt with in article 53 really related more to the effects of the lawful termination of a treaty. For that reason, he suggested that the Commission should examine the possibility of replacing the present title by that used for the corresponding article in the Special Rapporteur's second report: "Legal effect of the termination of a treaty".²

4. He did not believe that all causes of lawful termination necessarily had the same effect, either on the treaty situation itself or on acts done under the treaty and in reliance, or purported reliance, on the treaty. For example the cases of termination contemplated in article 39, in that part of article 40 which had not given rise to difficulties in the Commission at its last session, and in article 41, presupposed an express or implied agreement of the parties on the question of termination; and that agreement might deal not only with termination itself, but also with the effects of termination. He therefore suggested that, in the opening sentence of paragraph 1 as proposed by the Special Rapporteur, the words "unless the treaty otherwise provides" should be replaced by the words "unless otherwise agreed", and that the commentary should explain that such agreement could be made in the treaty which was being terminated or be implied therein, or could be found in some other agreement.

5. Termination resulting from the breach of a treaty, dealt with in article 42, could well give rise to State responsibility. Termination under article 43 or article 44 could give rise to legal questions relating to the adjustment of the situation created as a result of the termination of the treaty; the position was similar in the case

¹ See 846th meeting, preceding para. 58, and para. 58.

² Yearbook of the International Law Commission 1963, vol. II, p. 94, article 28.

of termination under article 45. Questions of State responsibility would not necessarily arise in any of the three cases. Those different kinds of termination could have different effects on the validity, or the continuing validity, of acts done under the treaty, as the Special Rapporteur himself had recognized with regard to termination under article 45. He therefore raised the general question whether the Special Rapporteur's draft adequately encompassed all those variations.

6. He accepted the general principle embodied in paragraph 1 (b), but found the use of the term "legality" inappropriate. The French version used the expression "*caractère légitime*" and the Spanish "*carácter lícito*", while the Spanish version of article 52 used the term "*validez*". Perhaps the best English word to use was "validity".

7. With regard to the Special Rapporteur's proposed new paragraph 1 (c), he had doubts about the concluding words "including any rights or obligations arising from a breach of the treaty"; the proper place for that point was article 42.

8. Another question was whether a general provision should not be included in the draft articles reserving the question of State responsibility. A provision of that type had been included in article 63, paragraph 5. The Special Rapporteur had mentioned the point in paragraph 4 of his observations on article 59 where he proposed the insertion of a new paragraph 2 (A/CN.4/186/Add.2), and in paragraph 5 of his observations on article 55 (A/CN.4/186/Add. 1).

9. With regard to paragraph 2, he suggested that the concluding words "takes effect" be replaced by the words "becomes operative", so as to bring the wording into line with that used in Part I, in particular, in articles 15 and 22.

10. Lastly, he noted that the question dealt with in the Special Rapporteur's paragraph 3 was also the subject of paragraph 2 of article 56. Perhaps the matter should be discussed when the Commission came to examine article 56; the question of combining the two provisions could then be considered.

11. Mr. CASTRÉN thought that the new text proposed by the Special Rapporteur was better, more concise and more precise than the text adopted by the Commission in 1963.³ He agreed that the order of the former paragraphs 2 and 3 should be reversed, and that the words "shall retain its validity only to the extent that it is not in conflict" in the former paragraph 2 should be replaced by the words "may be maintained in force only to the extent that its maintenance in force does not conflict . . .".

12. On the other hand, he was not sure that it was advisable to add a new paragraph 1 (c), as the Special Rapporteur had proposed in order to meet the suggestion of the United Kingdom Government. That provision might be of some use in supplementing and clarifying the other provisions of paragraph 1, but he was inclined to share the view, expressed by Mr. Jiménez de Aréchaga at the previous meeting,⁴ that the questions it dealt

with were already disposed of, at least in part, in paragraphs 1 (a) and 1 (b) and in some other general provisions of the draft. In any event, if the provision was retained it should be amended, for its present wording was unsatisfactory.

13. He agreed with Mr. Jiménez de Aréchaga that the proviso relating to paragraph 3, in the introductory sentence of paragraph 1, was liable to cause confusion; perhaps that difficulty could be overcome by transferring it to paragraph 1 (b).

14. In paragraph 2, the word "particular" seemed unnecessary and he suggested that it be deleted.

15. Mr. de LUNA said he was in general agreement with the principles underlying the Special Rapporteur's redraft, which gave expression to the rule that the termination of a treaty operated *ex nunc* and not *ex tunc*. International law, in the interests of the stability of treaties, did not look with favour on retroactivity in any form. Consequently, with the exception stated in paragraph 3 of the new draft, rights established in reliance on the treaty were not affected by its termination.

16. He was in favour of the new paragraph 1 (c), which met the point made by the United Kingdom Government. What he did not like, were the terms "act" and "situation", which he found unduly broad. According to the traditional concepts accepted by continental lawyers, a treaty could give rise to rights, obligations, faculties and powers. By virtue of the rule *pacta sunt servanda*, it created rights, in that it enabled a party to demand a certain conduct from another party; that other party was correspondingly under an obligation so to conduct itself. A treaty conferred a legal faculty when it conferred the possibility of obtaining a legally prescribed result by performing a particular act. A treaty conferred powers when it enabled a party to take some action to which certain results were attached. He suggested that paragraphs 1 (b) and 1 (c) be redrafted using terms which conveyed to the representatives of the various legal systems exactly what article 53 was intended to set forth.

17. With regard to the opening sentence of paragraph 1, he supported Mr. Rosenne's suggestion that the wording should be amended so as to cover not only the provisions of the treaty itself, but also those of the agreement terminating the treaty.

18. He agreed with those who found it inelegant to begin paragraph 1 with a reference to the exception stated in paragraph 3.

19. The idea expressed in the concluding words of paragraph 1 (c) was correct, but he agreed with Mr. Rosenne that the proper place for that passage was in article 42.

20. Mr. PAREDES said that he was prepared to agree to the Special Rapporteur's redraft of article 53, provided that the scope of the article was clarified. He could accept its provisions if they related to the termination of a treaty as a result of supervening circumstances, but not if they related to treaties that were null and void *ab initio*.

21. Treaties that were void *ab initio* could not have any legal consequences. For example, if a country entered

³ *Ibid.*, p. 216.

⁴ Paras. 64-65.

into a treaty by which it undertook to pay a certain sum of money, and it was later discovered that the agreement had been based on an error, the treaty was void and could have no effects whatsoever, even though it had been lawfully concluded originally. The position was similar in the event of coercion. If a country was occupied by foreign troops and signed an undertaking to build a road for them, on the treaty being declared null and void, all its effects disappeared with it.

22. On the other hand, where a treaty was terminated as a result of its breach, or of the emergence of a new preemptory norm of international law, it was proper to have regard for the validity of acts performed or any relationships established while the treaty was in force. Considerations of equity, justice and law all militated in favour of maintaining those acts and relationships after the termination of the treaty.

23. He agreed with Mr. Reuter on the question of retroactivity where a new rule of *jus cogens* was concerned. One example of limited retroactive effect was that of a hypothetical agreement on the non-dissemination of nuclear weapons, which would affect a treaty in force by which one country undertook to deliver certain nuclear weapons to another. The new rule would make it impossible to deliver the weapons, but there would still remain an obligation to refund any amounts received in payment.

24. Article 53 should state clearly that it dealt with the termination of treaties as a result of supervening circumstances and not with treaties that were void *ab initio*.

25. Mr. BRIGGS observed that paragraph 1 of the Special Rapporteur's redraft opened with the words "Subject to paragraph 3", and paragraph 3 purported to provide that certain acts performed, rights acquired, situations created and obligations incurred, would remain valid even where a treaty became void through the emergence of a new rule of *jus cogens* under article 45, although other such situations would be invalidated. Personally, he was unable to discover workable or practicable criteria in paragraph 3 for distinguishing them.

26. The difficulty resulted, in his opinion, from the awkward language adopted by the Commission in article 45 (A/CN.4/L.115). In that article, it was stated that a treaty which came into conflict with a new rule of *jus cogens* "becomes void and terminates". It seemed quite unnecessary to include the words "becomes void and", which merely repeated the language previously used. The legal situation was that the new rule of *jus cogens* terminated what had been a valid treaty. It would therefore be inaccurate to speak of the invalidity of acts performed or obligations incurred under that valid treaty before it was terminated. If paragraph 3 was needed at all, its proper place was in article 52, which dealt with the legal consequences of the nullity of a treaty.

27. Apart from the case of a treaty terminating under article 45, article 53 dealt not with nullity, but with the lawful termination of a treaty. He accordingly supported Mr. Rosenne's suggestion that in the opening sentence of paragraph 1 the words "unless the treaty

otherwise provides" should be replaced by the words "unless otherwise agreed".

28. As in the case of article 52, he doubted the desirability of using the expression "not affect the legality of any act done" in paragraph 1 (b); it could be misconstrued as a reference to municipal law. The wording should be improved so as to make it clear that the article was concerned exclusively with international law. That would, he thought, largely meet Mr. Jiménez de Aréchaga's objections to the concept of acquired rights.

29. With regard to the Special Rapporteur's proposed new paragraph 1 (c), he supported Mr. Rosenne's suggestion that the concluding words be deleted. The subject matter of those words properly belonged in article 42.

30. He suggested that the Drafting Committee consider redrafting paragraph 1 to read:

"1. Unless otherwise agreed, the lawful termination of a treaty shall:

(a) release States which were parties to it from any continuing obligation to apply the provisions of the treaty;

(b) not affect any rights or obligations arising from the application of the treaty prior to such termination".

31. Mr. LACHS said that on the whole the Special Rapporteur's new draft was a great improvement on the 1963 text.

32. As to paragraph 1, however, he shared Mr. Rosenne's misgivings over the proviso "unless the treaty otherwise provides". It should perhaps be replaced by broader language, though he was not sure that Mr. Rosenne's proposal was adequate.

33. In paragraph 1 (b), different wording should be found, so as to dispense with the use of the term "legality", a point which he had already raised in connexion with article 52.

34. The idea embodied in the Special Rapporteur's new paragraph 1 (c) was correct and the concluding portion should be retained. However, the words "any rights accrued or any obligations incurred prior to such termination" did not define the problem clearly enough. For two types of rights and obligations were at stake: first, rights established and obligations entered into at the time when the treaty was concluded—they were "vested under the treaty", to use the words of Chief Justice Marshall—and secondly, rights and obligations created during the operation of the treaty. It was necessary to make it clear which of the two were meant. He thought it should be the latter group only.

35. With regard to paragraph 3, he doubted whether its proper place was in article 53, which dealt with cases of termination arising from the will of the parties. The case envisaged in paragraph 3 was that of a treaty which became void as a result of the emergence of a new rule of *jus cogens*; it was not a case of termination pure and simple. Perhaps paragraph 3 should be transferred to article 52, with a cross-reference in article 53.

36. Mr. VERDROSS said that the Special Rapporteur was to be congratulated on his success in improving the wording of the article.

37. The word “legality” in paragraph 1 (b) called for the same comment as he had made at the previous meeting with reference to article 52,⁶ and Mr. Rosenne had also just made. The term “validity” would be more suitable in article 53 too, and would be in keeping with the spirit of the article. Legality and validity were two different things. For example, in municipal law, when a soldier married without his superior officer’s permission the marriage was valid, although it might be contrary to law under certain national legislation. In international law, an act performed in accordance with a treaty between two States was valid, but might be contrary to another treaty concluded between one of those two States and a third State.

38. With regard to paragraph 1 (c), he agreed with the views expressed by Mr. Jiménez de Aréchaga at the previous meeting and by Mr. Castrén at the present meeting.

39. He agreed with Mr. Lachs that the substance of paragraph 3 could be included in article 52.

40. Mr. AGO observed that article 53 was simplified and substantially improved in the Special Rapporteur’s sixth report (A/CN.4/186). Nevertheless, it still raised a number of delicate problems which were more important than appeared at first sight, especially in the French text, which in several places did not correspond to the English.

41. In general, he agreed with the view that the article should deal only with the case in which a treaty terminated after having had an entirely normal and legal existence—and thus having produced its effects—not with the case of a treaty which was void *ab initio*.

42. The wording of paragraph 1 (a) was probably correct in English, but in French the expression “*obligation de continuer à appliquer le traité*” conveyed the false impression that an obligation further to apply the treaty would arise at the time when it ceased to be in force, and that it was from that obligation that the parties were to be released.

43. Paragraph 1 (b) raised, not a problem of validity, to which Mr. Verdross had referred, but the problem of legality, which the Special Rapporteur had rightly tried to deal with. In the frequently quoted example of the treaty on the slave trade which had terminated owing to the abolition of slavery, the question that arose was whether acts performed under the terms of that treaty before the emergence of the new rule of *jus cogens* were not only valid, but lawful; it was necessary to ensure that an act performed under the treaty was not made to appear unlawful retrospectively and raise a question of responsibility. The Drafting Committee should therefore try to express the two ideas of validity and of legality or lawfulness in that paragraph.

44. The expression “situation resulting from the application of the treaty” was no doubt rather vague, as Mr. de Luna had remarked, but it was not certain that the two cases covered by paragraphs 1 (b) and 1 (c) could be combined; he himself saw a difference between them.

45. He saw no need to refer to “rights accrued” in paragraph 1 (c), but the French text should be carefully revised, as the expressions “*nouveaux*” and “*nés du traité*” were wrong. The rights and obligations meant were those deriving from the application of the treaty, not from the treaty itself. The last phrase, “including any rights or obligations arising from a breach of the treaty”, was rather startling and should be amended to remove any ambiguity. In any event, the problem of responsibility should not be mentioned at that point.

46. Paragraph 2 was satisfactory in English, but needed revision in French. The expression “*s’applique aux rapports*”, in particular, was inappropriate, because it gave the impression that the reference was to legal relations, whereas the meaning intended was that paragraph 1 applied in relations between States.

47. Mr. EL-ERIAN said that the Special Rapporteur was to be commended for his lucid analysis of the comments by governments on article 53 and the way in which he had tried to meet the points he considered should be taken into account in the text. The general structure of the article should be retained because it rightly distinguished between the legal effects of termination and the legal consequences of acts performed under the treaty.

48. He had not made up his mind about the best order for the provisions of the article, but termination should certainly be dealt with first and then denunciation or withdrawal. If a treaty terminated on account of its having become void under article 45, that would mean termination for all the parties, so the content of paragraph 3 should be moved to paragraph 1.

49. He was unable to understand the relevance of the United Kingdom Government’s point that where a treaty’s provisions had already been executed it might be extremely difficult to restore the *status quo*, since there was no provision in article 53 of the kind contained in article 52, paragraph 1 (b).

50. The content of paragraph 3 must certainly be retained, because a new rule of *jus cogens* would have overriding force, and no acquired rights which conflicted with it could be maintained. Some of the comments by governments were due to the fact that, as explained in paragraph (1) of the Commission’s 1963 commentary,⁶ article 53 did not deal with any question of responsibility or redress that might arise from acts which were the cause of the termination of a treaty.

51. Mr. TUNKIN said that the article needed careful scrutiny by the Drafting Committee. He agreed with Mr. Rosenne that the introductory proviso should be expanded to cover any agreement in whatever form, but he was not yet certain whether the word “validity” should be substituted for the word “legality” in paragraph 1 (b), or whether both terms ought to be used.

52. His views on paragraph 1 (c) were similar to those of Mr. Jiménez de Aréchaga, Mr. Castrén and Mr. Verdross. He agreed with Mr. Lachs that the text was open to two interpretations and might be read as relating to either of two groups of rights and obligations:

⁶ Para. 7.

⁶ *Yearbook of the International Law Commission, 1963, vol. II, p. 216.*

those laid down in the treaty itself, or those deriving from acts performed under the terms of the treaty. The first group ought not to be covered, since the treaty would have lapsed, and the second group was covered in paragraph 1 (b). So-called "acquired rights" had so often given rise to abuse that the Commission should be wary of introducing that concept.

53. He could understand the logic of Mr. Briggs's views on article 53, which resulted from his rejection of the principles of *jus cogens*, but he could not subscribe to them. Now that article 45 had been included in the draft, the inference to be drawn from that rule was inescapable. Voidance or termination in application of article 45 was termination of a special kind resulting from the treaty becoming contrary to a fundamental principle of international law, and its consequences were bound to be different from those of other forms of termination.

54. Though the wording of paragraph 3 might need further improvement, the substance was correct. By virtue of that provision, to quote the example used by Mr. Briggs, a transaction concluded under an old slavery treaty would not become illegal, but the situation it had created could not continue because it conflicted with a new rule of *jus cogens*.

55. He had no firm views about the position of paragraph 3; possibly the provision ought to be transferred to article 52.

56. The CHAIRMAN, speaking as a member of the Commission, said that he had no objection to the principles stated in article 53 and that on the whole he thought the new version proposed by the Special Rapporteur was an improvement.

57. The question raised by paragraph 1 (b) was whether a situation or an act was in conformity with the objective rules of the treaty; that was not a matter of validity, but of legality or lawfulness. The question of validity was covered by other articles of the draft.

58. With regard to paragraph 3, he shared Mr. Tunkin's view that the principle stated was correct, but that it was perhaps out of place in that article. From the point of view of drafting, he preferred the former wording: "shall retain its validity only". The new text, which stated that the situation "may be maintained in force only to the extent that its maintenance in force does not conflict" with the new norm, was mainly concerned with the result; it would be better to specify that the reason why such a situation could be maintained was because it was "legal". It was a question of determining whether the termination of the treaty as a result of the emergence of a new norm of general international law affected, or did not affect, the legality of the situation which continued after the treaty had terminated. He thought the Drafting Committee would be able to state the principle contained in paragraph 3 in an acceptable manner and suggest an appropriate place for it in the draft.

59. Subject to those reservations, he could accept the new draft of article 53.

60. Mr. VERDROSS said he still maintained that, under the terms of paragraph 1 (b), an act done in

conformity with a treaty concluded between A and B which terminated, could nevertheless be a violation of another treaty concluded between A and C and, consequently, not "legal".

61. The CHAIRMAN, speaking as a member of the Commission, explained that when referring to "legality" in connexion with paragraph 1 (b), he had meant legality with respect to the treaty in question.

62. Mr. JIMÉNEZ de ARÉCHAGA said that not enough attention had been given to the important comments made by Mr. Reuter at the previous meeting⁷ about the application of article 53 to rules of *jus cogens*, where the time factor was an essential aspect. The doctrine of *jus cogens* was not new, since it represented the application to international law of well-established concepts of contract law and of general principles of law concerning the invalidity of agreements with an illicit purpose, whose execution called for acts *contra bonos mores*. But while the notion of *jus cogens* was not new, the substantive contents of that notion were constantly changing in accordance with the development of international law. While other grounds of invalidity, such as fraud, coercion and error, provided for by the Commission in its draft would remain unchanged, the question whether a given agreement violated a rule of *jus cogens* might receive a different answer in 1940 than in 1966. The Commission had therefore to take the time element into account. For that purpose, article 37 dealt with the case in which there was an established rule of *jus cogens* in existence and the treaty was entered into subsequently, while article 45 dealt with the opposite case of a treaty executed prior to the emergence of a rule of *jus cogens*. It was in order to take account of the time factor that the Commission had provided in article 37 for invalidity *ab initio* and in article 45 for termination by the treaty becoming void.

63. The bearing of that distinction, and of articles 52 and 53, on the important example given by Mr. Reuter of the rule of *jus cogens* forbidding the use of force and acts of aggression, ought to be examined. As the Commission had indicated in one of its reports, such a rule of *jus cogens* had come into existence in 1945,⁸ which meant that treaties entered into after that date, which were designed to instigate aggression against another State, would be invalid *ab initio*, and any acts performed in reliance on them would be illegal, as stipulated in article 52, paragraph 2 (b).

64. On the other hand such a treaty entered into before 1945 would fall under the provisions of article 53, and the parties would be released from any obligations still to be performed under the treaty. However, the legality of acts performed while the treaty was in force would not be open to question, nor would the situation resulting from its application, particularly where territorial settlements were concerned. In other words, although the treaty might lapse, the executed settlement remained in force as was clear from the passage in the Special Rapporteur's observation on article 53 reading: "Nevertheless, it would be inadmissible to regard the

⁷ Paras. 68 *et seq.*

⁸ *Yearbook of the International Law Commission, 1963, vol. II, pp. 198-199, commentary on article 37, para. (3).*

emergence of the new rule of *jus cogens* as retroactively rendering void acts done at a previous time when they were not contrary to international law” (A/CN.4/186).

65. The 1963 text of paragraph 2, and the new text of paragraph 3, contained a provision designed to make clear that while the legality of acts performed before the emergence of a new rule of *jus cogens* was protected, the further maintenance in force of a situation resulting from the application of a treaty that had come into conflict with such a rule might not be required. But that particular provision could never apply to territorial arrangements resulting from a treaty concluded prior to the emergence of the rule because, as the Commission had already determined in connexion with article 44 on “change of circumstances”, territorial situations which resulted from executed treaties did not call for further enforcement of the treaty.

66. A hypothetical example of the type of situation that article 53, paragraph 3 was framed to cover could be drawn from the international conventions on narcotic drugs of natural origin, which might be considered to enunciate rules of *jus cogens*. Supposing that a treaty was entered into by two States, whereby one agreed to set up a manufacturing plant to supply the other with synthetic drugs and the international conventions were then extended to cover such drugs, a wider rule of *jus cogens* would have emerged and would terminate the treaty. The deliveries and payments already made under the treaty would be legal, but there would be no further obligation to deliver or receive the products, and under article 53, paragraph 3, neither party would be entitled to ask for further enforcement of the situation resulting from the application of the treaty; thus a State would not be entitled to ask for compensation for the termination of exports or for the cost of building the plant.

67. Mr. Reuter's comments had shown that the important provisions of article 53, paragraph 3, would require extremely careful drafting so as to obviate any misinterpretation. Possibly the phrase “the further enforcement of a situation” used by the Special Rapporteur in his report, but not in the new text of the article itself might be preferable to the phrase “a situation . . . may be maintained in force”, as it would stress that a new act of enforcement was required to enter into conflict with the new rule of *jus cogens*.

68. Mr. BARTOŠ said he was categorically opposed to the use of the word “legality” in paragraph 1 (b). The comment made on that point by the Government of Israel seemed to him to be pertinent; the fact that a treaty terminated did not affect the legal consequences of an act done in conformity with the provisions of the treaty. The act might be legal or illegal, permissible or prohibited, valid or invalid, but that depended on other considerations, and article 53 was not the place to define the nature of such an act.

69. Mr. AGO said he wished to complete his observations on article 53 by commenting on paragraph 3. Admittedly, that paragraph was an important one, but it should not be regarded as more important than it really was. Its purpose was to safeguard a number of situations which might be challenged because they had

been created on the basis of principles that were no longer accepted. But it must be remembered that those situations differed from one another and did not all require the safeguard in question.

70. Mr. Tunkin had given an interesting example of the kind of situation article 53 was intended to cover. It was now accepted as a rule of *jus cogens* that wars of aggression were prohibited, and that consequently an aggressor could not validly impose a treaty transferring territory to his advantage. Such a treaty would no longer be valid today, but—as Mr. Tunkin had pointed out—that did not mean that all frontiers, many of which had been fixed in such circumstances, must be renegotiated. In such cases, the part of the treaty providing for the transfer of territory ceased to exist as soon as the transfer took place. Consequently, it had no longer existed when the new *jus cogens* rule had supervened, and the Commission need not concern itself with safeguarding sovereignty over the transferred territory, which was not in question.

71. On the other hand, there were acts or situations which could be affected because the treaty remained in existence. Suppose, for example, that a treaty concluded in the past constituting an international protectorate was considered in the light of a supervening rule of *jus cogens* which prohibited international protectorates, so that all treaties setting up international protectorates had become null and void. The protectorate situation—the relationship between the protecting and the protected State—would cease to exist because the treaty had been in force when the new rule of *jus cogens* had been established. Again, the safeguard provided in paragraph 3 was not required.

72. Of course, all cases were not so simple and there might be instances in which the rule stated in paragraph 3 was necessary; but he hoped the Drafting Committee would study the text carefully in order to determine whether it was necessary and, above all, to prevent wrong inferences being drawn from it.

73. Unlike Mr. Bartoš, he thought that the issue was not the legal character of the act, but whether it was “lawful” or “licit”. The important point was to establish that a certain act performed at a given moment in execution of a treaty could not become unlawful *a posteriori*, and that it could not be claimed that a State had incurred international responsibility by performing an act in accordance with a treaty, even if the treaty had ceased to be valid.

74. Mr. AMADO said he was glad that his colleagues had cleared away the undergrowth from ground which he had found difficult from the outset. The only point remaining to be clarified was the meaning of the term “legality”. Behind that vague and abstract expression—for which he had a profound dislike, as it offended his sense of the concrete—lay concealed the idea of “well-foundedness”—the idea that the termination of a treaty did not affect the “legal efficacy” of an act performed in accordance with the treaty.

75. Mr. ROSENNE said that the discussion had only served to increase his uncertainty about the scope and purpose of the article. The contention by one member of the Commission that article 53 dealt with cases of

termination arising out of the will of the parties seemed to be at variance with article 30, paragraph 2 as adopted at the previous session (A/CN.4/L.115), and raised the question what was meant by the expression "lawful termination". During the discussion on that article Mr. de Luna and himself had expressed serious reservations about its scope, on the grounds that the draft articles concerning termination did not cover all the grounds on which a treaty could be lawfully terminated.⁹

76. At the fifteenth session Mr. Verdross had suggested¹⁰ including at the beginning of Part II, section III, an introductory article stating the general cases in which an article could be terminated, including termination when the treaty had been fully implemented or by reason of obsolescence or desuetude. The first of those cases was not explicitly covered in the articles on interpretation and modification, yet it was one of the main reasons for termination. It thus appeared that article 30 might require adjustment.

77. Article 53 might appear simple, but if so the appearance was deceptive, and the Drafting Committee would probably have to examine all the articles concerning termination in order to establish what the consequences were for each type of termination and to ascertain which had not been covered in the draft.

78. Mr. EL-ERIAN said that, if paragraph 3 was transferred to article 52, some of the comments he had made on the structure of article 53 would not apply.

79. The important question had been raised whether there existed a rule of *jus cogens* forbidding the establishment of protectorates. The Commission's position on *jus cogens* in general had been the subject of lively controversy in legal circles and a recent article in the American Journal of International Law had discussed three categories of *jus cogens*, contending that they were a part of positive international law.¹¹ His own opinion was that all protectorates were a derogation from the principles of the sovereign equality of States and were a violation of the provision in article 3 of the Commission's draft that every State possessed the capacity to conclude treaties, and of the provision in article 35 that a treaty procured by coercion of the representative of a State was without any legal effect. The exercise of responsibility for the external relations of a dependent territory was contrary to the Charter and all colonial protectorates were the result of coercion.

80. Mr. BARTOŠ said he understood Mr. Ago's view to be that if the treaty was valid, acts and situations in conformity with the treaty were lawful. He thought that might be a presumption. Nothing in the text guaranteed that the treaty itself was lawful, and in the absence of a guarantee it could not be said that everything which had resulted from the treaty must be considered lawful. What could be said was that the fact that the treaty terminated did not affect the juridical character, whether lawful or not, of such acts or situations. There could be a lawful act based on a treaty which itself was

vitiated. To maintain that all acts arising out of, and in conformity with, a treaty were lawful, introduced the question of lawfulness, and that was not the place to do so. If the treaty was assumed to be in full conformity with the law he would agree with Mr. Ago; but if that was in doubt he could not say that all acts and situations in conformity with a treaty whose lawfulness had not been investigated were validated by confirmation.

81. Mr. AGO said he thought the only point which arose was that an act which had been performed when the treaty was in force, and which had been in no way unlawful, either under the terms of the treaty or under the rules of international law existing at the time, could not become unlawful *a posteriori* simply through the emergence of a new rule of international law.

82. The CHAIRMAN, speaking as a member of the Commission, said that he was in favour of retaining the word "legality" (*caractère légitime*). Article 53 dealt with the consequences of a particular case of the termination of a treaty. The act was deemed to have been legal under the terms of the treaty which terminated, and its legality was not in doubt. The question to be settled was what effect the termination of the treaty had on the legality of the act.

83. He had been against the use of the term "legality" in article 52, because there the reference was to an act performed under a treaty which had been found to be void; it was not possible to speak of the "legality" of the act, because the treaty was void. The case contemplated in article 53 was quite different.

84. Mr. de LUNA said that article 53, both in its previous and in its new form, dealt with the legal consequences of the termination of a treaty. What was the general rule the Commission intended to state? It was the rule of non-retroactivity. The termination of the treaty did not affect what had gone before; it had effects *ex nunc*, but not *ex tunc*.

85. Once that was established, he did not see why the Commission should try to complicate its statement of non-retroactivity, and he was not clear about the relationship between paragraphs 1 (b) and 1 (c). If paragraph 1 (b) called for so many explanations among experts in the Commission, would it ever be understood outside?

86. He himself thought that paragraph 1 (c) was a sufficient statement that rights accrued—it did not matter whether that term, which had not always been viewed with favour, was retained or not—and obligations deriving, not from the treaty itself, but from its application, as Mr. Ago had rightly observed, must be respected and were not affected by the fact that the treaty terminated. It was also understood that it was impossible to go back on what had already been executed in accordance with the treaty, since that was no longer part of what subsisted at the time when the treaty was extinguished.

87. If paragraph 1 (b) really added a shade of meaning which some members regarded as indispensable, the Drafting Committee should consider combining it with paragraph 1 (c).

88. Mr. REUTER said that the discussion had confirmed his view that it would be hard to arrive at an

⁹ Yearbook of the International Law Commission, 1966, vol. I, part I, 823rd meeting, para. 19 and 841st meeting, paras. 25 and 31.

¹⁰ Yearbook of the International Law Commission, 1963, vol. I, pp. 94 and 97.

¹¹ A. Verdross, *Jus dispositivum and jus cogens in international law*, American Journal of International Law, Jan. 1966, p. 55.

entirely satisfactory text. In his opinion, the Commission should be content with a modest text; every complicated subject had contradictory aspects and the Commission must reconcile itself to drafting a somewhat contradictory text.

89. Many sound and interesting comments had certainly been made. It was true that, in all the textbooks of international and municipal law concerned with the inter-temporal law, a distinction was made between situations where execution was immediate and situations where execution was successive; but could that distinction be usefully discussed at a conference of plenipotentiaries? In any event, he thought that careful attention should be given to the terminology used, in order to ensure that the wording of the article harmonized with that of other articles, such as article 56.

The meeting rose at 5.55 p.m.

848th MEETING

Tuesday, 10 May 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 53 (Legal consequences of the termination of a treaty) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 53.

2. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that the Drafting Committee would have to do a considerable amount of work on articles 52 and 53, which were more difficult to formulate than appeared at first sight. However, perhaps too much had been made of some of the problems, which might disappear if a better draft could be devised.

3. He agreed with Mr. Rosenne's argument that the proviso at the beginning of the article, "Subject to paragraph 3", was not well placed because it related only to paragraph 1 (b), and although some members had suggested that it be transferred, he would have thought it could safely be dropped, since no such general

reservation was strictly necessary in view of the way in which the rest of the article was drafted.

4. To meet another point made by Mr. Rosenne, some such phrase as "or the parties otherwise agree" could be inserted in the introductory sentence after the word "provides". That addition would correspond to certain provisions in part I.

5. As for the substance of paragraph 1, sub-paragraph (a) appeared to have escaped criticism and comment had for the most part been concentrated on sub-paragraphs (b) and (c). The word "legality" had given rise to the same kind of objections in article 52, where the alternative word "validity," suggested by some members, was not quite the appropriate term. As far as the English text was concerned, the idea which the Commission had been trying to express in article 52, paragraph 1 (a) was that the invalidity of a treaty did not deprive of its licit character an act performed in good faith while the treaty was in operation. In article 53, paragraphs 1 (b) and 1 (c) had been cast in negative form, and some members had shown concern lest the language of the former should be interpreted as establishing acts as legal, which might be impeached for reasons outside the treaty. The criticism was unfounded because that particular issue was left open.

6. It was important to decide what the Commission wished to stipulate in those two sub-paragraphs. In his opinion, two points had to be covered. The first was that, in the circumstances contemplated, there would be no retroactive effects and termination would not deprive acts performed while the treaty was in force of their licit character. Perhaps that point of inter-temporal law had not been made sufficiently clear because of linguistic difficulties. In English, the notion of the licit character of an act not being affected was unfamiliar and the term "legality" was used. That term, however, could have more than one sense, so that its inclusion in the article could lead to misunderstanding in the English text.

7. The second point was the continued validity of acts, rights and obligations arising from the existence of a treaty, and in that respect the wording of paragraphs 1 (b) and 1 (c) was perhaps not clear. The Drafting Committee would have to scrutinize them both carefully, to make sure that both points were adequately brought out.

8. Some members of the Commission were in favour of dropping paragraph 1 (c) altogether. The idea of introducing into the text the concept of vested rights, in the special sense that it possessed in one branch of law, had not been his own and he was uncertain whether the article should cover both ways in which such rights and obligations could arise, namely, by virtue of being vested directly under the treaty, or as a result of acts performed under the treaty régime. As it stood, paragraph 1 (c) in his proposed new text dealt with the first category, and more thought would have to be given to the question whether the second category should also be covered. The drafting of paragraph 1 (c) was likely to be delicate, because of the difficulty of finding suitable phraseology that could be accurately rendered into all the working languages.

¹ See 846th meeting, preceding para. 58, and para. 58.

9. If the words "including any rights or obligations arising from a breach of the treaty" were dropped, as some members had suggested, a special provision might have to be added somewhere else concerning the legal consequences of termination arising from breach, because in that instance the consequences could not be the same for all the parties.

10. Mr. Rosenne had suggested that the words "becomes operative" should be substituted for the words "takes effect" in paragraph 2, so as to be consistent with other articles. That was a point to be borne in mind when part I was revised, but it must be kept open at present, since the phrase "becomes operative" had not yet been finally adopted and was not perhaps the best that could be found. It might be necessary to include a general provision on the taking effect of notices, because the drafting difficulties had not yet been fully resolved by the Commission.

11. He did not favour the suggestion that paragraph 3 be transferred to article 52. As members were aware from the observations in his fifth report on articles 37 and 45 (A/CN.4/183/Add.1 and 3), and those in his sixth report on articles 52 and 53 (A/CN.4/186), the doctrine of a *jus cogens* rule making a treaty void subsequently had involved serious problems of presentation; that was confirmed by the fact that a number of governments had misunderstood the relationship between articles 37 and 45. In the past, the Commission had deliberately taken the line that the emergence of a new rule of *jus cogens* rendered a treaty in conflict with it void, but for general purposes it had treated that case as being one of termination and consequently to be dealt with in article 53. If paragraph 3 were transferred back to article 52, governments might fail to perceive that articles 37 and 45 dealt with two distinct situations, and injustice might ultimately result from a misunderstanding of the operation of the inter-temporal rule.

12. Termination in the circumstances referred to in paragraph 3 did not result from the will of the parties but by operation of law, and was an instance of a treaty being initially valid and later becoming void. It was much the same as other forms of termination and there was therefore some justification for retaining the provision in article 53. Moreover, that would simplify the task of drafting articles 52 and 53. If the weight of opinion were finally in favour of removing the provision to article 52, it would need to be most carefully worded.

13. He was not unduly alarmed by Mr. Reuter's thesis concerning the contradictions in article 53 and the fact that paragraph 3 appeared to derogate from the provisions of paragraphs 1 and 2. If a rule of *jus cogens* became applicable to a treaty, whatever had occurred in the past the subsequent enjoyment of the rights and obligations resulting from the treaty must be subject to their not being in violation of that rule.

14. The discussion had sharpened Mr. Rosenne's doubts about what was meant by lawful termination and he had pointed out that termination on grounds of obsolescence and desuetude had not been covered. His criticism raised points of both substance and drafting. During the discussion on termination through the definitive execution of a treaty at the second part

of the seventeenth session,² the consensus of opinion seemed to have been that it should not be regarded as a real instance of termination.

15. In earlier years, the Commission had from time to time given some thought to whether termination by reason of obsolescence and desuetude should be covered more explicitly, but had reached the conclusion that they were covered, at least partly, in the provisions concerning fundamental change of circumstances and in the notion of tacit agreement. The real problem was to decide whether obsolescence was a ground for termination rather than a factual cause of termination which had to be founded on the tacit agreement of the parties to allow the treaty to fall. The point had troubled him in connexion with other articles, and it would be helpful if the Drafting Committee could be instructed to examine and report on it so as to enable the Commission to decide whether more explicit provisions were called for, and if so in what form. The point was of importance because a fairly comprehensive rule had been inserted in article 30, laying down that termination could only come about as a result of the application of the terms of the treaty or of the articles in the draft, and that imposed an obligation on the Commission to ensure that all cases of termination were covered in the articles.

16. Mr LACHS said that if the question whether or not to include provisions dealing with obsolescence and desuetude were referred to the Drafting Committee in connexion with article 53, the Commission might not have an opportunity of discussing it in plenary meeting.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the problem should be examined as a general one and the purpose of his suggestion was to save time. If the Drafting Committee felt unable to submit a proposal, the matter could be discussed in the Commission itself.

18. The CHAIRMAN, observing that the Drafting Committee's texts were never final, suggested that article 53 be referred to it for examination in the light of the discussion and of the Special Rapporteur's proposal.

*It was so agreed.*³

ARTICLE 54 (Legal consequences of the suspension of the operation of a treaty) [68]

[68]

Article 54

Legal consequences of the suspension of the operation of a treaty

1. Subject to the provisions of the treaty, the suspension of the operation of a treaty:

(a) Shall relieve the parties from the obligation to apply the treaty during the period of the suspension;

(b) Shall not otherwise affect the legal relations between the parties established by the treaty;

² Yearbook of the International Law Commission, 1966, vol. I, part I, 828th meeting, paras. 65 *et seq.* and 841st meeting, paras. 5 *et seq.*

³ For resumption of discussion, see 864th meeting, paras. 96–102.

(c) In particular, 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.

2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the operation of the treaty impossible.

19. The CHAIRMAN invited the Commission to consider article 54. The Special Rapporteur had proposed the insertion between paragraphs 1 and 2 of a new paragraph reading:

“ In the case of the suspension of the operation of a multilateral treaty:

(a) with respect to one party, paragraph 1 applies only in the relations between that party and each of the other parties;

(b) between certain of the parties, paragraph 1 applies only in the mutual relations of those parties.”

20. Sir Humphrey WALDOCK, Special Rapporteur, said that the brief comments made by governments had been analysed in his report (A/CN.4/186). He doubted whether it was necessary to specify the substantive articles to which article 54 referred, as suggested by the Government of Israel, though it was important to ensure that the drafting of the article was sufficiently clear to indicate which types of suspension fell under its provisions.

21. The assumption by the Government of Israel that the article did not apply to suspension consequent upon severance of diplomatic relations should be considered when the Commission came to review article 64 for the second time. It should be noted that the text of article 54, on which the Government of Israel had commented, had been drafted by the Commission before that of article 64, which provided that the severance of diplomatic relations would not normally affect the relations established by a treaty. The Commission had left open the point that such a situation could render performance of the treaty impossible: the case might be regarded as temporary suspension which, it could be argued, was not covered in the draft. His own opinion was that the position of article 64 would have to be changed. Some governments, while conceding that the means of applying a treaty could disappear with the severance of diplomatic relations, had criticized article 64 as opening the door too wide to claims based on severance of relations as a ground for suspension.

22. The change he was proposing in article 54 was intended to meet the point made by the United States Government that the Commission had failed to take account of the difference between the case in which one party to a multilateral treaty suspended its operation with respect to one other party, and the general case of suspension between all or some of the parties.

23. Mr. de LUNA said that the Special Rapporteur had done well, first, to refrain from expressly mentioning the case covered by article 64, and secondly, to take the case of multilateral treaties into account in view of the pertinent comments of the United States Government. He was not, however, wholly satisfied with the new text proposed by the Special Rapporteur for that purpose.

24. The United States Government's comment served to bring out the two differences between a bilateral and

a multilateral treaty in regard to the effects of suspension. First, certain provisions of the treaty might not affect all of the parties, but only some of them. For example, a multilateral peace treaty might include territorial clauses fixing the frontier between State A and State B, but not affecting the other parties. In accordance with the principle of the separability of contractual rights and obligations, international law permitted States A and B to modify those clauses without the participation of the other parties, provided of course that the modifications were not incompatible with the object and purpose of the multilateral treaty as a whole.

25. A fairly recent specific case of application of the principle of compatibility of a multilateral treaty with the modification, agreed between some of the parties, of “individualized” rights and obligations, was the Memorandum of Understanding of 5 October 1954 between Italy, the United Kingdom, the United States of America and Yugoslavia⁴—the States principally concerned with the status of Trieste. By the terms of that Memorandum the provisions of the peace treaty relating to Trieste had been modified without the participation of the other parties, which had not been principally concerned, and without their being subsequently notified. Only the United Nations Security Council, which was responsible for administering the territory of Trieste, had been informed. One of the parties to the peace treaty, the USSR, had merely informed the Security Council that it had taken note of the agreement, without lodging any protest.

26. In another case, however, France, considering it contrary to the object and purpose of the Treaty of Versailles, had protested at the Anglo-German Naval Agreement of 18 June 1935, by which the United Kingdom had renounced the rights conferred on it by the disarmament clauses of the Treaty of Versailles.

27. Secondly, a multilateral treaty differed from a bilateral treaty in regard to the effects of suspension, in that the treaty as a whole might be suspended for one or more of the parties, but not for all of them. That was the problem which the Special Rapporteur, in response to the United States Government's comment, had tried to solve by inserting a new paragraph in article 54.

28. It was true that the effects of suspension were frequently “individualized”—that was to say, restricted to relations between some of the parties, while the treaty continued to apply between the others as if there had been no suspension—and for such cases the wording proposed by the Special Rapporteur was perfectly satisfactory. But there could be another case which was not covered by that wording: that of the treaties which McNair described as “objective”.⁵ The suspension of a treaty of that kind for one or more of the parties affected not only that party or those parties, but also, *inter se*, the parties between which the treaty had not been suspended, by reason of its general and objective nature.

29. An example once quoted by Mr. Gros was that of treaties relating to pollution of the sea by oil; other

⁴ United Nations, *Treaty Series*, vol. 235, p. 99.

⁵ McNair, *The Law of Treaties*, 1961, pp. 260 *et seq.*

examples were the treaties relating to conservation of the living resources of the sea or to nuclear tests. In those cases, it would not be enough to say that the multilateral treaty, if suspended as between some of the parties, remained in force for the others, *inter se*, since an objective interest was involved; the disappearance of certain species of marine life affected all the parties, as did nuclear tests.

30. For the second case, therefore, the new paragraph proposed by the Special Rapporteur was insufficient. He himself would be inclined to follow the wording proposed by the United States Government, and without going into detail, to draft paragraph 1 (a) in both simpler and broader terms. He accordingly proposed the following text:

“ Shall relieve the parties specially affected by the suspension from the obligation to apply the treaty during the period of the suspension.”

That wording, which consisted of the United States text, with the addition of the adverb “specially”, taken from article 42, would cover all the cases contemplated by the Special Rapporteur in his proposal, as well as cases in which the suspension of a treaty affected all the parties because of its “objective” character. It would obviate the need for the Special Rapporteur’s new paragraph.

31. Mr. RUDA, referring to the comments of governments on article 54, said that with respect to suspension following the severance of diplomatic relations, the Government of Israel had been right to point out that the article did not refer to the consequences of the suspension of such relations on the operation of a treaty. That comment had, of course, been made before the Commission had adopted article 64, which dealt with the effect of severance of diplomatic relations on the application of treaties. The Special Rapporteur had been logical in not adding anything on that subject to article 54, for the problem of the severance of diplomatic relations *per se* had no bearing on the legal consequences of suspension of the operation of a treaty. Article 54 was not concerned with the causes of the suspension, but with its effects.

32. In that connexion, he agreed with the Special Rapporteur’s comment on the placing of article 64: it would be better to place it in the section on the termination or suspension of the operation of a treaty than to leave it at the end of the section on the application and effects of treaties.

33. The Government of Israel also suggested that article 54 should specify all the articles relating to the suspension of the operation of treaties. He saw no real need for such an enumeration, which would only encumber the text. The Special Rapporteur had done well not to adopt that suggestion.

34. The United States Government had pointed out that the article did not take account of cases of suspension of a multilateral treaty as between two of the parties to that treaty and had proposed an amendment accordingly. The Special Rapporteur had accepted the comment and proposed his own amendment, but he (Mr. Ruda) preferred the wording proposed by the United States Government or, better still, Mr. de Luna’s

proposal adding the adverb “specially”. The Drafting Committee could easily find some elegant formula for paragraph 1 (a) which would reduce the article to more manageable proportions, while at the same time expressing the ideas both of the Special Rapporteur and of Mr. de Luna.

35. Mr. REUTER said that, from the drafting point of view, it again appeared impossible to retain the three expressions “legality”, “*caractère légitime*”, and “*carácter licito*”, in paragraph 1 (c), which did not have precisely the same meaning.

36. In paragraph 1 (a) the Commission had wished to make it clear that the parties’ freedom to suspend the operation of a treaty was limited by certain factual considerations, in particular, the period of the suspension. But there might well be other matters that ought to be mentioned or called to mind, if only because other articles provided that the suspension of a treaty could be total or partial; that question brought in the principle of reciprocity, on which the draft as it stood was perhaps rather reticent. If partial suspension were the only problem, he would suggest adding the words “to that extent” between the words “shall” and “relieve”. That addition would make it possible to omit the words “during the period of the suspension”, as the temporal element would be covered by the limitation thus introduced.

37. But Mr. de Luna had just raised some much more far-reaching and important questions which might lead the Commission to reconsider the whole article and to doubt whether it was possible to solve such complex problems in a single text, without introducing numerous distinctions.

38. The United States Government’s comment seemed to have convinced many members that it was necessary to deal separately with the case of multilateral treaties. But if the Commission also tried to distinguish between the causes of suspension, as Mr. Rosenne had suggested in connexion with other articles, it would be carried rather far. For certain causes of suspension could have effects very different from those mentioned in article 54. In the case of a multilateral treaty, for instance, the suspension might be a penalty imposed by a competent authority; that case should also be taken into account.

39. Similarly, the proviso at the beginning of paragraph 1 ought to refer not only to the provisions of the treaty, but also to such matters as the nature of the treaty and the obligations binding the parties outside the treaty in question. At that stage of the discussion, he was not convinced that the whole article should be reconsidered with a view to placing it on a much broader basis.

40. The formula proposed by the Special Rapporteur to settle the question of multilateral treaties was interesting, but he doubted whether it went to the root of the problem, as defined by Mr. de Luna.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission should not overlook the existence of article 46, containing general provisions on the separability of treaty provisions, which made express reference to cases of partial suspension.

42. Mr. ROSENNE said that he agreed with the Special Rapporteur's view that an enumeration of the articles to which article 54 applied was no longer as necessary as it had been when the Government of Israel had prepared its comments, because of the way in which the Commission, during the second part of its seventeenth session, had further clarified the concept of suspension.

43. It was, however, necessary to be sure that all genuine cases for which suspension could be contemplated had been properly covered in the substantive articles of part II, and that the Commission had indicated in the draft the extent to which suspension ought to have priority over termination. In most of the articles concerned, termination and suspension seemed to have been presented as alternatives, termination being given priority; but in the case of breach (article 42) priority seemed to have been given to suspension, and that was correct in the case of breach of a multilateral treaty. The problem had special relevance to article 39 and he wondered whether, if articles 30, 39 and 54 were read together, the Commission might not find that it had opened the door to something which it had wanted to avoid, namely, *de facto* denunciation by way of suspension. If that were so, it would be preferable to insert in article 39 some explicit reference to suspension, indicating precisely whether and to what extent it would operate in the circumstances covered by that article.

44. He found acceptable what was implicit in the Special Rapporteur's report—that it would not be correct to introduce the possibility of suspension into article 44 (Fundamental change of circumstances).

45. On the question of partial suspension, the same problem might arise as had arisen concerning partial termination in connexion with article 53, and he wondered whether article 46, dealing with the separability of treaty provisions in relation to the grounds of invalidity, termination or suspension dealt adequately, if taken in conjunction with articles 52, 53 and 54, with the legal consequences of applying separability to the suspension of the operation of a treaty. The answer might be in the affirmative, but he would welcome the Special Rapporteur's views. The point was connected with what Mr. Reuter had said about the need to cover adequately in the draft the principle of reciprocity in treaty obligations. He himself took a less pessimistic view about the way that issue had been handled throughout the draft articles and believed that it had been covered, but the point should be examined.

46. The temporal validity of suspension had been mentioned in the discussion; but problems of territorial application could also arise. Examples could be found in practice of a treaty being suspended in respect of a certain part of the territory of a party. The matter might not need to be mentioned in the article, but it should probably be referred to in the commentary.

47. As for the temporal effect or the duration of suspension, the whole essence of suspension was its temporary character. A close perusal of the relevant articles would reveal the moment from which suspension would begin, but he was not sure that they indicated clearly when it would end. He did not consider that bringing suspension to an end, or suspension itself,

could have retroactive effects. That was probably implicit in the idea of suspension, but it might need to be stated in more definite terms.

48. The most important issue raised by article 54 was the as yet unsolved problem of article 40, paragraph 3 (A/CN.4/L.115) proposed by the Drafting Committee during the second part of the seventeenth session, which had not yet been approved by the Commission. Once a decision had been taken on that text, it might be easier to grasp the implications of the addition to article 54 proposed by the Special Rapporteur in order to take account of the United States Government's apparently well-founded comment.

49. Mr. TUNKIN said that he was in general agreement with the proposal submitted by the Special Rapporteur to meet the valid point raised by the United States Government. However, he did not believe that, for that purpose, it was necessary to introduce an additional paragraph dealing with the suspension of multilateral treaties. Paragraph 1 of article 54 referred to treaties in general, not only to bilateral treaties.

50. The interesting point raised by Mr. de Luna should be covered elsewhere; article 54 concerned cases in which a treaty was lawfully suspended: it did not deal with the causes of suspension. The question whether suspension of the operation of a treaty by one or more of the parties might constitute grounds of suspension for another party was a matter which was outside the scope of the article.

51. For those reasons, he suggested that the point raised by the United States Government be dealt with by rewording paragraph 1 of article 54 on the following lines:

“1. Subject to the provisions of the treaty, the lawful suspension of the operation of a treaty between all or certain of the parties only:

(a) Shall relieve the parties concerned (or “the parties affected”) from the obligation . . .”

52. The CHAIRMAN, speaking as a member of the Commission, said he thought the article could be accepted as it stood, subject to a few drafting changes, with the addition of the new paragraph proposed by the Special Rapporteur. The Commission had already accepted the suspension of the operation of treaties as an institution, but it had not yet defined the grounds and procedures for such suspension, because article 40 had not yet been put into final form. As the principle of suspension had been accepted, it was logical to state the consequences of suspension. As Mr. Tunkin had just pointed out, article 54 dealt only with the consequences and scope of suspension.

53. It was particularly important to determine the consequences and scope of suspension in the case of a multilateral treaty, so the proposal made by the Special Rapporteur to meet the point raised by the United States Government was justified. But it could, perhaps, be improved by condensing the new paragraph so as to eliminate the division into two sub-paragraphs; for there was in fact only one idea to be expressed, namely, that the effect of the suspension was restricted to the parties between which the operation of the treaty was suspended.

54. Mr. AGO said he did not think that article 54 was of major importance. The draft would not suffer much if it were omitted, since what it said was self-evident. Mr. Tunkin had rightly pointed out that the purpose of the article was not to specify when, or between which parties, the operation of the treaty was suspended, but what occurred when the treaty was suspended, between the States for which it was suspended.

55. The text of the article as adopted in 1963 was satisfactory, even without the addition suggested by the United States Government. But if the Commission wished to be very precise and state what happened when the operation of a multilateral treaty was suspended as between some of the parties only, it would be enough to insert the words "between which the operation of the treaty is suspended" after the words "Shall relieve the parties", in paragraph 1 (a).

56. Mr. VERDROSS said he agreed with Mr. Tunkin and Mr. Ago. Article 54 dealt only with the consequences of the fact of suspension; moreover, it referred to treaties in general and not to bilateral treaties in particular, so that the addition proposed by the Special Rapporteur was unnecessary.

57. Mr. CASTRÉN said that after listening to the discussion he had come to the conclusion that the Special Rapporteur's proposal was acceptable in substance, but could be simplified by combining the proposed new paragraph with the existing paragraph 1. The Drafting Committee could examine all the suggestions that had been made, in particular those of Mr. de Luna and Mr. Tunkin.

58. Mr. JIMÉNEZ de ARÉCHAGA said he was afraid the Commission was going too far, and that suspension of the operation of a treaty might become a new way of avoiding treaty obligations. The Commission had begun by introducing incidental references to suspension into a number of draft articles dealing with termination. That had been done on the basis that, where termination was permissible, suspension of the operation of the treaty would *a fortiori* also be permissible.

59. But the Commission had gone much further when, at the previous session, it had considered introducing into article 40 a new paragraph 3, which would permit the operation of a multilateral treaty to be suspended as between certain parties only;⁶ suspension would thus be permitted in certain circumstances in which termination itself was not permissible. That fact had made it necessary to devise guarantees to avoid suspension being utilised as a means of obtaining the *de facto* termination of a treaty. After a brief discussion the Commission had decided to defer consideration of the whole of article 40,⁷ and to re-examine it after it had agreed on the safeguards to be introduced into article 67 on the question of *inter se* modification; it would then consider whether those guarantees would be sufficient, if extended to cover the question of *inter se* suspension.

60. The question of *inter se* suspension arose only when the suspension of the treaty was a consequence of its breach. That question had been dealt with in article 42 as adopted by the Commission at its previous session (A/CN.4/L.115), and paragraphs 2 (a) and 2 (b) of that article made distinctions which covered the comment by the United States Government. Of course, that comment had been made before article 42 had been adopted by the Commission on second reading.

61. For those reasons, he did not believe it was necessary to add the new paragraph proposed by the Special Rapporteur. If, however, the Commission were ultimately to adopt in article 40, paragraph 3, a provision which would allow *inter se* suspension to have the effect of putting an end to a treaty, the text of article 54 would have to be adjusted accordingly. He therefore suggested that the matter be left open.

62. Mr. BRIGGS said that either Mr. Tunkin's or Mr. Ago's proposal would meet the point made by the United States Government. The article did not deal with grounds of suspension, but only with the legal consequences of suspension.

63. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. de Luna had raised a very broad question. Personally, he agreed with the view that the matter was outside the scope of article 54, which did not deal with the substantive right of suspension. Article 54 was only concerned with the consequences of suspension in those cases in which, under the previous articles, the operation of a treaty was validly suspended. Mr. de Luna's remarks related more to article 40, the decision on which had been deferred.

64. The point raised by the United States Government was a valid one in the light of the 1963 text of the draft articles. Since then, at its last session, the Commission had adopted article 42, which gave a larger place to suspension; in the event of the breach of a treaty, termination was regarded as the last, not the first resort. Consequently, paragraph 2 of article 42, as finally adopted, set forth a number of possibilities in regard to multilateral treaties. It even provided, in sub-paragraph (c), for a case in which an individual party could suspend the operation of the treaty with respect to itself, regardless of the attitude taken by the other parties to the treaty. Sub-paragraph (b) stated that a party specifically affected by the breach could invoke it as a ground for suspending the operation of the treaty in its relations with the defaulting State; a bilateral situation was thus created in relation to a multilateral treaty. In the light of those complicated provisions, he had believed it safer to meet the point raised by the United States Government by introducing a paragraph which clearly stated the position in the various cases.

65. Either of the solutions put forward by Mr. Tunkin and Mr. Ago was acceptable, but it would probably be necessary to adopt both of them. In particular, the introduction of the adjective "lawful" seemed very necessary.

66. He did not, however, like the expression "parties affected"; a more precise wording such as "the parties in question" would be better.

⁶ Yearbook of the International Law Commission, 1966, vol. I part I, 841st meeting, paras. 57 *et seq.*

⁷ *Ibid.*, para. 90.

67. He accordingly suggested that paragraph 1 be redrafted to open:

“ 1. Subject to the provisions of the treaty, the lawful suspension of the operation of a treaty between all or certain of the parties only:

(a) Shall relieve the parties in question from the obligation . . . ”.

68. The points raised by Mr. Rosenne would require some further reflection and he would rather not commit himself on them at that stage. However, he was inclined to believe that article 46 on the separability of treaty provisions, adopted by the Commission at its last session, covered the question of partial suspension sufficiently, when combined with article 54 as it now stood and the provisions of the various substantive articles.

69. He did not favour introducing any reference to territorial questions into article 54; that would make the article unduly long, which was undesirable for a general provision of that kind.

70. As for the temporal element, it was sufficiently covered by the statement in paragraph 1 (a) that the suspension relieved the parties from the obligation to apply the treaty “ during the period of the suspension ”. The Drafting Committee might consider whether it was necessary to introduce into the draft articles a provision to the effect that suspension came to an end when the cause of suspension ceased, though that seemed to him self-evident. If it was considered necessary to cover the point by means of an express provision, it should be placed elsewhere than in article 54.

71. He suggested that article 54 be referred to the Drafting Committee for consideration in the light of the discussion.

72. Mr. de LUNA said that his views were the same as those of Mr. Tunkin and Mr. Ago. The only difference between his proposal and Mr. Tunkin's was the inclusion of the word “ specially ” before the word “ affected ”, and he would not press for that. The reason why he had suggested the use of the expression “ specially affected ” was that it had been used by the Commission in paragraph 2 (b) of article 42. If a different expression were used in article 54, difficulties of interpretation might arise.

73. He fully agreed that article 54 did not deal with the causes of suspension and that the first group of examples he had given did not come within the scope of the article; as to the last group, he was firmly convinced that the prohibition of nuclear tests would soon become a rule of *jus cogens* outlawing such tests as offences against humanity.

74. Sir Humphrey WALDOCK, Special Rapporteur, said that the term “ affected ” was used in article 42 in a different context. To refer in article 54 to the “ parties affected ” would be unsatisfactory as the term was too vague; there could well be parties affected other than those directly in question.

75. Mr. BARTOŠ said he had already had occasion to raise objections to the institution of suspension. It was true that to suspend the operation of a treaty was less serious than to derogate from it, but as a result of the suspension certain States might find themselves excluded from the benefits of treaties of a humanitarian character. To allege that a State had violated or failed

to observe the provisions of a treaty amounted to saying that it did not deserve to have those provisions observed in relation to itself, and the operation of the treaty was suspended where it was concerned. Moreover, suspension of the operation of a treaty might be an expedient to avoid applying the most-favoured-nation clause to a State. For reasons of principle, and out of a desire to safeguard objective treaties and the treaties which shaped the international public order, he warned the Commission against the danger of the institution of suspension, which could be used by a State to disrupt public order by a unilateral decision.

76. The CHAIRMAN, speaking as a member of the Commission, said that the position taken by the Commission on article 54 in no way prejudged the position it would take with respect to the grounds and procedures for suspension. In particular, the Commission had not yet taken a decision on the possibility of suspending the operation of any treaty whatsoever, including treaties of a humanitarian character, to the detriment of certain States. Subject to that reservation, he accepted article 54.

77. Mr. ROSENNE asked whether the Special Rapporteur had any comments to make on the question, raised by Mr. Jiménez de Aréchaga and himself, of strengthening the guarantees to ensure that suspension did not become a concealed means of *de facto* termination of a treaty, especially in the case covered by article 39.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that the point could be dealt with by including in the draft articles a provision to the effect that suspension must terminate when the causes of suspension ceased to exist. Personally, he thought that that went without saying, since the interpretation and the application of the draft articles were governed by good faith. He would give the matter some further thought, however, to decide whether such a provision was necessary.

79. Mr. ROSENNE said he was satisfied with that explanation for the time being.

80. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 54 to the Drafting Committee, as suggested by the Special Rapporteur.

*It was so agreed.*⁸

The meeting rose at 5.45 p.m.

⁸ For resumption of discussion, see 865th meeting, para. 87-99.

849th MEETING

Wednesday, 11 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Co-operation with Other Bodies

[Item 5 of the agenda]

1. The CHAIRMAN said he had received a letter from Mr. Golsong, the observer for the European Committee on Legal Co-operation, transmitting the memorandum concerning the law of treaties which the Commission, at its last session, had asked him to be good enough to supply.¹ Mr. Golsong said that he had drafted the memorandum on his personal responsibility and that he expected to attend the Commission as an observer from 8 to 11 June.

Law of Treaties

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

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 55 (*Pacta sunt servanda*) [23]

Article 55

Pacta sunt servanda

A treaty in force is binding upon the parties to it and must be performed by them in good faith.

2. The CHAIRMAN invited the Commission to consider article 55.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that article 55 was the core of the whole draft. In his third report, he had put forward a more complicated text,² but the Commission had decided to formulate the rule *pacta sunt servanda* in as simple terms as possible and the outcome of its discussions had been a short and forceful statement. In preparing his sixth report he had therefore taken as his premise that the Commission's wish to keep the article simple must be respected, though he had naturally taken into account any comments by governments and delegations that compelled attention for reasons of law or logical presentation.

4. After carefully analysing the comments he had come to the conclusion that most of them could be regarded as already met, either in article 55 or in other articles of the draft, and that the rest were not quite pertinent to article 55. It was unnecessary to summarize his observations on those comments, since they had been set out fairly fully—and he hoped lucidly—in his report (A/CN.4/186/Add.1).

5. The one amendment he had proposed applied to the English text only; it was intended to meet the point made by the Government of Israel that the English words "A treaty" did not exactly correspond with the French and Spanish versions, which spoke of "Every treaty".

6. Mr. VERDROSS said that article 55 was very important and stated a fundamental principle.

7. He approved of the Special Rapporteur's proposal to replace the opening words "A treaty" by the words "Every treaty" in the English text, but he was not very satisfied with the expression "in force", which did not mean much. What was meant was that the treaty had been concluded in conformity with the procedural and substantive rules laid down in the convention, and it would be better to replace the words "in force" by some wording on those lines.

8. Mr. RUDA said he agreed that article 55 stated a fundamental principle of public international law.

9. With regard to the position of the article, the Special Rapporteur spoke of placing it immediately after part I, or even before it, right at the head of the draft—though that would be rather too abrupt—or else mentioning it in a future preamble. Personally, he thought it a little premature to speak of a preamble; unless it was a simple text, easy to accept, he would be opposed to the idea, because he thought a preamble generally had a certain political import, which a conference of plenipotentiaries was better qualified to formulate than was the Commission.

[23] 10. It would be logical to place article 55 after part I, but in the interests of greater harmony the Commission might consider making a radical rearrangement of the draft articles and adopting the following presentation: first, the birth of a treaty, that was to say the present part I ("Conclusion, entry into force and registration of treaties"); then the life of a treaty, the present part III ("Application, effects, modification and interpretation of treaties"); and lastly, the death of a treaty, in other words the present part II ("Invalidity and termination of treaties").

11. With regard to the wording of article 55, the Commission had arrived at a categorical, clear and precise text which should be kept as it stood. He thought the Special Rapporteur had given satisfactory answers to the various comments by governments.

12. Sir Humphrey WALDOCK, Special Rapporteur, said he was not certain whether members of the Commission were aware of his ideas—still tentative—about the rearrangement of the articles, to which he had referred at various stages in the preparation of the draft. The general scheme he had put forward in a small working paper he had submitted to the Drafting Committee at the second part of the seventeenth session was to transfer the provisions concerning interpretation and application nearer to the beginning of part I, and his suggestion that article 55 should follow part I was an element in that scheme.

13. Mr. LACHS said that article 55 was obviously crucial, but a fundamental principle could nevertheless be stated succinctly.

14. He agreed with the Special Rapporteur that the article should be placed immediately after part I—a point that could be dealt with when the Commission was discussing the final rearrangement of the articles. If the Commission decided to include a preamble to the draft articles—which he did not think it was called upon to do—the preamble would have to cover the much wider field of the role and function of treaties as a fundamental feature of relations between States, of

¹ Yearbook of the International Law Commission, 1966, vol. I, part I, 830th meeting, paras. 18–21.

² Ibid., 1964, vol. II, p. 7.

which the principle *pacta sunt servanda* was a basic element; it could certainly not be confined to a statement of the principle.

15. The criticism of the words "in force" was not particularly convincing and he disagreed with Mr. Verdross's argument. The words must be maintained for precisely the reasons Mr. Verdross had given, because unless a treaty came into operation the principle *pacta sunt servanda* did not apply. Articles 17 and 23 covered the situations assimilated to entry into force which Mr. Verdross had in mind, because of their provisions concerning rights and obligations prior to, and requirements for, entry into force. Hence the qualification "in force" in article 55 could not be omitted.

16. He would not examine the article at length, since it had been discussed in detail in the Commission. Any further elaboration of the text would require a close examination of theory and practice concerning a principle that had been discussed from Cicero's day to our own. Vattel had devoted a whole chapter to it in his *Droit des Gens*, and it had also been discussed by Macchiavelli and those who had followed him up to the present time.

17. What was essential was clarity in the rule. The principle of good faith stood on its own feet and needed no explanation: any attempt to provide one would lead to casuistry. It meant fidelity and the conscientious fulfilment of promises by acts, or by refraining from acts that could frustrate the purpose of the contract. It meant honesty, not evasion—the obligation not to do anything that might prevent the execution of the treaty. Any enumeration might be deceptive for lack of completeness. If the Commission attempted to go further, it would find itself discussing such issues as those raised by article 12 of the Treaty of Utrecht, which had led to the well-known conflict of interpretation between France and England, so tellingly described by Vattel and Voltaire, the one claiming that the parties had deliberately left the text unclear in order to leave the way open for non-performance,³ the other that they were obviously negligent.⁴ The present meaning of article 55 would be plain to both lawyers and laymen, and he was strongly in favour of its being left untouched.

18. The drafting change in the English text proposed by the Special Rapporteur was acceptable, but of little significance, as there was no important difference between the two alternatives.

19. Mr. EL-ERIAN said that at the sixteenth session he had found himself in a minority and had been unable to concur in the approach adopted by the Commission to an article containing a fundamental rule, which the United States Government described as "the keystone that supports the towering arch of confidence among States" (A/CN.4/186/Add.1). The second reading of the articles provided an opportunity for second thoughts and the Special Rapporteur's lucid observations had been most helpful; but they still had not convinced him that he ought to fall in with the Commission's general line.

20. The question of the position of article 55 was a matter not only of logic, but also of substance because,

to be binding, a treaty must possess not only formal, but also substantive validity. For that reason the article ought to follow the provisions on the conclusion of treaties, substantive validity and continuance in force. Only if that order were followed would it be appropriate to have a provision on the sanctity of treaties and the obligation to comply with them.

21. For the first time, the Commission was considering the possibility of attaching a preamble to one of its drafts. At the United Nations Conference on Diplomatic Intercourse and Immunities, certain delegations had attached much importance to the inclusion in the preamble to the Convention of a list of traditional diplomatic functions, including that of fostering friendly relations between States, and some had pressed in particular for the clause stipulating that customary international law should continue to govern questions not expressly regulated by the Convention on Diplomatic Relations. He agreed with Mr. Lachs that, if a preamble were to be attached to the draft articles, it could not consist solely of the rule *pacta sunt servanda*; something would have to be added about the codification being intended to place the law of treaties on the "widest and most secure foundations", to borrow the language of General Assembly resolution 1902 (XVIII).

22. Mr. Verdross had contended that the words "in force" did not mean very much, but in fact they meant that the treaty had been freely consented to, did not derogate from fundamental principles of international law and had not been secured by fraud or coercion. Thus the words conveyed that the instrument met the requirements for essential validity laid down in the draft, so they were important and must be retained.

23. He still considered that the article required further elaboration. Such points as that raised by the Finnish Government—that the article might usefully state that a party must abstain from acts calculated to frustrate the objects and purposes of the treaty—deserved consideration, as did the points he himself had mentioned in the discussion at the sixteenth session⁵—points which were covered in the Harvard draft.⁶ The article could be expanded without losing its forceful character, particularly as there was general agreement on what should be its fundamental content.

24. Mr. CASTRÉN observed that the Special Rapporteur, after a full analysis of the comments by governments, had proposed that the 1964 text be retained subject to a slight change in the English version, which seemed acceptable. The Finnish and Turkish Governments wished article 55 to include a provision requiring the parties to refrain from acts calculated to frustrate the object and purpose of the treaty; that had been part of the Special Rapporteur's original intention, and two delegations to the General Assembly, those of Greece and the United Arab Republic, had proposed an amendment to that effect. The Government of Israel also seemed favourable to the idea, though it had stated that it would be satisfied if the matter were dealt with

⁵ *Yearbook of the International Law Commission, 1964*, vol. I, p. 30.

⁶ *Research in International Law*, "III, Law of Treaties"; Supplement to the *American Journal of International Law*, vol. 29, 1935.

³ Vattel, *Droit des Gens*, Livre II, chap. VII, § 92.

⁴ Voltaire, *Le Siècle de Louis XIV*, chap. XXIII.

in the commentary. Since the Commission had reached the conclusion, after long discussion in 1964, that the obligation which the governments in question wished to emphasize was implicit in the existing text and since there were strong reasons in favour of that concise and simple formulation, he was willing to accept it.

25. He agreed with the Special Rapporteur that it would be premature to take a final decision on the position of article 55.

26. Mr. ROSENNE, after paying a tribute to the Special Rapporteur's analysis of the comments made by governments and by delegations in the Sixth Committee, said he had considerable sympathy with the desire expressed by one member of the Commission to elaborate on the content of the article; but on balance he considered that the Special Rapporteur's conclusions were correct and that the article ought to be kept in the form arrived at after detailed discussion during the sixteenth session.

27. The words "in force" should be retained for reasons already given, more especially those put forward by Mr. Lachs. He hoped that some of the firm, and indeed noble, views expressed in the Special Rapporteur's observations would find a place in the commentary or in the introduction to the Commission's report, especially those concerning the application of the *pacta sunt servanda* rule to the draft articles.

28. For the time being, he reserved his position on the placing of the article, which was not a mere problem of drafting or good presentation, because the rule was applicable to the whole draft. It would seem that the article should precede section II of part I of the text as approved at the seventeenth session (A/CN.4/L.115).

29. It was not the Commission's function or custom to prepare a preamble to the draft conventions it drew up and he would not advocate any departure from precedent in that regard, because of the political and ideological considerations which were apt to arise when a diplomatic conference discussed a preamble. Nevertheless, since in article 69 the Commission had recognized the legal significance of a preamble, it could indicate what fundamental legal principles it considered ought to find a place in the preamble to a convention on the law of treaties; among them should be the obligation to apply treaties in good faith.

30. Mr. de LUNA, after congratulating the Special Rapporteur on his admirable defence of the text of the article, said he must admit that he found the idea of a preamble attractive. If that idea was not accepted, he would support Mr. Ruda's suggestion that article 55 should be placed immediately after part I and that the draft should be subdivided into three stages: the birth, life and death of a treaty.

31. It was true that it was not the Commission's practice to draft preambles and it was also certain that, if it adopted that course, the more universal and abstract it tried to be, the more obstacles it would encounter; but the undertaking was worth while. Experience had shown that the members of the Commission, even though they started from different conceptions of the world, succeeded in reaching agreement on concrete results.

32. At first sight, it might be tempting to regard mere declarations of principle as of no importance compared

with legal texts drafted in imperative terms which created rights, obligations, faculties and powers; but experience of constitutions, of international law and of the Charter had shown that that was not so. For example, the opening declaration of the Charter had proved to be much more important than the detailed rules embodied in the instrument itself.

33. It was also true that, even when ideological differences had been overcome, the drafting of a preamble would be a complicated matter. The preamble should first state the principle of good faith, because that was the keystone of the edifice and because it would reassure certain governments. Then it should deal with the relationship and balance between the principle *pacta sunt servanda* and the no less important principle *pax est servanda*. Lastly, and perhaps most difficult of all, it should define the function of treaties in the ineluctable relationship between international politics and law, since the maxim *fiat justitia pereat mundus* was pernicious and justice could be compatible with stability, as the Commission had shown by the *rebus sic stantibus* clause it had drafted.

34. Mr. AGO said that article 55 was one of the small number of key articles in the draft, which were recognizable by the fact that they were laconic and lapidary. He fully supported the Special Rapporteur in his resistance to any attempt to lengthen the article, to add to it anything that was not essential or to modify it in any way which might detract from its clarity or impact.

35. The question of the position of the article would no doubt arise again later, but like the Special Rapporteur he had already formed the opinion that it should be placed immediately after part I.

36. As to the words "in force", he thought they could not be changed and were essential to the text; a treaty which was not in force could not be the subject of the provision in article 55. Mr. El-Erian had rightly pointed out that the expression "in force" meant not only that the treaty had been concluded in accordance with the provisions of the articles and had accordingly come into force, but also that it had remained in force and had not become void. It would be dangerous to invoke subsequent articles to restrict the scope of the expression. At the beginning of the draft the Commission had stated that the treaties referred to were treaties in written form. Thus the principle *pacta sunt servanda* was of wider scope than the draft, for every treaty, in whatever form it was concluded, must bind the parties and be performed in good faith. Consequently, to restrict the meaning of the expression "treaty in force" in any way might call in question the existence of treaties other than those to which the Commission was referring. All things considered, therefore, the expression "in force" was the best.

37. With regard to the principle of good faith, like the Special Rapporteur, he did not see why the fact of stating that the treaty must be performed in good faith should give the impression that the rule of good faith was confined to the application of treaties.

38. As to the Turkish Government's proposed addition of a clause stipulating that the parties to a treaty must

refrain from acts calculated to prevent the application of the treaty, he pointed out that the Commission had already included in its draft a very specific rule requiring States to refrain from any acts calculated to frustrate the objects of the treaty, but referring to a period before the treaty entered into force. When a treaty was in force, it must be performed in good faith, and States parties were obliged not only to refrain from acts that might prevent its application, but also to apply it in full. The proposed addition was therefore superfluous, and apart from the fact that it might give rise to misunderstanding, it would make the text less concise and less forceful than the Commission had intended.

39. Mr. REUTER said he agreed with the Special Rapporteur's observations and Mr. Ago's comments; he earnestly hoped that article 55 would not be referred to the Drafting Committee again.

40. Mr. TUNKIN said he agreed with most of what had been said and with the Special Rapporteur's conclusion that the text adopted at the sixteenth session was satisfactory.

41. He fully subscribed to Mr. El-Erian's interpretation of the meaning of the words "in force" and believed that it would still be advisable for the Drafting Committee to consider the advisability of redrafting the beginning of the article to read "Every treaty which is valid and in force . . .". His reason was that many treaties which were legally invalid were still being performed and on the face of it, article 55 might be construed, though without sufficient ground, to mean that any treaty, simply by virtue of being performed, was binding even though legally it was totally invalid. Admittedly, not many international lawyers would take seriously the thesis developed in a recently published book that any treaty which was effective was valid, but nevertheless every effort should be made by the Drafting Committee to dissipate any possible doubts.

42. The Commission should not attempt to draft a preamble; that was a matter which ought to be left to a diplomatic conference, for reasons familiar to all members. It could, however, indicate in its report to the General Assembly that the principle *pacta sunt servanda* ought to be stressed in a preamble to any convention adopted.

43. With regard to the position of article 55, the Special Rapporteur's suggestion that it should follow part I was acceptable.

44. Mr. BRIGGS said that at the sixteenth session seven members had spoken in favour of including the words "in force" and seven against.⁷ He had been among those who had opposed their inclusion on the ground that they would be tautological, seeing that in article 1, paragraph 1, a treaty had already been defined as an international agreement concluded between two or more States and governed by international law; in his view, a treaty that was not in force was a draft treaty and not a binding instrument. So much had been read into the words "in force", including the concept of validity, that the discussion had only reinforced his conviction that those words were undesirable.

In order to avoid additional amendment, however, he would agree that the text should be retained exactly as it stood.

45. It was too early to decide on the proper place for article 55 and he hoped that the working paper on the possible rearrangement of the draft articles which had been prepared by the Special Rapporteur for the Drafting Committee at the second part of the seventeenth session, but never discussed, would be reissued so that the Drafting Committee could put forward recommendations on the subject to the Commission.

46. The drafting change proposed by the Special Rapporteur was unobjectionable, but he personally considered that "A treaty" was an exact rendering of the expression "*Tout traité*".

47. Mr. AGO said that, on the substance, he agreed with Mr. Tunkin; there was no doubt that, for a treaty to be binding on the parties and to be capable of being performed, it must be valid and must be in force. But while he would acknowledge that a treaty might be valid and yet not be in force, he doubted whether the converse was true, and wondered if there was not some misunderstanding on that point. He would not take a definite position, because Mr. Tunkin's comment related to the English text, and it might be that the English expression "in force" differed slightly in meaning from the French "*en vigueur*". In his view, there was a very clear difference between a "treaty in force" and a "treaty effectively applied". A treaty might be applied *de facto*, yet not be in force, and vice versa. According to French terminology, if a treaty was "*en vigueur*", it must be "*valide*"; if it was not "*valide*", it was not "*en vigueur*", thus it would be a pleonasm to use the terms "*valide*" and "*en vigueur*" side by side.

48. Mr. VERDROSS explained that he had merely suggested replacing the expression "in force", by some more specific phrase such as "concluded in conformity with the rules of this convention"—an idea very similar to that advanced by Mr. Tunkin—and perhaps adding the words "and still in force" to meet the point raised by Mr. El-Erian. He would have no objection, however, to that clarification being given in the commentary.

49. Mr. AMADO said he must congratulate the Special Rapporteur on the lucidity of his analysis and the rigour of his arguments. He accepted the text as it had been adopted by the Commission.

50. He understood Mr. Tunkin's point of view, but to him the idea of performance of a treaty was inseparable from the principle of good faith. That principle, to which he attached great importance, conditioned the performance of a treaty, so that a suggestion such as that made by the Turkish Government was surprising. A valid treaty which was not in force did not bring into play the good faith which ensured performance. Even if Mr. El-Erian's point of view were accepted, how was it conceivable that good faith was involved if the treaty was not in force?

51. The idea of enunciating the *pacta sunt servanda* rule in a preamble was not without merit, but a preamble was always a declaration of intention, an indication of the purpose to be achieved. The Commission's

⁷ *Yearbook of the International Law Commission, 1964*, vol. I, 726th and 727th meetings.

intention in its draft was to set out the rules which already existed in the practice of States and to go on from there to develop international law in the interests of justice and for the benefit of mankind. That was what the Commission should say in the preamble, if it decided to put one at the beginning of its draft, but to do so would be presumptuous and outside its proper role.

52. Although he made no claim to being an expert on the English language, he agreed with Mr. Briggs that the expression "A treaty" should be retained in the English text; it faithfully reflected the French "*Tout traité*".

53. As to the position of the article, the Commission could have confidence in the Special Rapporteur, who could be relied upon to explore all the possibilities.

54. He agreed with Mr. Reuter that the article should not be referred back to the Drafting Committee.

55. Mr. JIMÉNEZ de ARÉCHAGA said that he welcomed the Special Rapporteur's drafting amendment to article 55, which would bring the English text closer into line with the French and Spanish and would give dignity and force to the statement of the rule.

56. The words "in force" should be kept without any qualification or addition, which might weaken the article, and he subscribed to Mr. El-Erian's interpretation of those words, which was not that the treaty had entered into force under the provisions of articles 23 and 24, but that it was valid and had not terminated. However, to insert a reference to its being valid might have a restrictive effect and require further qualification by some such wording as "valid and not terminated".

57. Any such change was unnecessary because the intention was to designate treaties in force in accordance with all the articles of the draft, including article 51 on procedure. In other words, article 55 could not be invoked unilaterally by a State alleging that the treaty could not be executed because it was not in force, unless all the procedures laid down in article 51 had been complied with. Only then could the invoking State cease to execute the treaty any further. Furthermore, any suggestion that the article be amplified, by setting out in greater detail how the rule would apply, might involve serious risks. Experience with Article 2, paragraph 4, of the Charter, concerning the use of force, demonstrated the danger of going into too much detail and he therefore preferred article 55 in its present absolute form.

58. Mr. TSURUOKA said that the Commission was in unanimous agreement on the idea to be expressed in article 55. The article raised only two questions; the best way of expressing the idea and the position it should occupy in the draft.

59. With regard to the drafting, he was prepared to accept the article as it stood, but in view of the importance he attached to the moral value of the principle which governed the whole of the law of treaties, he urged the necessity of stating the rule as simply and, hence, as forcibly as possible.

60. If the majority preferred to retain the words "in force" and to add the word "valid", he would not object, although personally he would be inclined

to eliminate any qualification, since the questions of entry into force and validity were dealt with in other articles of the draft and it was unnecessary to repeat those ideas in article 55. The addition of the word "valid" would be rather ill-advised and might alter the meaning of the article, which should be that, as long as a treaty was in force and its invalidity had not been established, it must be performed by the parties in good faith.

61. With regard to the position of the article, he agreed with several of the previous speakers that it could be settled later, when the Commission came to review the arrangement of the draft as a whole.

62. The CHAIRMAN, speaking as a member of the Commission, said that all members were in agreement on the substance: a valid treaty which had entered into force was binding and must be performed. The only question that arose, therefore, was whether the wording of the article accurately expressed what the Commission wished to say. He himself believed it was implicit in the text that the treaty was valid, but if that seemed doubtful to some members, the Commission must consider the point carefully and endeavour to dispel the doubt, especially as article 55 was a key article of the draft.

63. With regard to position, since a treaty was only performed after it had been concluded and if it was considered valid, it would seem logical to place article 55 immediately after the articles on the conclusion and validity of treaties. But that question would be examined by the Drafting Committee when it reviewed the order of the articles in the draft as a whole.

64. Mr. BARTOŠ said he wished to reaffirm his conviction that the principle *pacta sunt servanda*, which was one of the foundation stones of the law of treaties, should be expressly stated in the draft and, in view of its importance, preferably in a separate article. Article 55 was probably in its right place, but he would leave that question aside for the time being.

65. It would be important to explain in the commentary what were the links between that essential principle and the basic general rules of public international law, whether those rules were incorporated in the United Nations Charter or in other instruments containing *jus cogens*. The principle *pacta sunt servanda* was essential, not only from the standpoint of the free will of the parties and the sanctity of treaties, but also from that of the stability of everyday relations between States. The higher principles of *jus cogens*, however, were an even more reliable foundation for those relations. The application of the principle *pacta sunt servanda* could not be pushed to the point of absurdity; there were exactions like those of Shylock which went beyond the juridical order. The purpose of treaties was to strengthen public order, not to destroy it. Consequently, treaties must be performed within the framework of the international public order constituted by *jus cogens* and of the general principles of international law. The Special Rapporteur would certainly be able to put into the commentary the few sentences needed on that subject, so that the Commission could not be reproached for having said more than it intended.

66. As to the question whether to retain the words "in force", he considered that only treaties in force were treaties in the technical sense, that was to say, sources of law. The principle *pacta sunt servanda* applied only to such treaties. However, some treaties which had ceased to be in force left juridical vestiges which were still applicable to certain situations provided for by those treaties. The Commission had already considered such situations. It should avoid using in the article terms open to an unduly narrow interpretation which might exclude the regular application, in good faith, of certain provisions of such treaties. In his view, so long as a treaty was applied, it was in force.

67. The question of the responsibility resulting from non-observance of the rule *pacta sunt servanda* should not be dealt with in article 55, since the Commission had decided in principle to leave aside all matters relating to the responsibility of States—a subject which it would be called upon to codify at a later stage. It would be doubly wrong if it tried to deal with the question of responsibility in article 55, where the offence would be the non-observance of a treaty, when it had not done so in the article on the direct violation of a treaty.

68. Mr. REUTER said that the division in the Commission was not on the substance of the article, on which they were all agreed, but on the "colour" to be given to it. Those who were in favour of revising the text apparently wished the expression of the principle also to reflect other articles in the draft. At the first reading, in 1964, opinions had been divided on the inclusion of the words "in force"; they were still divided on the retention of those words and on the addition of the word "valid". To be logical, it would be necessary to go even farther and introduce the rule with the proviso "Subject to the articles of this draft". But that would give the completely false impression that the main purpose of the articles proposed by the Commission was to attenuate the binding force of treaties.

69. He therefore maintained his position and agreed with Mr. Ago, particularly after listening to Mr. Bartoš, but thought it essential that the questions raised should be clarified fully. In particular, the commentary must explain the meaning of the words "in force" with respect to the principle, upheld by some members, that a supervening new rule of *jus cogens* automatically deprived of all force a treaty in conflict with that rule.

70. Sir Humphrey WALDOCK, Special Rapporteur, summing up, said that the situation was not very different from what it had been at the end of the 1964 discussion.

71. He wished to make it clear that he had had no intention of suggesting that the Commission should undertake the drafting of a preamble, thus departing from the wise practice it had followed hitherto. His suggestion was merely that the final report might indicate that the *pacta sunt servanda* rule was one of the points that could appropriately be stressed in a preamble to the future convention. It would, of course, be for governments to formulate a preamble in due course.

72. The question of the position of article 55 was one to which close attention would have to be given, both

by the Drafting Committee and by the Commission itself. It would be premature to deal with that question at the present stage, but in any event it was not desirable that so important a rule as that embodied in article 55 should be placed so late in the draft.

73. The main point of the discussion had been the same as in 1964, namely, whether the opening words "Every treaty" or "A treaty" should be used without qualification, or whether the words "in force" and possibly "valid" should be added. For the reasons so well explained by Mr. Reuter, his personal inclination would be to use the words "Every treaty" without any qualification. Any addition might upset the carefully adjusted balance of the relation between the substantive provisions on nullity and termination and the procedures for establishing nullity and termination. The Commission had taken the utmost care, when drafting the various provisions on nullity and termination, not to open the way for violation of treaties on the pretext of applying some of the articles. For those reasons, and also in order not to spoil the simplicity and force of the statement of the rule, he was opposed to the insertion of the adjective "valid".

74. On the other hand, for the reasons set out in paragraph 2 of his observations on article 55 (A/CN.4/186/Add.1), it was necessary to retain the words "in force". The Commission had made a distinction in the draft articles between the conclusion of a treaty and its entry into force, and he could not agree with Mr. Briggs that the fact that a treaty had been concluded implied that it was in force; such a proposition would be inconsistent with the provisions of the various draft articles so far adopted by the Commission, and also with usage in international law. The expression "treaty in force" automatically ruled out any invalid treaties. Such treaties were plainly not "in force". That being so, he urged that the rule embodied in article 55, which was a bulwark of the maintenance of treaties, should not be weakened by the introduction of any additional words.

75. As to his suggestion that the opening words "A treaty" should be replaced by "Every treaty", that point could be left to the Drafting Committee. Although he was inclined to agree with Mr. Briggs that "A treaty" was the English equivalent of the French expression "*Tout traité*", the use of the word "every" would perhaps give greater emphasis to the rule. In the opening words of article 3 as adopted on second reading in 1965 (A/CN.4/L.115), precisely for the purpose of emphasis, the expression "Every State" had been used in English, "*Tout Etat*" in French and "*Todo Estado*" in Spanish.

76. He had taken note of the remarks of various members on the subject of good faith and, in particular, of the desire expressed by Mr. Bartoš for the inclusion of a passage on the subject in the commentary.

77. He suggested that article 55 should be referred to the Drafting Committee for consideration in the light of the discussion.

78. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed

to refer article 55 to the Drafting Committee, as suggested by the Special Rapporteur.

*It was so agreed.*⁸

ARTICLE 56 (Application of a treaty in point of time)
[24]

Article 56

Application of a treaty in point of time

1. The provisions of a treaty do not apply to a party in relation to any fact or act which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party, unless the contrary appears from the treaty.

2. Subject to article 53, the provisions of a treaty do not apply to a party in relation to any fact or act which takes place or any situation which exists after the treaty has ceased to be in force with respect to that party, unless the treaty otherwise provides.

79. The CHAIRMAN invited the Commission to consider article 56. The Special Rapporteur had suggested that it might be desirable to add a third paragraph reading:

“ 3. In the case of a treaty which has first entered into force provisionally under article 24 and afterwards definitively under article 23, the date of the entry into force of the treaty for the purpose of paragraph 1 shall be the date when the treaty entered into force provisionally. ”

80. Sir Humphrey WALDOCK, Special Rapporteur, said that his examination of governments' comments had not led him to make any new proposal, although the provisions of article 56, especially paragraph 2, were extremely difficult to formulate in any language.

81. He had dealt in paragraph 2 of his observations (A/CN.4/186/Add.1) with the point raised by the Government of Israel concerning the relationship between article 56 and article 24, which concerned provisional entry into force. As a general rule, provisional entry into force was used as a technique for accomplishing the purposes of a treaty regardless of whether it ever entered into full force. However, the occasional case could also occur of a double entry into force—first provisional and then definitive. The question could then arise which date should be considered as the date of entry into force. He was not certain that it was necessary to deal with that case, but he had suggested a text that could be added to article 56 as a new paragraph if the Commission wished to introduce such a provision.

82. The Greek delegation had proposed that article 56 should state whether the provisions of a treaty applied to facts, acts or situations which fell partly within the period when it was in force. He had explained in paragraph 3 of his observations that that comment seemed to proceed from a misconception. It was only in appearance that a treaty could seem to apply to situations which fell partly within the period when it was in force. In law, the true situation was that the treaty only applied

to facts and situations insofar as they fell within the period when it was in force.

83. The Turkish Government had suggested that the final words of paragraph 1 “ unless the contrary appears from the treaty ” should be replaced by the words “ unless the treaty stipulates otherwise ”. That suggestion was based on the argument that exceptions to the non-retroactivity rule should be limited to specific cases. The question was one which the Commission had examined carefully in 1964; it had decided, however, that the expression “ unless the treaty otherwise provides ” would be too narrow⁹ and that decision, in his opinion, was correct. Consequently, he did not suggest any change in the wording of paragraph 1.

84. He had dealt in paragraph 7 of his observations with the proposal by the Netherlands and the United States Governments to replace the final words of paragraph 2 “ unless the treaty otherwise provides ” by the words “ unless the contrary appears from the treaty ”. It was very easy to confuse the question of the legal consequences of termination with the problem dealt with in paragraph 2—that of the application of treaty provisions in relation to acts, facts or situations taking place or existing after the treaty had ceased to be in force. The Commission had drawn a subtle distinction—and one which he believed was legally valid—between legal consequences and subsequent application. Hence he did not suggest any change in the wording of paragraph 2, although he was not at all certain that the best language had been found to express the Commission's intentions. He would be glad to hear the views of other members on that question.

85. Mr. REUTER warmly congratulated the Special Rapporteur on his efforts to throw some light on such a difficult matter. He too would try to explain his understanding of the question; if he was found to be mistaken on any point, that would at least help to show how the article could be improved.

86. On the whole, he supported the Special Rapporteur's position. Article 56 dealt with two sets of problems: paragraph 1 was concerned with problems relating to the period preceding the treaty and paragraph 2 with problems relating to the period following the treaty. Those two sets of problems could no doubt be dealt with in a single article entitled “ Application of a treaty in point of time ”, but they could also be dealt with separately, the first in an article on the entry into force of treaties and the second in an article on the termination of treaties.

87. If the draft was examined as a whole, it would be seen that in the articles on entry into force—for instance, in article 17—the Commission had not dealt with the problem of the effects of a treaty in point of time, whereas it had done so in the articles on termination. That was a perfectly rational approach, but it meant that there could not be complete symmetry between the two paragraphs of article 56. The Commission should consider whether paragraph 1 was sufficient to cover all the problems, bearing in mind that they were being dealt with for the first time, and

⁸ For resumption of discussion, see 867th meeting, paras. 2 and 3.

⁹ *Yearbook of the International Law Commission, 1964, vol. II, p. 178, para. (5).*

it should ask itself the same question about paragraph 2, in which the problems were being dealt with for the second time.

88. Paragraph 1, which was in negative form, overlooked one problem: that of a previous situation which had not ceased to exist. The Commission had already discussed that problem in connexion with *jus cogens*, but had not dealt with it in any article. He did not wish to take a position on whether the Special Rapporteur had been right to leave it aside; he was willing to accept the text as it stood. But if the Special Rapporteur were to reconsider his views, he (Mr. Reuter) would support him.

89. With regard to paragraph 2, the Special Rapporteur had explained that he had wished to keep the question of the continued application of the provisions of a treaty, as such, quite separate from that of the legal consequences which might continue after the termination of the treaty. He (Mr. Reuter) was prepared to accept that rather subtle distinction, but would ask the Special Rapporteur whether it would not be better to replace the word "exists" by the words "is established" or "is created"; as it stood, paragraph 2 also ignored the question of the effects of a situation previously created under a given legal régime when a new régime subsequently came into force. It was true that the case of existing situations that were maintained was dealt with in article 53, but the amendment he had proposed would make article 56, paragraph 2, clearer.

90. Mr. de LUNA said that at that stage he would deal only with the Special Rapporteur's additional paragraph 3. The suggested text referred to only two possibilities: first, the case of a treaty which had entered into force provisionally but had never been brought into force definitively; secondly, the case of provisional entry into force followed by definitive entry into force. It did not deal with a third possibility—which was not a purely hypothetical one since he knew of a number of examples in practice—the case of a treaty which entered into force provisionally for a definite period, then ceased to be in force, and was subsequently brought into force definitively. In that case, there were two dates of entry into force and also an interval during which the treaty was not in force at all.

91. However, he saw no need for the additional paragraph. Article 56 referred simply to "entry into force" and made no distinction between provisional and definitive entry into force. The point raised by the Government of Israel could therefore be safely left to be dealt with by interpretation of the provisions of article 56 as it stood.

The meeting rose at 12.55 p.m.

850th MEETING

Thursday, 12 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de

Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 56 (Application of a treaty in point of time)
(continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 56.

2. Mr. ROSENNE said he wished first of all to express his regret if the comment by the Government of Israel had caused any misunderstanding. The purpose of that comment had simply been to draw attention to the fact that, in principle, the scope of a treaty *ratione temporis* extended to the period during which it was in force provisionally in accordance with article 24. That point had not been mentioned in the 1964 commentary, though it had been dealt with in paragraphs (1) and (2) of the Special Rapporteur's commentary on article 57 in his third report.² The only purpose of the comment by the Government of Israel had been to call attention to that point, as had been done with regard to article 55.

3. He appreciated the efforts of the Special Rapporteur to deal with the matter in paragraph 2 of his observations (A/CN.4/186/Add.1). Personally, he thought that a specific provision was not necessary in the article and that, if the Special Rapporteur and the Commission were agreeable, the point could be covered adequately in the commentary.

4. Mr. CASTRÉN observed that most of the comments by governments or delegations related to the saving clauses at the end of each of the two paragraphs of article 56. Several governments thought that the same formula should be used in both paragraphs, though some preferred the wording used in paragraph 1, others that used in paragraph 2. For the reasons given by the Special Rapporteur, he considered that the difference between the two paragraphs should be maintained.

5. As to the additional paragraph which the Special Rapporteur had suggested to meet the comment by the Government of Israel, he thought it superfluous and liable to make the article unnecessarily complicated, as Mr. de Luna had pointed out at the previous meeting.³ The draft could not cover every detail. The rule stated in the new paragraph seemed self-evident; if the Commission thought fit, it could be mentioned in the commentary, as Mr. Rosenne had just suggested.

6. Unlike Mr. Reuter, he did not consider that paragraph 1 was incomplete because it failed to cover situations which had not ceased to exist when the

¹ See 849th meeting, preceding para. 79.

² *Yearbook of the International Law Commission, 1964*, vol. II, p. 10.

³ Para. 91.

treaty entered into force. If the situation came within the scope of the treaty, it must be, and probably would have been, taken into consideration in the treaty; if it did not, the treaty would be silent on the matter, and rightly so.

7. On the other hand, he thought there were sound reasons for Mr. Reuter's proposal that the words "situation which is established" should be substituted for the words "situation which exists" in paragraph 2; it was similar to the suggestion made by the Netherlands Government.

8. On the whole, he was prepared to accept the 1964 text as it stood, subject to drafting amendments.

9. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the Special Rapporteur that paragraphs 1 and 2 should be retained as they stood.

10. Paragraph 1 established the principle that treaties, in general, did not apply to past events or situations, unless the parties intended to give them retroactive effect. He favoured the present negative formulation, despite the implication that a treaty could apply to events which were taking place, or had not ceased to exist, at the time when the treaty entered into force. That would not constitute a retroactive application of the treaty.

11. He endorsed the Special Rapporteur's unwillingness to add a positive formulation on the subject of pending or continuing facts or situations, as suggested by the Greek delegation. Normally, the parties to a treaty would take such facts or situations into account, and there was little need in that case for a residuary rule of non-retroactivity, which was in fact what the provisions of article 56 constituted.

12. Since the parties could be presumed to have taken continuing facts or situations into account, the whole question became one of interpretation of their intention, and it was preferable not to interfere with that interpretation by laying down too rigid a rule. As the Permanent Court had stated in the *Phosphates in Morocco* case,⁴ "The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case,"—the expression used in the French text was *une question d'espèce*—and it had added that "in answering these questions it is necessary always to bear in mind the will of the State...".

13. Furthermore, a distinction should be made between a merely passive continuation or prolongation of a situation, and the active continuation of a previous situation which found expression in recurring or fresh performance of a given conduct. There again, the Permanent Court had pointed to the existence of "subsequent factors which... are merely the confirmation or development of earlier situations...".⁵ That distinction had been established by the European Commission of Human Rights when it had decided that a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms committed before the entry into force of the Convention

did not fall within the Commission's jurisdiction even if the applicant was still serving a sentence, because the execution of a final sentence constituted a mere passive continuation of a past decision.⁶ The Commission had thus taken the same view as the Permanent Court on "subsequent factors which are merely the confirmation or development of earlier situations". On the other hand, in the *De Becker* case, the European Commission had considered that, although the initial violation of rights had been committed prior to the entry into force of the Convention, the jurisdiction of the Commission was established because there had been fresh proceedings or recurring applications of those acts after the Convention had come in force.⁷

14. An additional reason for not adopting the suggestion made by the Greek delegation was that the Commission had already considered and rejected it in 1964, because of the fear that it would go too far in excluding prior facts which might still be caught by the new treaty, particularly with regard to jurisdictional clauses.⁸

15. With regard to paragraph 2, he supported the Special Rapporteur's rejection of the Netherlands Government's suggestion that the words "any situation which exists" should be replaced by "any situation which comes into existence". For the reasons he had already given, a treaty that had been replaced could not apply to continuing situations—covered by the expression "situations which exist"—since those situations would as a rule be caught by the new treaty.

16. The additional paragraph suggested by the Special Rapporteur was unnecessary, because article 56 made no distinction between provisional and definitive entry into force, so that it covered both. That point would be explained in the commentary.

17. Mr. BRIGGS endorsed the view that the suggested additional paragraph was unnecessary; the point raised by the Government of Israel could perhaps be dealt with by using, in paragraph 1, the words "before the treaty became binding on that party" instead of the words "before the date of entry into force of the treaty with respect to that party".

18. The language of paragraph 1 was reminiscent of the United Kingdom contention in the *Ambatielos* Case, that "none of its [the treaty's] provisions are applicable to events which took place or acts which were committed before that date [July 1926].⁹ In its judgment, the Court had not used that language, but had laid down that the treaty could not be deemed to have been in force prior to the exchange of ratifications and that, in the absence of "any special clause or any special object necessitating retroactive interpretation", it was "impossible to hold that any of its provisions must be deemed to have been in force earlier".¹⁰ In its 1964 report the Commission had reproduced the relevant

⁶ *Yearbook of the European Convention on Human Rights, 1960*, p. 284.

⁷ *Ibid.*, 1958-1959, pp. 230-235.

⁸ *Yearbook of the International Law Commission, 1964*, vol. I, pp. 33 *et seq.* vol. II, pp. 177 *et seq.*

⁹ *I.C.J. Reports 1952*, p. 40.

¹⁰ *Ibid.*

⁴ *P.C.I.J. (1938) Series A/B No. 74*, p. 24.

⁵ *Ibid.*

passages of that judgment¹¹ and he would urge that the wording of article 56 be modified to conform with it. That could be done by using a short formulation such as: "A treaty confers rights or creates obligations only during the period when it is in force".

19. After the entry into force of the treaty, its provisions would be applied in accordance with its terms; normally, the provisions of the treaty would apply to acts and situations contemporaneous with its existence in force. The question of its possible application to past facts was one of interpretation and, as Mr. Jiménez de Aréchaga had observed, it was undesirable to interfere with that interpretation by laying down unduly rigid rules in the matter. The presumption of non-applicability to past facts embodied in paragraph 1—except where the contrary appeared from the treaty itself—was too strong as a residuary rule. To say, as the International Court had said, that a treaty could not be in force retroactively was a different proposition from stating that the treaty provisions could not be given retrospective effects. Such retrospective effects could exist in certain cases, such as jurisdictional clauses which made no reservations regarding past events. On a previous occasion he had given as an example the case of an extradition treaty, which would apply to a person charged with murder before it entered into force. Great care should also be taken not to prejudice the position regarding peace treaties. If the language which he suggested for paragraph 1 were adopted, it would be possible to deal more adequately with the problems raised by paragraph 2.

20. He believed that the view taken by the Greek delegation regarding the saving clause "unless the treaty otherwise provides" was quite correct; a treaty was not terminated if some of its provisions continued to be applied. In paragraph 6 of his observations (A/CN.4/186/Add.1), the Special Rapporteur stated that the Commission had not overlooked the possibility of taking that view, but had rejected it. He (Mr. Briggs) had searched in vain through the records of the 1964 discussions for any indication that the Commission had considered the matter.

21. He recalled that article IV, paragraph 2 of the Antarctic Treaty, signed at Washington on 1 December 1959, provided that:

"No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."¹²

If that treaty were to cease to be in force, the question would arise whether a State could invoke, in support of a claim to sovereignty, an event which had occurred while it had been in force. The prohibition no longer applied, since the treaty had not forbidden the acts in question; it had merely denied to them certain effects while it was in force.

22. Another example was provided by the Convention on the Liability of Operators of Nuclear Ships, signed at Brussels on 25 May 1962. Article XIX of that Convention read:

"Notwithstanding the termination of this Convention or the termination of its application to any Contracting State pursuant to Article XXVII, the provisions of the Convention shall continue to apply with respect to any nuclear damage caused by a nuclear incident involving the nuclear fuel of, or radioactive products or waste produced in, a nuclear ship licensed or otherwise authorized for operation by any Contracting State prior to the date of such termination, provided the nuclear incident occurred prior to the date of such termination or, in the event of a nuclear incident occurring subsequent to the date of such termination, prior to the expiry of a period of twenty-five years after the date of such licensing or other authorization to operate such ship."¹³

Under that provision, the question would arise what was the legal basis of liability during the 25 years in question, at a time when the treaty was terminated. His own conclusion was that either the treaty was not in fact terminated, which was the thesis put forward by the Greek delegation at the General Assembly, or that the question was not a treaty question at all; it simply meant that certain matters of liability would survive the treaty.

23. For those reasons he considered that paragraph 2 was neither necessary nor desirable and that his own brief text would better serve the intended purposes of both paragraphs of article 56. It stated all that was required in the matter of the application of treaties in point of time. It was not the same provision as that contained in article 55, which referred to the binding character of treaties and not to the application of treaties for the duration of the period when they were in force.

24. The CHAIRMAN, speaking as a member of the Commission, said he had no comments to make on paragraph 1, which, in his opinion, could be retained as it stood.

25. With regard to paragraph 2, he agreed with Mr. Reuter and to some extent with the Netherlands Government. He had not been convinced by the Special Rapporteur's explanations. Situations created before the treaty entered into force or while the treaty was in force were covered implicitly or explicitly by paragraph 1. Paragraph 2 could refer only to situations which arose after the treaty had ceased to have binding force. The expression "situation which is established" would therefore be preferable to "situation which exists".

26. He agreed with Mr. Briggs and with the Greek delegation that paragraph 2 stated not an exception, but a general rule relating to the case of a treaty which, although it had terminated, was maintained in force at least in part. That would apply, for example, to the Convention on the Liability of Operators of Nuclear Ships, article XIX of which provided that "the provisions

¹¹ *Yearbook of the International Law Commission, 1964*, vol. II, p. 178.

¹² United Nations, *Treaty Series*, vol. 402, p. 74.

¹³ *Le Droit maritime français, 1962*, tome XIV, p. 596.

of the Convention shall continue to apply” even after the Convention had terminated. Mr. Briggs had clearly established the distinction between the fact of a treaty being in force and the applicability of its provisions; a treaty might well come into force at a certain date and apply to facts or acts prior to that date. Consequently, paragraph 2 should specify that a treaty could not apply to facts, acts or situations which arose after the treaty had ceased to be in force; that was a general rule, not an exception.

27. Mr. ROSENNE said that article 56 did not deal either with entry into force or with termination, but with the period during which the parties were legally bound to apply the terms of the treaty. From the doctrinal point of view, if a treaty contained provisions on its continued application after its termination, it could be said that technically the treaty was still in force, at least in part.

28. Although the example was not directly relevant—in view of the provisions of article 3 (*bis*)—he would cite the constitution of UNESCO, because it provided a clear illustration of the problem. That instrument specified that the withdrawal of a Member State became effective on 31 December of the year following the one in which notice of withdrawal had been given. The effect of that provision was that the instrument remained in force, at least in part, with regard to the withdrawing country until that date had passed.

29. Though there might be differences in doctrinal approach, he did not believe there was any fundamental cleavage within the Commission regarding the rule to be embodied in article 56, namely, that the obligation to perform the treaty was incumbent on every party thereto for the period between the entry into force and the lawful termination of the treaty for the party concerned.

30. It appeared to be generally accepted that, under the *pacta sunt servanda* rule, a treaty might have retroactive effects or prospective application if the parties so agreed; such agreement could either be expressed in the treaty itself or take some other form; it could, for example, follow from the nature of the treaty.

31. The difficulties that had arisen were essentially questions of drafting; the Drafting Committee should be able to state the rule clearly and avoid any complications due to confusion between the concept of lawful termination and that of the application of treaties.

32. With regard to the concluding words of paragraph 1, he agreed with the remarks contained in paragraph 4 of the Special Rapporteur's observations, especially the passage reading: “quite often the very nature of a treaty indicates that it is intended to have certain retroactive effects without specifically so providing (see paragraph (5) of the commentary)” (A/CN.186/Add.1). That same thought was reflected elsewhere in the Commission's draft, for example, in article 39 as adopted at the previous session, and he assumed that the matter would be further clarified after the Commission had re-examined the articles on interpretation.

33. The provisions of paragraph 2 really dealt with the consequences of lawful termination and perhaps the Drafting Committee should consider combining them

with those of article 53; that would avoid the inelegance of having two separate provisions on the consequences of lawful termination, drafted from slightly different angles, on the basis of what was admittedly a valid, but also an extremely fine, distinction.

34. In law, there could be no further application of a treaty after its lawful termination and he could therefore not accept all the contents of paragraph 7 of the Special Rapporteur's observations.

35. In 1964, article 56 (then article 57) as first submitted by the Drafting Committee had consisted of only one paragraph; but as a result of the discussion paragraph 2 had been added at the 759th meeting.¹⁴ He now urged that its contents be transferred to article 53.

36. Mr. LACHS said that the Special Rapporteur's approach to the problem of provisional entry into force was correct; however, as had already been pointed out, since article 56 made no distinction between provisional and definitive entry into force, there was no need to insert an additional paragraph on the subject. It would be sufficient to deal with the matter in the commentary.

37. Paragraph 1 should be retained as it stood.

38. With regard to paragraph 2, he shared the Special Rapporteur's views on the proposals for its amendment. In particular, he endorsed his rejection of the Netherlands Government's suggestion that the words “which exists” should be replaced by the words “which comes into existence”. It was essential to draw a distinction between a situation which existed and one which came into existence; the former expression covered a situation which arose during the currency of the treaty and continued to exist after its termination.

39. The example of the Antarctic Treaty given by Mr. Briggs did not seem convincing; the purpose of that Treaty was to freeze all claims while it was in force. The prohibition of claims based on events which occurred while the Treaty was in force resulted from the operation of its own clauses.

40. The fact of the matter was that even if a treaty ceased to exist, it could not be erased altogether; it ceased to operate, but it became a part of history. As indicated by the concluding words of paragraph 2, “unless the treaty otherwise provides”, problems of that kind should be decided in accordance with the terms of the treaty itself. The concluding passage of paragraph 2 should, however, be brought into harmony with the changes which had been suggested for article 53. The reference to article 53 contained in paragraph 2 should be retained so as to stress the clear link between the two sets of provisions.

41. Mr. de LUNA said that, although he was generally in favour of simplification, he could not support the short text proposed by Mr. Briggs; it was an oversimplification of the whole matter and did not really cover all the questions with which the Commission was attempting to deal in article 56. In fact, it was little more than a paraphrase of the *pacta sunt servanda* rule embodied in article 55.

¹⁴ *Yearbook of the International Law Commission, 1964*, vol. I, p. 165, para. 16 and p. 232, para. 8.

42. He agreed with those speakers who had stressed that when a treaty was completely terminated, it ceased to be in force and could not be a source of rights or obligations. The example of the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships was not conclusive. The case envisaged by Mr. Briggs was that of the Convention ceasing to be in force in respect of one of the parties, but remaining in force for the others. That situation was a fairly common one in international law; for example, the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 specified, in article 65, paragraph 2, that denunciation of the Convention by a party did not release that party from its obligations in respect of any act constituting a violation performed by it before the date on which the denunciation became effective.¹⁵ A further example was to be found in the customary clause in the constitutions of international organizations to the effect that certain obligations remained due by a former member of the organization for a certain period after its withdrawal.

43. Paragraph 2 dealt with different matters from those covered by provisions such as article 65, paragraph 2, of the Human Rights Convention. It related to events which had occurred while the treaty was in force. It was important to remember the difference between acquired or vested rights and mere expectations. A right could have its source in a treaty, but once it was vested in its beneficiary it had a life of its own. A vested right would survive the withdrawal of the party concerned from the treaty, but a mere expectation would not.

44. He agreed with those who had pointed out that, if a treaty could be applied to a situation arising after its termination, the treaty—or the relevant part of it—was still in force.

45. Mr. EL-ERIAN said he agreed with the Special Rapporteur's conclusions on paragraph 1 of article 56 and with the distinction so clearly made between the consequences of the termination of a treaty and the continued application of certain provisions of a treaty after it had ceased to be in force. He therefore fully supported the Special Rapporteur's idea of keeping the contents of article 56 separate from those of article 53.

46. Paragraph 2 did not appear to touch the question of acquired rights, but related only to the further application of a treaty's provisions after its termination.

47. The suggested paragraph 3 was unnecessary because article 56 was drafted in general terms, so that it covered both entry into force under article 23 and provisional entry into force under article 24. The matter could be explained in the commentary.

48. There seemed to be a lack of clarity in the comments of the Greek delegation. A distinction should be made between the effects of the future convention on the law of treaties and the effects of the individual treaties that would be governed by its provisions. Article 56 did not deal with the general effects of the future convention on the law of treaties: it enunciated principles which still contained some elements of declaratory law because in 1959 the Commission had considered casting the draft articles in the form of a code. Personally, he had

no doubt that the rules embodied in article 56 gave expression to general norms of international law.

49. In 1964, in answer to a question by Mr. Ago regarding treaties providing for the pacific settlement of disputes, the Special Rapporteur had said that "The case-law of the International Court of Justice supported the general principle that a jurisdictional treaty applied to all disputes unless the parties stipulated the exclusion of disputes having their genesis in events prior to the conclusion of the treaty".¹⁶ As Mr. Ago had pointed out "The fact that the parties often thought it necessary to include in their treaty a clause specifying that the procedure laid down in it applied only to facts subsequent to the acceptance of the treaty surely seemed to suggest that the usual principle was . . . that the procedure applied to all disputes, even those arising out of prior facts".¹⁷

50. Article 56 did not prejudice the application in point of time of the future convention on the law of treaties.

51. Mr. AGO said he first wished to make it clear that he shared the view of those who did not consider it necessary to add to article 56 a paragraph on provisional entry into force. A treaty either entered into force or it did not; if it did so even provisionally it nevertheless entered into force. It was therefore pointless to complicate an already difficult article by adding a provision of the kind proposed.

52. One point which should be emphasized was that the rule stated in article 56 was a residuary rule. The essential factor was what the will of the parties had been, and that will might diverge from the course outlined by the Commission. Consequently, there might perhaps be some advantage in placing the proviso concerning what appeared from the treaty, or what it provided, at the beginning of the paragraphs rather than at the end.

53. The Drafting Committee would have to give careful consideration to the question raised by Mr. Rosenne regarding the relationship between paragraph 2 of article 56 and article 53; in the present text, the phrase "Subject to article 53" certainly seemed obscure.

54. However, the most difficult and important problem raised by the article, which was full of pitfalls, was that of "situations". Where the reference was to facts or acts which supervened or took place at a given moment, the problem was relatively easy to solve; it would even be rather strange for a treaty to provide that it did not apply to facts or acts which supervened or took place while it was in force. But a "situation" began at a certain moment and then continued. As drafted, paragraph 1 meant that the treaty did not apply to a situation which had begun before, and ceased to exist before, the treaty entered into force, but that the contrary might appear from the treaty; in other words, the treaty might provide that it applied to a previous situation which had ceased to exist by the date of entry into force. But by its silence, paragraph 1 implied that the treaty always applied to a previous situation which had not yet ceased to exist when the treaty entered

¹⁶ *Yearbook of the International Law Commission, 1964*, vol. I, p. 41, para. 14.

¹⁷ *Ibid.*, para. 11.

¹⁵ United Nations, *Treaty Series*, vol. 213, p. 252.

into force; curiously enough, it even gave the impression that the treaty itself could not exclude from its scope a situation which had begun before its entry into force and had continued to exist while it was in force. It was obvious, however, that certain treaties, such as jurisdictional treaties, could exclude situations of that kind. Consequently, the Commission ought to clarify that point.

55. At first glance, paragraph 2 appeared to state the obvious, but that was better than saying something incorrect. On that point he shared the view of the Chairman: a "situation which exists after the treaty has ceased to be in force" could have begun to exist before that date. Any international court examining such a situation would have to consider whether the treaty had been in force at the time when the situation had begun and, if so, to judge the situation according to the treaty. It would be absurd to exclude a situation from the scope of a treaty because that situation had continued to exist after the treaty had ceased to be in force. The Commission would therefore do well to follow the suggestion of the Netherlands Government that the words "situation which exists" be replaced by the words "situation which comes into existence".

56. He had no specific proposals to make, but would urge the Drafting Committee to review article 56 with the utmost care.

57. Mr. TUNKIN said that both paragraphs of article 56, but in particular paragraph 2, raised some awkward theoretical problems. On the question raised by the Greek delegation, for example, it was clear that, if certain clauses of a treaty were applied, they could only be regarded as being still in force.

58. Although the wording of the article could be affected by whatever view was adopted on the various theoretical issues, taking a practical approach, both paragraphs of article 56 could be accepted as a reflection of existing practice, and in his view they were acceptable as rules of law, regardless of theoretical controversies.

59. He had himself been one of the negotiators of the Antarctic Treaty of 1959 and he well remembered the difficult negotiations over article IV, which had the effect of freezing territorial claims in Antarctica. The hypothetical example based on that article given by Mr. Briggs was not convincing. If the Antarctic Treaty were to terminate, any acts performed while it had been in force would of course be governed by its provisions and could not be invoked in support of any new territorial claim, or any rebuttal of a claim made before 1959. Such an application of the Antarctic Treaty to all the events which occurred during the period of its operation would be consistent with the general tenor of article 56.

60. The problems raised by Mr. Ago should receive careful consideration by the Drafting Committee, although the difficulties involved had been somewhat exaggerated.

61. As to the suggested paragraph 3, he agreed that it was unnecessary.

62. Lastly, he was unable to support the suggestion by Mr. Ago that both in paragraph 1 and in paragraph 2, the concluding proviso should be moved to the

beginning of the paragraph. He was in favour of placing the proviso after the statement of the rule, as in other instances.

63. Mr. BARTOŠ said it had been maintained that the rule stated in paragraph 1 was a residuary rule—a general rule applicable in the absence of special arrangements by the parties. That was very true. But the use of the expression "unless the contrary appears from the treaty" added to the general rule and to the parties' special rule a third kind of rule—an additional derogation resulting from the interpretation of the treaty. That involved an element of uncertainty which sound juridical technique should try to remove.

64. With regard to the question of provisional entry into force, Mr. Ago had asked that an already difficult rule should not be further complicated. Mr. Tunkin, on the other hand, thought that the question should be dealt with; he was thinking in particular of provisional entry into force as provided for in the final clauses of a treaty. Not infrequently, however, a treaty was applied provisionally irrespective of its final clauses, because during the negotiations, the parties had agreed on a transitional arrangement by which the treaty would be applied provisionally pending its entry into force. In that case, there was no "provisional entry into force" in the strict sense of the term, but the treaty was applied by virtue of an agreement independent of its provisions; that was an expedient by which certain relations could be established between the parties even if the political climate, for example, made it impossible for the treaty to enter into force. Though he did not ask that that question should be dealt with explicitly in article 56 itself, he thought it should at least be mentioned in the commentary.

65. Mr. AMADO said that article 56 was difficult enough in any case, but it was made even more unattractive by the abundance of the possibilities involved. For all their enlightenment, their profound theoretical knowledge and their wide practical experience, the members of the Commission had not found their way easily through the difficulties. The whole statement of that so-called rule of law was qualified by the phrase "unless the contrary appears from the treaty" or "unless the treaty otherwise provides". In other words, an extraordinary effort was made to state a rule, and then the parties were left to embark on the hazardous enterprise of interpreting the treaty. It was therefore to be hoped that the Drafting Committee would not only reject the new paragraph proposed by the Special Rapporteur, but would even consider deleting article 56 altogether.

66. Mr. JIMÉNEZ de ARÉCHAGA said he felt bound to comment on paragraph 2, because of the doubts to which the discussion had given rise. The examples given of treaties to which the proviso at the end of the paragraph would apply, had shown that they were terminated by express provision in the treaty itself, and the Commission, in its draft articles, could not seek to impugn the intention of the parties or the expression of that intention. However, certain effects of those treaties arising from acts performed while they were in force might continue, and that continuation was reinforced by other rules of international law.

67. To take the example of the Antarctic Treaty, by virtue of the inter-temporal rule acts performed while the treaty was in force could not provide a ground for occupation, because that would be unlawful under international law, being forbidden by the treaty. The position under the Convention on the Liability of Operators of Nuclear Ships was even clearer. A State remained responsible for having licensed a nuclear ship while a party to the treaty and for having created a potential risk, but the licensing would have to take place while the treaty was in force.

68. With regard to the other problem raised in paragraph 2, as a result of the Netherlands suggestion, which had been supported by some members, he was concerned lest the adoption of a formula using some such wording as "any situation which comes into existence" might create a contradiction between paragraphs 1 and 2. Three kinds of situation had to be taken into account—extinct, continuing and future—and it must also be borne in mind that while paragraph 1 was concerned with a new treaty, paragraph 2 was concerned with an old treaty. If the Commission endorsed the Netherlands Government's assertion that the old treaty did not apply to situations that had come into existence after its termination, that would be correct, but obvious. However, that formula was also open to the interpretation, *a contrario*, that the old treaty applied not only to situations which had ceased to exist, which was correct, but also to continuing situations, which was the exact opposite of what had been implicit in paragraph 1.

69. Thus, if the changes proposed were introduced in paragraph 2, the inference that the Commission wished to be drawn from paragraph 1 would be in danger; hence it was preferable to keep the text as it stood, in order to avoid the implication that the old treaty might apply to existing situations or to situations subsisting after its termination.

70. Mr. AGO said that the Commission should give a good deal of thought to the wording of the article, in order to make sure that it covered all the cases as well as possible. But he had no doubt that it would be possible to find satisfactory wording, and he was not in favour of the desperate course advocated by Mr. Amado, who would like the Commission to drop the article altogether because of the difficulties it involved. There were indeed real difficulties; but they were due solely to the existence of continuing situations, whose existence in time did not coincide with that of the treaty. That was the point to be settled.

71. The problems to be solved were not theoretical problems at all. To a very large extent they could be solved either by the treaty, which would itself in many cases give the necessary particulars, or by interpretation of the treaty, though it would be wrong to think that everything could be settled by interpretation.

72. The first case he had pleaded before the International Court of Justice had been one between France and Italy concerning a situation that had arisen before the entry into force of a jurisdictional clause and had continued to exist after its entry into force. The clause simply stated that the jurisdiction of the Court did not extend to earlier situations. But what was meant by "earlier situations"? Were they situations which had

begun and ceased to exist before the jurisdictional clause had come into force, or were they situations which had begun before, but might continue to exist even after it had come into force? The Court had settled the question in a certain way, but in a later case it seemed to have taken a different position. That showed how necessary it was for the Commission to draw up a residuary rule on the subject, which was by no means hypothetical.

73. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that as he had indicated at the outset, article 56 was a difficult one and not easy to draft in any of the working languages. It would certainly need further consideration by the Drafting Committee, but the Commission must decide what the article should contain. As it stood, the text did not provide a positive rule and the title was a misnomer, because the article in fact set out the conditions when a treaty did *not* apply in point of time; it dealt with the temporal limits of application and not with the general principle of application in point of time. That fact provided his answer to Mr. Ago's criticism of paragraph 1, that it failed to indicate what happened when the situation had begun to exist before the treaty came into force and continued after the treaty came into force. If paragraphs 1 and 2 were retained in their present form, the title would have to be changed to correspond to their content.

74. Paragraph 1 was essential, for precisely the reasons just given by Mr. Ago. Although the examples cited in learned works might not be numerous, there had been a number of cases, particularly in respect of jurisdictional clauses, in which the principle of non-retroactivity had been very important. In his opinion, there was a fundamental rule that a treaty did not have retroactive effects unless the intention of the parties had clearly been to the contrary or such an intention could be deduced from the general provisions of the treaty; that rule needed to be stated. It could be left to the Drafting Committee to consider whether the rule should be expressed in terms of non-retroactivity, with the intention of the parties as a qualification, or the other way round.

75. At that juncture the Commission was unlikely to make much more progress in solving the central problem posed by the temporal aspect of acts or facts, which was inherent in the nature of things. He was not sanguine about the chances of resolving the difficulty simply by better drafting.

76. He would not conceal his uneasiness about paragraph 2 and the over-subtlety of the distinctions to be drawn between it and article 53. The explanation in his sixth report (A/CN.4/186/Add.1) of the difficulties involved was, he thought, correct and the discussion had not dispelled any of his anxieties. The Drafting Committee would need to examine carefully the exact relevance of those two provisions to the whole draft.

77. The substantive discussion on paragraph 2 had centred on the clause "unless the treaty otherwise provides" and he remained unconvinced by the argument developed by the Chairman and by Mr. Briggs. There was a doctrinal issue involved, but the apparent cleavage of opinion was not perhaps very wide. However, he thought it would be difficult to argue that, when the

parties had contemplated and provided for termination or for withdrawal by one party, a particular clause in the treaty remained legally in force for that party. He had dealt with that point in paragraph 7 of his observations.

78. The difficulty was the familiar one of an executed treaty giving rise to vested rights and obligations, and those rights continuing to have effects and possessing an independent legal existence by virtue of having arisen out of the treaty. An example of the difficulty could be drawn from the Convention on the Liability of Operators of Nuclear Ships under which, by reason of licensing a nuclear ship during the existence of the instrument, a party incurred a liability that might survive for twenty-five years, whether or not it remained a party. That Convention contained an express provision clearly contemplating that a State might cease to be a party, but certain effects would nevertheless continue during the existence of the treaty. Admittedly the case was the special one of an obligation arising out of something that had occurred during the treaty's existence and continuing as an independent legal obligation after the party concerned had withdrawn.

79. The Convention for the Protection of Human Rights and Fundamental Freedoms was another example, because it provided that a State denouncing the Convention would remain liable for violations of human rights occurring before the denunciation took effect. It was the existence of that type of provision that had prompted the Commission to add the proviso "unless the treaty otherwise provides", and if paragraph 2 were retained, it would probably have to remain more or less in its present form. The point was a substantive one, but the Drafting Committee could discuss it.

80. Of course, the real issue before the Commission was whether paragraph 2 should be retained at all, and if so, how it should be related to article 53. On that issue the discussion had not thrown much light, so he reserved his own position until the Drafting Committee had had an opportunity of examining the article.

81. It was unnecessary to complicate the task of formulating article 56 by referring to final clauses, the problem of which he had brought up on various occasions, hoping to obtain from the Commission an answer to the question what legal force they possessed. The Commission seemed to regard them as some kind of esoteric mystery: it agreed that they had some force, but no one seemed to be clear as to its source.

82. Generally speaking, he still held to the conclusions he had expressed in his sixth report. He would do his best to help the Drafting Committee overcome the difficulties created by the excessively fine distinctions drawn between article 56 and article 53.

83. The new paragraph he had suggested for inclusion in the article need not stand, as everyone seemed to agree that it was superfluous.

84. The CHAIRMAN suggested that article 56 be referred to the Drafting Committee in the light of the discussion.

*It was so agreed.*¹⁸

¹⁸ For resumption of discussion, see 867th meeting, paras. 4-10.

ARTICLE 57 (The territorial scope of a treaty) [25]

[25]

Article 57

The territorial scope of a treaty

The scope of application of a treaty extends to the entire territory of each party, unless the contrary appears from the treaty.

85. The CHAIRMAN invited the Commission to consider article 57, for which the Special Rapporteur had proposed an additional paragraph reading:

"A treaty may apply also in areas outside the territories of any of the parties in relation to matters which are within their competence with respect to those areas if it appears from the treaty that such application is intended."

86. Sir Humphrey WALDOCK, Special Rapporteur, said that article 57 had given rise to much discussion at the sixteenth session and the Commission had decided not to cover in the article (then article 58) a number of issues which he had presented in his third report,¹⁹ with the result that the text had been pared down to something almost lapidary. After examining the comments by governments and delegations, he had come to the conclusion that most of their suggestions should for one reason or another be rejected.

87. The Greek delegation to the Sixth Committee had questioned the need for the article, on the ground that it merely created a refutable legal presumption. In a sense that was true, as it was true of many other articles in the draft which in some measure had to be subject to the will of the parties; but that did not mean that the Commission should refrain from stating residuary rules, if it seemed necessary, as it had decided to do in article 57.

88. The most extensive change proposed was the addition, advocated by the Netherlands Government, of a second paragraph expressly enunciating the right of States composed of distinct autonomous parts to declare to which constituent element a treaty applied. That would bring the Commission back to the issues examined, but set aside, at the sixteenth session. Though he sympathized with the Netherlands proposal—and it would be remembered that in his original draft he had put forward certain provisions regarding capacity in an attempt to elucidate some of the difficult problems involved—he had accepted the Commission's view that the article should be restricted in the manner decided on in 1964. The text which had emerged from that discussion was not so rigid as to exclude legitimate possibilities of the kind contemplated in the Netherlands proposal, which therefore did not call for changes in the text.

89. The Governments of Finland, the Netherlands and the United States had raised a point that deserved attention, namely, the extra-territorial application of treaties, arguing that, although that had not been the Commission's intention, the text might be read as excluding such application, for example, in respect

¹⁹ *Yearbook of the International Law Commission, 1964*, vol. II, p. 12.

of ships and aircraft on the high seas, the continental shelf, etc. Of course, the Commission had not overlooked treaties concerned with such matters, but had regarded article 57 as being primarily concerned with the application of treaties to the territory of the parties. Perhaps it was desirable, given the nature of the article, to try to cover the point, though the drafting would not be easy. His own proposal for a new paragraph had been read out by the Chairman. The text proposed by the United States Government on that point differed slightly from the Netherlands Government's proposal for the revision of the article as a whole. The new texts proposed by the two governments would be found in paragraph 4 of his observations (A/CN.4/186/Add.1).

90. Mr. PAREDES said that the territory of States differed in nature: it was not always uniform and continuous. Some States had both continental and island territories, others had dependent territories. Those differences gave rise to a wide variety of legal, economic, geographical, political and administrative situations, and the problems relating to the different parts of the territory of a State were rarely the same. In his view, therefore, it was normal for treaties to relate to a specific part of the territory; in other words, the principle to be deduced was exactly the opposite of that which the Commission was upholding in article 57. The treaty applied to the territory to which the object or purpose of the treaty specifically related. If the treaty was silent on the matter, the intention would have to be examined to determine whether it applied to all the territories, with differing status, of the States which had concluded it, or only to some part of those territories. In short, far from solving the problems, article 57 in its existing form complicated them enormously, and it would be better to delete it.

91. In case the Commission nevertheless decided to retain the article, he would point out that in the new paragraph proposed by the Special Rapporteur, the phrase "areas outside the territories of any of the parties" seemed to be so general that it could even mean that the treaty could be imposed on countries which had nothing to do with it and which would thus be subjected to a sort of colonization.

92. The Special Rapporteur had probably not intended the phrase in question to have that meaning, and had no doubt been thinking only of parts of the territory which were not contiguous or which had a special legal status, such as maritime zones, warships, air space or dependent territories of the States which had concluded the treaty. But it was essential to clarify the text by specifying that it referred exclusively to territories subject to the jurisdiction of the States parties to the treaty and that, as required by the principle of the independence and equality of States, a country could not have a particular course of action imposed on it by countries of which it was not a dependency.

93. Mr. REUTER said he believed that the Commission could concur in the Special Rapporteur's observations and retain the text it had adopted in 1964. Subject to what the Commission might subsequently decide about such expressions as "appear from the treaty", the text must certainly have some flexibility, but it was in fact already fairly flexible.

94. He thought the proposal made by the Governments of the Netherlands, the United States and Finland might possibly be the result of a misunderstanding, or rather of the fact that, of the three versions of the article, only the Spanish was entirely correct, in that the opening words of the article were exactly the same as the title, namely, "*El ámbito de aplicación territorial*", whereas the word "territorial" had vanished from the English and French texts, though it was obvious that the article related only to territorial application. The question whether there was a field of application that was not territorial was entirely foreign to the Commission's intentions. He was therefore in favour of rejecting the proposal by the three governments and mentioning in the commentary that the Commission had not wished to settle that question.

95. If the Commission nevertheless wished to add a paragraph on that question to the article—and in doing so it would be venturing on difficult ground—he would prefer the text proposed by the United States to that of the Netherlands Government or even that of the Special Rapporteur, for he doubted whether the words "area" in English and "zone" in French, used by the Special Rapporteur, were wholly satisfactory in the context. There might be cases of extra-territorial application in which it would be inelegant to use those words, for example, when referring to ships or to space. In that respect, the text proposed by the United States had the advantage of not containing any word likely to be controversial.

96. The defect of the text proposed by the Netherlands Government was that it raised a serious question of substance; for it introduced the idea that, when a treaty was applied in a non-territorial field, a burden of proof was imposed on the party intending to apply the treaty, which had to prove that it was entitled under international law to apply the treaty outside its territory. He hoped the Commission would not raise that question unintentionally.

97. Mr. LACHS said that article 57 needed careful re-examination. In principle, most treaties applied to the territory of the parties, but there were a number which applied exclusively to areas outside the territory, for example, outer space. That point ought to be reflected in the article, because the scope of application of such treaties was not ancillary, but an essential element of the instrument. The Commission must strike some kind of balance and not overlook existing and possible future treaties of that kind.

98. The Netherlands Government had re-opened issues that had already been discussed at length by the Commission and there was no need to recapitulate the reasons for the Commission's decision that the article should not deal with territorial limitation resulting from colonial clauses and the like. He agreed with the comments made by the Czechoslovak Government. The institutions of trust territories and dependent territories mentioned by the Netherlands Government were disappearing and the Commission need not legislate for their perpetuation. Recent treaties of a humanitarian nature concluded under United Nations auspices took account of that fact, as was clear from article 23 of the Convention for the Suppression of the Traffic in Persons and

of the Exploitation of the Prostitution of Others,²⁰ and article 12 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery.²¹ By virtue of those provisions, the two instruments applied to the whole territory of a State party, irrespective of the legal status of any particular part of the territory within its jurisdiction. There was no need to amplify article 57; the problem of the application of treaties to what were known as colonial territories or to the component parts of a federation should not be dealt with in the draft articles.

99. He agreed with Mr. Reuter that the formula suggested by the Netherlands Government to cover extra-territorial application might cause difficulties and would have to be carefully examined if the Commission decided to add a provision on that point. The wording suggested by the Special Rapporteur would lead to complications, especially the phrase "within their competence".

100. Mr. CASTRÉN said he supported the suggestion by three Governments—the Netherlands, the United States and Finland—that a paragraph be added to article 57 to provide for cases of extra-territorial application of treaties; as drafted in 1964, the article had not been complete. He was also prepared to accept, in the main, the wording submitted by the Special Rapporteur for the new provision; but he proposed that the words "under international law", taken from the text suggested by the Netherlands Government, be inserted after the word "competence". The title of the article might also have to be changed to cover such cases.

101. He also approved of the Netherlands Government's proposal that a further provision be added to article 57 to take account of special factors such as the federal structure of a State or the position of dependent territories; he hoped the Commission would examine that proposal with all the care it deserved. The Special Rapporteur himself had said in his observations that he was in sympathy with much that was said in the comments of the Netherlands Government, but believed that the rule adopted by the Commission in 1964 was flexible enough not to give rise to difficulties in practice of the kind envisaged by that Government. He (Mr. Castrén) feared that the doubts of the Netherlands Government might be justified. Finland, for example, had on several occasions experienced difficulties with regard to its autonomous territory of the Aaland Islands, where the treaties entered into by Finland could not be applied without the assent of the local *Landsting*. The provision proposed by the Netherlands Government seemed useful, as it provided a practical solution for those complex problems.

The meeting rose at 1 p.m.

²⁰ United Nations, *Treaty Series*, vol. 96, p. 284.

²¹ *Op. cit.* vol. 266, p. 40.

851st MEETING

Friday, 13 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldo.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 57 (The territorial scope of a treaty) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 57.

2. Mr. ROSENNE said he agreed with much of what had been said about article 57 at the previous meeting, except that he had the same slight doubts about the phrase "entire territory" as he had expressed at the sixteenth session.²

3. The article should be retained as it stood at present. The point intended to be covered by the additional paragraph tentatively suggested by the Special Rapporteur was met by the proviso "unless the contrary appears from the treaty"; that proviso could either limit or extend the general rule set out in the article, which was rightly made subject to the intention of the parties, however that might be ascertained. If extra-territorial application needed to be dealt with at all, it should be done in the commentary.

4. The CHAIRMAN, speaking as a member of the Commission, observed that the 1964 discussion had changed the fate of article 57, which had originally been intended to extend the application of treaties beyond frontiers. As a result of that discussion, the Commission had confined itself to stating that a treaty applied to the entire territory of each party "unless the contrary appears from the treaty"—a proviso intended to permit restriction of the scope of application to a part of the territory. At least that was how he had understood the article in the final version submitted by the Drafting Committee.

5. A few of the comments by governments—which added nothing new, since the Commission had already considered the points they contained in 1964—stressed that some treaties were intended to be applied outside the territory of the State, without there being a colonialist régime or any extension of the competence of the State to the detriment of the freedom of other peoples; examples of such treaties were those intended to apply to the high seas or outer space. Those comments were

¹ See 850th meeting, preceding para. 85.

² *Yearbook of the International Law Commission, 1964*, vol. I, p. 48, paras. 23 *et seq.*

well-founded and the Commission's draft should contain a provision covering cases of extra-territorial application, in the form of an additional paragraph in article 57. The Special Rapporteur's proposal (A/CN.4/186/Add.1) could serve as a basis for discussion, but he would prefer the provision to be based not on the competence of the State, which might be open to question, but on international law itself. He would suggest, therefore, that the words "in relation to matters which are within their competence with respect to those areas" be replaced by the words "if international law permits".

6. He hoped the Commission would also make the change suggested indirectly by Mr. Reuter and bring the opening words of the English and French texts of the article into line with the Spanish text, in order to make it clear that the reference was to "territorial" application.

7. Mr. de LUNA said the Commission should not try to improve on the former text, which he was in favour of adopting as it stood.

8. Any discussion of the problem dealt with in article 57—the territorial scope of a treaty—must start from the general principle of the unity and continuity of a State, which was reflected, so far as its territory was concerned, in the principle of the mobility of contractual frontiers which was stated by the Commission in that article. That was both the best and the most convenient general rule—the general presumption which it was sufficient to apply to the territorial unity of the State.

9. It was true that there were cases in which a treaty either did not extend to the entire territory of each of the parties or extended even beyond it. But those cases, which were the consequence of a general rule of international law, could be covered very concisely by the formulation used in article 57, since the final phrase, "unless the contrary appears from the treaty", respected the free will of States, which were in a position to decide the scope to be given to a treaty in each specific case.

10. States which were not unitary in structure and comprised either autonomous territories or associated States could rely on the "federal" clause. For where a federal State was a party to a treaty, it alone, under international law, was entitled to the rights and bound by the obligations provided for in the treaty and was responsible for the performance or non-performance of the treaty. Naturally, that was sometimes rather inconvenient for a federal State if it wished to be a party to a treaty applicable to the entire territory of the parties; in that case, it either made a reservation to the territorial application or it undertook the necessary internal adjustments, so that when it bound itself on behalf of the entire national territory it could answer for the application of the treaty to its autonomous territories or component States. Another formulation, such as the one suggested by the Chairman, would also be acceptable, but it was not necessary.

11. He was also opposed to the proposal put forward by three governments—those of the Netherlands, the United States and Finland (A/CN.4/186/Add.1)—that a paragraph relating to cases of extra-territorial application should be added to the article. The paragraph suggested by the United States said the same thing as

the text drawn up by the Commission. The text proposed by the Netherlands, instead of admitting the exception to the general presumption resulting from the operation of the free will of the parties, established extra-territorial application as a general rule. The Netherlands was, of course, concerned to safeguard the huge natural gas resources under its continental shelf. He was convinced, however, that such practical problems could be solved by the exercise of free will, which the Commission had recognized in article 57.

12. Although there would be certain advantages in stating a second rule in another paragraph in order to take account of the cases referred to by governments, he thought they would be outweighed by the disadvantages, especially those relating to terminology. Whether the expression employed was "matters which are within their competence" or "jurisdiction of the State", it was hard to avoid a taint of the so-called colonial clause, with its reference to "all the territory or territories for whose international relations the parties are responsible". The suggested new paragraph was therefore superfluous and could even be dangerous.

13. Mr. TSURUOKA said he agreed with Mr. Rosenne and Mr. de Luna, and thought that the article should be retained as it stood.

14. He was rather surprised that, in part III of the draft, the Commission dealt only with application in point of time and space without mentioning application with reference to persons or things, for example; but he realized that detailed treatment would complicate the text, and that the work must be of practical value. From a practical point of view article 57 was necessary, since the territorial application of a treaty had sometimes been the cause of a dispute. He was not thinking of colonialism, as there would soon be no more colonies, but of the case of federal States—a subject of which he had had some experience in relations between his own country and the United States of America, particularly in connexion with the application of a treaty between them in all the constituent states of the Union. It was essential to include an article of that kind, but the Commission should not strive too much for perfection and try to cover all aspects of applicability.

15. It would be better not to add anything to the article. The phrase "unless the contrary appears from the treaty" should be interpreted fairly broadly, in the positive as well as the negative sense, so that it was understood that the treaty—if its object so required or the intention was clear—was applicable outside the territory of the parties. If that idea was expressed in the commentary, there would be no problems of interpretation in treaty relations between States.

16. Mr. BARTOŠ said that the Commission had tried to make the article simple so that its meaning would be clearer, but he concluded from the numerous objections raised by governments and the comments made during the discussion that simplicity was not always the best method. The objections were contradictory, but fundamentally most governments disliked the article's simplicity.

17. The Commission had considered at length the question whether it was better to speak of all the terri-

tories for which a State party was internationally responsible, or simply to speak of the entire territory of each of the parties. Both formulas could be defended, but in order to combat colonialism the Commission had chosen the second, fear of neo-colonialism and the vestiges of colonialism having led it to abandon the so-called colonial clause, which had formerly been preferred.

18. Other clauses had reappeared in the comments by governments, particularly the "federal" clause, about which he had misgivings. The expression "the entire territory" seemed to leave outside the scope of the treaty certain detached territories, which were not integral parts of the international community and had no international personality. Should those territories, whose connexion with the State party to the treaty was dubious, be excluded by a general rule, or should their case be dealt with in special clauses to be embodied in the treaty by an express provision? He himself preferred the second solution.

19. It might be asked, however, what the position would be in the case of multilateral conventions and law-making treaties. During a stay in Japan and when reading of events in Cuba, he had wondered what, from the point of view of the territorial application of treaties, would be the fate of territories which were certainly an integral part of the national territory of a sovereign State, but were in practice removed from its jurisdiction and classed as territories of another State: were the bases of Okinawa and Guantanamo part of "the entire territory" of the State to which they had been ceded? According to the Commission's view of the matter, they were not. On the other hand, those areas were excluded from the "entire territory" of the State to which they originally belonged. However that might be, the Commission need not concern itself with such cases, but the objections raised by governments would have opened its eyes to the fact that it had not taken them into consideration.

20. Several governments, including that of Yugoslavia, had raised another question: the application by national courts of rules stated in an international treaty and intended to apply outside the national territory. The questions involved related, of course, to the high seas, warships, outer space and international organizations; the Commission had deliberately omitted them.

21. Consequently, although the article was admittedly incomplete, everyone agreed that it was acceptable as a general principle, as was stated in the Netherlands Government's comment. With regard to the text proposed by the United States Government, although paragraph 1 was acceptable, paragraph 2 was very dangerous. It had not been the Commission's wish that a treaty should apply beyond the territory of each party, whenever such wider application was clearly intended. Nor could he endorse the objections made by the Greek delegation. The Special Rapporteur should give further study to the objections raised by governments and submit more precise conclusions to the Drafting Committee, so that the article could be made more complete, even though it might perhaps be more complicated.

22. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with those members who wished to keep article 57 in much the same form as it was at present, but the Com-

mission would have to make its intention more explicit in order to prevent misinterpretation. The article had been intended to relate solely to treaties capable of being applied within the territory of a party. An additional paragraph to meet the point made by the Governments of Finland, the Netherlands, and the United States, stipulating that a treaty could also apply beyond the territory of any of the parties, did not belong in the present draft, but in a code on the law of treaties, because it was without normative substance.

23. The article as it stood constituted a rule of law, because it established a legal presumption that treaties capable of territorial application created an obligation which had to be performed in respect of the entire territory of a State and that any party wishing to restrict the territorial application of the treaty to only a part of its territory was bound to raise the question of such restriction at the time when the treaty was drawn up and to obtain the agreement of the other party or parties.

24. It was unnecessary to insert another paragraph, as proposed by the Netherlands Government, explicitly enunciating the right of a State composed of distinct autonomous parts to declare which of them the treaty applied to, since that right was already recognized by the final proviso for any State, whether federal or unitary, provided that the other parties to the treaty agreed to a territorial limitation.

25. If the majority were in favour of adding a paragraph to state the obvious fact that a treaty could apply beyond the territory of a party, questions of competence and jurisdiction would have to be left aside. States would regard as inconsistent with, if not the letter, at least the spirit of the Antarctic Treaty, anything in the Commission's draft that could be read as implying that certain States possessed jurisdiction in the Antarctic under international law—which would be the effect of the Netherlands proposal. The same objection applied to the Special Rapporteur's text, which might imply that they would possess competence in that area.

26. Any reference to international law in article 57 would only complicate matters and, in answer to Mr. Bartoš, he felt bound to emphasize that the Commission had never intended the article to cover, even by implication, the kind of serious political issues he had mentioned. Nor had any government understood the text in that sense. The Drafting Committee should adhere to a formula more or less on the lines of the one approved in 1964.

27. Mr. BRIGGS said he had no difficulty in accepting the principle stated in article 57, which was a statement of existing international law; he was opposed to the article's dealing with colonial or federal clauses. To judge from its comments, the United States Government seemed to be of the same opinion, since it regarded the definition as self-evident. That meant that a State with a federal form of government had no difficulty in accepting the principle that a treaty extended to its entire territory.

28. In the United States it was a rule of constitutional interpretation that a treaty was the supreme law of the land and was self-executing, and difficulties had some-

times arisen in certain states of the Union over the application of treaty provisions binding on the entire United States. However, that was a problem not of international, but of internal constitutional law, with which the United States had often been faced when concluding treaties, because it regarded them as applicable to the whole territory of the country.

29. The words "territorial scope" and "scope of application" used in the 1964 text had proved to be misleading and the Special Rapporteur, in paragraph 3 of his observations (A/CN.4/186/Add.1), had raised the question whether it was the Commission's intention to deal with the whole topic of the territorial scope of treaties or only with their application to the internal territory of a State. If the words "scope of application" were retained, an additional provision to meet the point raised by the three governments would be needed. The revision proposed by the Netherlands Government went too far, nor did he favour the phrase "with respect to those areas" in the Special Rapporteur's text. The United States text was preferable, but could be improved upon. The second paragraph might read: "A treaty may also extend to matters within the competence of a party outside its territory, unless the contrary appears from the treaty". However, he questioned whether anything need be said on the scope of application. He had no strong views on the matter and believed that it would suffice to shorten the article to read: "A treaty extends to the entire territory of each party, unless the contrary appears from the treaty".

30. Mr. AGO said that the principle underlying the article was simple, sound and obvious—so obvious that it might be questioned whether it need be stated. The intention was to say that, where a treaty was susceptible of territorial application and was intended to be applied in the territory of each party, it applied in principle to the whole of that territory, and if the parties wished it to be otherwise, they must say so in the treaty. If a State wished to exclude part of its territory from the application of a treaty, it could also say so in a declaration, as the United Kingdom had done in the case of the Channel Islands.

31. The only difficulty raised by article 57 was a small matter of drafting. He agreed with Mr. Jiménez de Aréchaga that it should be made clear that the article related only to certain treaties, namely, those capable of territorial application and which were intended to be applied in the territory of the parties. For there were treaties which had no territorial application and to which the rule could consequently not apply; there were also treaties which, though they had territorial application, were not intended to be applied in the territories of the States parties, for example treaties on the high seas, the Antarctic Treaty and, probably, some day, treaties relating to the moon.

32. In order to define the scope of the article quite clearly, he proposed that the words "intended to be applied in the territories of the parties" should be inserted after the words "The scope of application of a treaty".

33. Mr. TUNKIN said that there was still some confusion about the purport of article 57, and the text approved at the sixteenth session could be construed

in several ways. The most justifiable interpretation was that a treaty was binding upon a State which was a subject of international law as a territorial entity. If that was correct, the Commission's intention had not been clearly expressed and the Netherlands Government's proposed new paragraph, stipulating that a State could limit the application of a treaty to some of its constituent parts and that a declaration to that effect should not be regarded as a reservation, was due to a misunderstanding, since the point was covered by the proviso "unless the contrary appears from the treaty". The parties were free to regulate matters concerning application before signing or ratifying, either in the treaty itself or by means of an additional agreement, a process of which he had had some personal experience during the negotiation of a treaty between the Soviet Union and Denmark.

34. The new wording for article 57 suggested by the United States Government was unacceptable because it was contrary to international law and might lead to the parties stipulating that a treaty applied to the territory of a third State. The Special Rapporteur's new paragraph, submitted to take account of the point made by the three governments, contained certain indispensable safeguards, but it might be even more widely misunderstood than the 1964 text, which could be regarded as stressing the element of the territorial integrity of a State as a subject of international law. The Special Rapporteur's text could be construed as meaning that, subject to the principles of international law in force, the scope of application of a treaty extended to the entire territory of a party; that hardly needed saying.

35. The proposed new paragraph would introduce the issue of application to certain territorial régimes and would alter the meaning of the article. Mr. Ago wished to restrict it to territorial application, but the 1964 text could be read as referring to any treaty.

36. It seemed unnecessary to provide for the possibility of a treaty being applicable to areas outside the territory of a State, because any such treaty would contain the requisite provisions, subject of course to their being in conformity with international law.

37. He supported the principle embodied in the 1964 text, that a State was bound as an entity, unless otherwise agreed, but the text itself needed to be made clearer.

38. Mr. AMADO said he found the 1964 text of article 57 satisfactory, but he understood the reasons for the addition proposed by Mr. Ago and could accept it. He would be in favour of dropping the article, but he recognized that it was sometimes necessary to state the obvious. However, he objected to the use of the expression "The scope of application", which was unnecessarily complicated. It would be better to say "A treaty applies . . .".

39. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Ago that article 57 raised no difficulty in regard to treaties which were territorial in scope, but intended to apply to only part of the territory. There were many treaties of that kind. The State was sovereign; it exercised authority over its territory and was free to conclude a treaty applicable to the whole or only to a part of that territory.

40. The problem became much more difficult when a treaty applied not in the territory of the States parties, but elsewhere. The draft articles would be incomplete if they did not deal with that question.

41. The solution suggested by the United States Government did not seem to him to be acceptable; he did not think it possible to base a rule concerning treaties to be applied outside the territory of the States parties solely on the intention of those parties. Some limitation was necessary. The Netherlands Government had suggested that it should be based on a State's jurisdiction under international law; the Special Rapporteur had proposed something rather similar. He (Mr. Yasseen) had suggested an objective criterion, namely, that a treaty intended to be applied outside the territory of the States parties must be in conformity with international law. For instance, two States could conclude a treaty applicable to the high seas to the extent that international law allowed it.

42. Mr. AGO said that in such cases reference must always be made to the treaty itself. Although it was possible to formulate a residuary rule for treaties that were territorial in scope and intended to be applied in the territory of the State—a rule by which, if the treaty was silent on the matter it would apply to the entire territory—it did not seem possible to draft a residuary rule for treaties relating to such diverse objects as the territory of another State, the high seas, Antarctica or the moon. Moreover, it was inconceivable that a treaty of that kind would not specify its own scope of application.

43. The criterion of conformity with international law was sound, but it was not only relevant to article 57, for the problem of the conformity of a treaty with international law could arise in all respects. Furthermore, if a treaty derogated from a general rule of international law, either that rule was not a peremptory norm and derogation was permissible, or it was a rule of *jus cogens* and derogation was prohibited by another article. Hence a reference to international law would be superfluous and he was still convinced that it would be better to retain the 1964 text.

44. The CHAIRMAN, speaking as a member of the Commission, said he saw no objection either to leaving the article as it stood, or to making the addition proposed by Mr. Ago and supported by Mr. Tunkin. But if it were so worded, article 57 would leave aside an important problem which had been raised by several governments and which ought to be dealt with.

45. It was true that there was a general requirement that all treaties must at least be in conformity with *jus cogens*. But as Mr. Tunkin had pointed out, the intention of the parties could not be taken as the sole basis for a rule on treaties applicable outside the territory of the parties. It was essential to stress that the intention of the parties was not sovereign for the purpose of determining such an extension of a treaty, and that the extension must be in conformity with international law. A reservation to that effect would be of value, even though, generally speaking, every treaty must be in conformity with *jus cogens*.

46. Mr. CASTRÉN observed that only a few members of the Commission had supported the proposal made

by three governments that cases of extra-territorial application should be provided for. The majority seemed to think it would be sufficient to state a general rule for normal cases which gave the parties the right and the freedom to extend or restrict the territorial scope by a special provision or some other specific statement in the treaty itself. He was not opposed to the latter solution.

47. The Netherlands Government's proposal to add a new paragraph relating to States consisting of autonomous regions each of which was free, under constitutional provisions, to decide whether or not to accept a treaty concluded with foreign States, had been criticized for different reasons by several members of the Commission and seemed to have no chance of being adopted. But that proposal had nothing to do with colonialism, which the Commission had discussed on several occasions, in particular, during the two readings of article 3.³ On the contrary, the Netherlands proposal was designed to safeguard the independent status of states members of a federal State and that of autonomous territories, and at the same time to facilitate the conclusion and ratification of treaties by States having a special constitution. In such cases, if it were thought that the treaty should be applied to the entire territory, a provision to that effect could be inserted in the treaty itself; and that was the effect of the Netherlands proposal. The Special Rapporteur stated in his sixth report (A/CN.4/186/Add.1) that the matter raised by the Netherlands Government had been much discussed by the Commission. After re-reading the relevant summary records, he (Mr. Castrén) had come to the conclusion that the proposal was in fact a new one; but, if the Commission did not wish to adopt it, he would not press the point.

48. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission seemed to be assuming that there were two entirely separate categories of treaty; those capable of application within the territory of a State party and those capable of application outside that territory; but the reality was not so clear-cut. There could be, and were already in existence, international instruments in which both elements were present, such as the Conventions on the Law of the Sea⁴ and the Antarctic Treaty.⁵ Both contained provisions applicable within and without the territory of a State party, such as the provisions concerning the nationality of ships and the requirement to disseminate scientific information obtained in the Antarctic. The argument that article 57 was relevant to one category of treaties only could not stand, but Mr. Ago had offered a solution of the problem raised by the Chairman and Mr. Tunkin, and a way out of the difficulty would be for the article to refer to "treaties capable of being applied in the territory of a State".

49. Mr. AMADO said he would once again plead the cause of States in the Commission. By the proviso "unless the contrary appears from the Treaty" article 57 left States completely free. But they were already re-

³ Yearbook of the International Law Commission, 1965, vol. I, pp. 23 *et seq.* and 1962, vol. I, pp. 57 *et seq.*

⁴ United Nations Conference on the Law of the Sea, 1958, Official Records, vol. II, pp. 132 *et seq.*

⁵ United Nations, Treaty Series, vol. 402, p. 72.

sponsible for the expression of their intentions. To go on to say that a treaty must be in conformity with international law, as proposed by the Chairman, was surely superfluous.

50. Mr. BRIGGS said that Mr. Ago's solution appeared to be gaining support; he had only one doubt: that to keep the words "scope of application" might cause misunderstanding. He hoped Mr. Ago could agree to some such wording as "a treaty capable of being applied in the territory of each party extends to the entire territory". A second paragraph would then be unnecessary.

51. Mr. de LUNA said he must first make it clear that he had had no intention of implying that some of the formulas which had been proposed were tinged with colonialism.

52. He was opposed to the insertion of an additional paragraph for the reasons given by Mr. Jiménez de Aréchaga and other speakers; but he could support either Mr. Ago's formula or the amendment suggested by Mr. Amado.

53. Mr. TUNKIN said that, since a treaty was binding on a State as a territorial entity, the question the Commission had to decide was what was the physical scope or "sphere" of its application? The Treaty concerning the Archipelago of Spitzbergen⁶ provided an illuminating example, because it was concerned with only a part of Norwegian territory, but was binding upon Norway as a territorial entity. If Norway had been a federal State, no constituent part could have claimed that it was not bound by the treaty.

54. States were free to conclude treaties covering a whole range of different subjects and there could be no question of a constituent part of a federation, say a republic of the Soviet Union, not being bound by the treaty as a whole or being able to plead reasons of internal constitutional law for not assuming the obligations imposed by the treaty.

55. He subscribed to Mr. Ago's views concerning the physical scope of application.

56. Mr. TSURUOKA said he had little to add to what Mr. Jiménez de Aréchaga and Mr. Tunkin had said. He was not sure that, in practice, the addition proposed by Mr. Ago would really clarify the idea the Commission wished to express. All treaties were, in a sense, intended to be performed in the territory of the parties. Even where a treaty related to the high seas or to outer space, the court called upon to adjudicate on a violation would have to base its judgment on the provisions of the treaty. If the relevant provisions applied to the high seas or to outer space, the treaty applied outside the territory of the State. He had confidence in the good sense of the Drafting Committee, but had wished to draw its attention to that point.

57. Mr. LACHS, amplifying the comments he had made at the previous meeting, said that the Commission was faced with an extremely interesting theoretical and practical issue raised by the problem of how treaties regulated events taking place outside the actual physical territory of a party. At the sixteenth session the Commission had been mainly concerned with how to define

the area within which a treaty applied. There had been general agreement that there was no need to revert to the problem of the colonial clause.

58. There seemed to be no real doubt that the question of the federal clause could be left aside; when that point had arisen in the Sixth Committee in connexion with two international instruments, the consensus of opinion seemed to have been that the Commission's draft articles need contain no express provision on the matter.

59. Article 57 was drawing more attention to the problem of application to areas outside the territory of a State party, and when commenting on it at the previous meeting⁷ he had had in mind, particularly, the need to ensure that the extension of treaties to such areas would not be left to the discretion of the State party concerned. The difficulty was how to draft such a provision. Clearly the land territory of a State must be taken as the point of departure, and the proviso at the end of the article should be retained. He was inclined to accept in principle Mr. Ago's suggestion, as amplified by Mr. Tunkin, but it would be necessary to explain as fully as possible in the commentary, what the Commission was trying to do. The aim must be not to hinder the development of a branch of international law in the making. He was particularly interested in matters pertaining to outer space, concerning which it was so vital for States to reach agreement.

60. Mr. EL ERIAN pointed out that the Special Rapporteur had not made an unqualified proposal for an additional paragraph, but had rather put forward a tentative text in case "the suggestion of the three governments that cases of extra-territorial application should be covered commends itself to the Commission" (A/CN.4/186/Add.1). In the 1964 discussion,⁸ a number of suggestions had been made to the effect that article 57 (then article 58) should cover such cases, but the Commission had ultimately decided against it. In particular, it had decided not to include a provision on the application of treaties to territories for which a party was internationally responsible, in order to avoid the controversies that arose from the association of that formula with the "colonial" clause.

61. A number of important questions had been raised during the present discussion and the Drafting Committee would no doubt find suitable language to prevent any misconstruction being placed on the provisions of article 57. Personally, he agreed with Mr. Ago's suggestion, which would make it clear that the article dealt with territorial application and did not prejudice the application of a treaty outside the territory of the parties.

62. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had centred on two main questions: first, the possible insertion of an additional paragraph, and secondly, the more fundamental question of the terms of the provisions of the one paragraph which all members were agreed to retain.

63. On the first question, it was clear that a large majority of the members were not in favour of the insertion of an additional paragraph. He had not

⁷ Paras. 97 *et seq.*

⁸ *Yearbook of the International Law Commission, 1964*, vol. I, pp. 46 *et seq.* and pp. 167-169.

⁶ League of Nations, *Treaty Series*, vol. 2, p. 8.

himself made a definite proposal on that point, and he did not wish to take the matter any further.

64. On the second question, it should be noted that the title of the article "The territorial scope of a treaty" gave the impression that its contents covered much more than they really did. Unless the contents of the article were broadened to cover the whole question of the territorial scope of treaties, that title would have to be reworded in narrower terms.

65. He wished to emphasize that the concluding proviso, "unless the contrary appears from the treaty", did not cover by implication the question of extra-territorial application. To read such an implication into it would be contrary to the natural meaning of the words. If the Commission desired to cover the question of extra-territorial application it should do so explicitly; otherwise it should admit that the question was not dealt with in article 57.

66. In the additional paragraph which he had tentatively put forward, he had used the expression "within their competence" for the purpose of placing a limitation on the idea that the mere agreement of the parties could enable them to extend the application of a treaty outside their respective territories. It was for that reason that he had been unable to accept the United States proposal, which could lend itself to possible misinterpretation on that point.

67. It was essential to draw a clear distinction between three separate questions. The first was the capacity of a State to act for itself, for its federated component units in the case of a federal State, and for its dependent territories. The second was the principle that when a State concluded a treaty it bound itself in respect of the whole of its territory and not merely part of it. The third was the actual territorial application of the treaty, and since there appeared to be a general desire in the Commission to cover that question alone, it would be necessary to amend the wording of article 57 on the lines suggested by Mr. Ago.

68. The question would then arise whether the Commission should adopt a provision stating the proposition that when a State entered into a treaty it bound the whole of its territory. As he saw it, that proposition was covered by the general concept of what constituted a State; the expressions "State" and "party" as used in the draft articles could only be taken as referring to the whole entity which constituted the State in international law. If the Commission were agreed on that point, the contents of article 57 could be safely confined to the question of territorial application, especially in the particular context of part III of the draft articles.

69. The Drafting Committee would, of course, have to consider the possibility of replacing the term "application" by a less ambiguous one, so as to make it clear that article 57 was intended to refer to territorial application and not to the proposition that a treaty entered into by a State bound the whole of its territory.

70. He was in entire agreement with Mr. Jiménez de Aréchaga as to the need to avoid giving the impression that a clear-cut distinction could always be made between two types of treaty: those which had a territorial application and those which had not. The example of

the exchange of information called for under the Antarctic Treaty showed that a treaty of the first type could involve more than mere territorial application.

71. In the light of that observation, it would perhaps be desirable to replace the reference to the "scope of application of a treaty" by a reference to the "scope of application of the provisions of a treaty". Such a formulation might help to avoid the misunderstandings which had prompted the suggestion by the three governments discussed in his observations.

72. He accordingly proposed that article 57 be referred to the Drafting Committee, with instructions to prepare a provision based on the 1964 text, amended on the lines suggested by Mr. Ago.

73. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 57 to the Drafting Committee, as proposed by the Special Rapporteur.

*It was so agreed*⁹

ARTICLE 58 (General rule limiting the effects of treaties to the parties) [30]

[30]

Article 58

General rule limiting the effects of treaties to the parties

A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon a State not party to it without its consent.

74. The CHAIRMAN invited the Commission to consider article 58, for which the Special Rapporteur had proposed a new title reading:

"General rule limiting to the parties the obligations and rights arising under a treaty"

Although, in accordance with its usual practice, the Commission would deal separately and successively with each of the articles 58 to 62, he wished to draw attention to paragraph 1 of the Special Rapporteur's observations on article 58, which read: "This and the next four articles form a group covering the topic of the effect of treaties in creating obligations or rights for third States. Accordingly, in considering each of these articles it is necessary to keep in mind the contents of the five articles as a whole" (A/CN.4/186/Add.2).

75. Sir Humphrey WALDOCK, Special Rapporteur, after thanking the Chairman for underlining the inter-connection of articles 58-62, which was particularly close in the case of the first three of those articles, said that in 1964, there had been a considerable division of opinion between members of the Commission, particularly on the question of rights created in favour of third parties. As a result of the discussion, the Commission had adopted as the first article of the group the one which now appeared in the draft as article 58, and which was intended to state in very general terms the principle in the matter. The rather neutral formulation of article 58 was designed to take account of the views of some members on the provisions embodied in article 60.

76. There had been few government comments on article 58. The Governments of Cyprus and Algeria

⁹ For resumption of discussion, see 867th meeting, paras. 11-13.

had drawn attention to the connexion between its provisions and those of article 36. Article 58 made provision for a treaty being used as a means of binding a third party with the consent of that party; if that consent was obtained by coercion, it was clearly invalid under article 36. That question had been raised when article 36 had been discussed at the previous session,¹⁰ and the general feeling had been that, although the Commission might consider introducing a provision to deal with it into article 58, it was perhaps already covered by the general language of article 36 as adopted at that session.

77. He had proposed a change in the title of the article in order to meet the point raised by the Netherlands Government, as explained in paragraph 2 of his observations.

78. Mr. ROSENNE said that he was in general agreement with the conclusions reached by the Special Rapporteur.

79. With regard to the connexion between article 58 and article 36, he recalled that at the previous session he had accepted the general view on article 36 largely because of the stress laid by Mr. Ago on the need for a lapidary text. He had done so, however, subject to the question being dealt with in the commentary and his position was the same with regard to article 58 and its commentary. The question was one to which governments would have to give some attention at the conference of plenipotentiaries.

80. The Drafting Committee would have to examine the wording of article 58 carefully; in its terms, it applied only to the question of imposing obligations or conferring rights upon States not parties to a treaty. Paragraph (2) of the commentary adopted in 1964,¹¹ however, introduced another element, which was not covered by the text of article 58 itself; the question of the modification of legal rights and obligations, and perhaps even of their extinction. From the legal point of view, the modification of rights was not the same as the imposition of obligations. Article 61 dealt with the revocation or amendment of provisions regarding obligations or rights of third States, and the question arose whether article 58 was fully consistent with the remainder of the group of five articles.

81. Moreover, for the same reasons, he had some doubts about the Special Rapporteur's proposed new title for article 58.

82. Mr. BARTOŠ said he was quite convinced that articles 58 to 62 were inseparable as to substance. Nevertheless, in his capacity as a member of the Commission, he did not agree with the view expressed by the Yugoslav Government that the first three of those five articles could be combined in one article; he was more inclined to take the Czechoslovak Government's view that article 58 stated a general principle which should be stressed as such. Moreover, the Yugoslav Government was not at all opposed to that principle.

83. With regard to the comment by the Netherlands Government, he did not agree that the transfer of a piece of territory constituted an exception to the principle

stated in article 58. In his opinion, the transfer of a piece of territory did not entail the transfer of the contractual situation resulting from prior treaties, for in that case the frontiers represented legal facts the contractual nature of which had already been consummated. The State to which the territory was transferred was not obliged to accept that territory, but if it did so it could not accept more than was transferred to it.

84. There was no reason to make any change in the rule stated in article 58, as formulated in 1964. The rule was a simple one, as the Greek delegation had observed, but it was of great importance and almost a part of the international public order. The Commission should therefore bear it in mind in reviewing the articles that followed.

85. Mr. AGO said that the more he thought about it, the more convinced he became that article 58 should be left as it stood. The comments which had been made about the title seemed to him to have little legal justification. In that context, the term "effects" could only denote legal effects, not factual consequences. Although he was not absolutely opposed to changing the title, he thought, like Mr. Rosenne, that it would be preferable not to do so.

86. If reference were made to article 36, it would also have to be made to all the other articles concerning invalidation of consent, such as those on error and fraud, for there was no justification for restricting the reference to invalidation by the threat or use of force. Consent to be bound by obligations or to acquire rights under article 58 created an agreement and therefore came within the scope of the rules relating to treaties. The Commission could mention in the commentary that the rules relating to invalidation of consent must be taken into account in applying article 58, but it would be dangerous to mention only one ground for invalidation.

The meeting rose at 12.55 p.m.

852nd MEETING

Monday, 16 May 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 58 (General rule limiting the effects of treaties to the parties, (continued)¹)

¹ See 851st meeting, preceding para. 74.

¹⁰ *Yearbook of the International Law Commission, 1966*, vol. I, part I, 826th-827th meetings and 840th meeting, paras. 84 *et seq.*

¹¹ *Yearbook of the International Law Commission, 1964*, vol. II, p. 180.

1. The CHAIRMAN invited the Commission to continue consideration of article 58.
2. Mr. de LUNA said that the Special Rapporteur was to be congratulated on the sound legal sense reflected in his observations and on the impartiality with which he had respected the division of opinion in the Commission, even at the cost of his personal convictions. At the second reading, the Commission should not concern itself with the doctrinal differences which had divided it into two almost equal groups in 1964; in all good faith and setting theoretical considerations aside, it must arrive at specific results which were satisfactory to all.
3. His own view, which he had expressed in 1964, that a treaty could create subjective rights² was based on the case-law of the Permanent Court of International Justice in the German Interests in Polish Upper Silesia case³ and above all in the Free Zones (1932) case;⁴ it was also supported by State practice, as further exemplified in various articles of the peace treaties concluded in 1947: article 29 of the treaty with Finland,⁵ article 76 of the treaty with Italy,⁶ article 28 of the treaty with Bulgaria⁷ and article 32 of the treaty with Hungary.⁸ It was quite obvious, however, that the important practical problem was that of the revocability or irrevocability of the right conferred on a third party.
4. It was, indeed, immaterial whether the third party expressly agreed to accept the right conferred on it by a treaty or remained silent until it became convenient to decide to exercise that right; as a matter of doctrine, the mere exercise of the right could always be interpreted by those who did not share his own opinion as acceptance *rebus ipsis et factis*, by conclusive acts, and it was at that point that the "collateral agreement" was introduced, which he himself regarded as a fiction, but which others considered to be necessary.
5. In any event, what mattered was that, in order to achieve a practical result, the members of the Commission should agree on the consequences of the rights created either by the treaty itself or by the subsequent consent of the third party. It was universally accepted that, without its prior consent, no State could be bound to anything whatever by a treaty to which it was not a party; the opposite view would be contrary to the principle of the sovereign equality of States. Since a State could not be bound without its consent, it could not be obliged to exercise a right conferred upon it by a treaty to which it was not a party; but the act of conferring a right upon it by a unilateral or bilateral act did not infringe the equality or the independence of States. Similarly, every State was free to confer upon another State, by a unilateral legal act, a right which might be irrevocable by virtue of the principle that no State could disavow its own acts without violating the good faith essential to international relations, and the beneficiary State was free to exercise that right or not to do so.
6. Naturally, he was not very satisfied with the wording of article 58, which was contrary to the facts of international life, but in a spirit of compromise he would accept that imperfect solution.
7. Turning to the comments by the Algerian delegation and the Government of Cyprus, he observed that both were rightly concerned to ensure that it could not be inferred from the article that an obligation could be imposed on a State by extorting a consent vitiated by coercion. He saw no need for continual restatement of the principle already laid down by the Commission concerning invalidation of consent as a ground for nullity or voidability; the *pacta sunt servanda* rule in itself implied an authentic treaty which was not vitiated. Consequently, there was no reason to recast the article, as desired by Algeria and Cyprus. If absolutely necessary, that obvious principle could be further stressed in the commentary.
8. The Netherlands Government claimed that, in exceptional cases, a treaty could impose obligations upon a third party. In his opinion, that view was wrong, for never, without any exception, could a treaty impose an obligation upon a third party without its consent. That did not mean that contractual provisions agreed between two or more States did not have repercussions on third States, but those were indirect repercussions and effects deriving not from the treaty, but from other rules of international law. The Netherlands Government was confusing them with obligations and rights directly created by a treaty. Among other examples was the most-favoured-nation clause, where there was no creation of rights for the third party by the treaty; the third party, which was a party to the first treaty, was merely supplementing a certain rule with elements contained in subsequent treaties.
9. The Netherlands Government's suggestion should therefore be rejected. On the other hand, he approved of the proposed change in the title and the other minor amendments suggested by the Special Rapporteur.
10. Mr. VERDROSS said that, as the article had been adopted by an overwhelming majority on the first reading, he would not oppose it, but he was still convinced that half of it was not correct. He recognized that there were no treaties which imposed obligations on a third party, but he could not agree that there were no treaties which imposed rights on a third party.
11. Mr. REUTER said that article 58 was one of those whose merit lay in their brevity. From that point of view, the Special Rapporteur's observations merited approval and the Commission should retain the article as it stood.
12. It might perhaps be well to point out that there were a number of special situations which constituted exceptions to the first phrase: "A treaty applies only between the parties"; for example, a treaty setting up an international organization certainly applied as between that organization and the parties. It would be enough simply to mention one case of that kind.
13. The CHAIRMAN, speaking as a member of the Commission, said he wished to comment on two points that had been raised in connexion with article 58. Unlike the Netherlands Government, which challenged the principle itself, he did not think the article was open

² *Yearbook of the International Law Commission, 1964*, vol. I, p. 90, paras. 29 *et seq.*

³ *P.C.I.J.* 1926, Series A, No. 7.

⁴ *P.C.I.J.* 1932, Series A/B, No. 46.

⁵ United Nations, *Treaty Series*, vol. 48, p. 248.

⁶ *Op. cit.*, vol. 49, p. 158.

⁷ *Op. cit.*, vol. 41, p. 76.

⁸ *Ibid.*, p. 202.

to question. That was only a matter of a misunderstanding, or rather of the need to view the article from a different angle. Treaties, like agreements in municipal law, produced effects only between the contracting parties; that was a recognized principle. But, like those agreements, treaties created certain legal situations which could and should be recognized. That was a different question, however, namely, that of the extent to which the legal situations created by the treaty could be invoked against third parties; in other words, the question of the indirect effects of the treaty, which was governed, not by the treaty itself, but by other sources of international public order. The wording adopted by the Commission was therefore correct, though the words "A treaty applies only between the parties" might be replaced by the words "A treaty produces effects only between the parties".

14. The Algerian delegation and the Government of Cyprus wished to add to the article a provision stipulating the nullity of obligations imposed on a third State, in other words, consent obtained by coercion. He could see no need for that; the case was covered by the draft as a whole. True, the members of the Commission had not been in agreement on the rights arising from a treaty; some had maintained that a treaty itself could directly create rights for third parties, whereas others had supported the theory of the collateral agreement. With regard to obligations, on the other hand, the Commission had unanimously recognized that the basis of any obligation which the parties to a treaty wished to impose on a third State was consent, or more precisely, a collateral or supplementary agreement grafted on to the original treaty. That new agreement must be subject to the general rules governing treaty-making and could be void if there were grounds for nullity. From that point of view too, it would therefore be better to retain the existing wording.

15. Mr. CASTRÉN said he accepted the new title for article 58 proposed by the Special Rapporteur, which was an improvement. The present title could lead to confusion, as the comments of the Netherlands Government showed. That change was all that was needed and the Commission could accept the text of the article as it stood.

16. Mr. BRIGGS said that the new title for article 58 suggested by the Special Rapporteur, which was designed to correct a defect in the drafting, would create another difficulty inasmuch as rights and obligations could be provided for in a treaty for individuals, if the parties so intended. Given the definition of a party in article 1 (f) (A/CN.4/L.115), such a change in article 58 might prove restrictive. The difficulty was due to the words "applies only between the parties". An illustration was provided by Article 3 in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War⁹ and Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,¹⁰ which conferred rights on "parties to the conflict", though the conflict did not necessarily have to be of an international character and the entities did not have to be States parties to the two treaties or even States at all.

⁹ United Nations, *Treaty Series*, vol. 75, p. 136.

¹⁰ *Ibid.*, p. 288.

17. The final words of the article "without its consent" had been discussed at length and he would not reopen the issue except to point out that they destroyed the balance supporting the Commission's claim in the 1964 commentary¹¹ that it had tried to take a neutral stand in the doctrinal controversy. The inclusion of those three words produced an article which was somewhat biased; they could safely be omitted without involving the Commission in a theoretical argument about the general principle stated in article 58, which he endorsed. His criticism was directed only at the wording. In his opinion, the article could be redrafted to read: "A treaty neither imposes any obligations nor confers any rights upon a State not a party to it".

18. Mr. LACHS said he shared the Special Rapporteur's view that the comment by the Netherlands Government was mainly due to a misunderstanding and was not very relevant. The effects of treaties could be direct or they could be indirect and far-reaching, and leaving aside treaties defining frontiers or demarcating the continental shelf, it could even be argued that a trade agreement between two non-adjacent States could indirectly affect a third State across the territory of which their goods had to be transported. That argument could be pushed too far.

19. He had had doubts about the title of the article, particularly the word "limiting", and they persisted with regard to the new title suggested by the Special Rapporteur. The issue was not a semantic one, but involved the essence of a treaty commitment. The proposition that a treaty could be limited as to its substance was not sustainable, because only the parties could impose obligations on themselves or create rights arising out of the treaty itself. That constituted the very essence of a treaty and was not a limitation. It should be brought out more clearly in article 58.

20. There was obviously a risk of the article being examined by governments and lawyers as a separate entity and not in the context of the three articles, 58-60, taken together. In order to obviate any misunderstanding, those articles should be given a common title or heading.

21. Mr. EL-ERIAN said that the rules set out in articles 59 and 60 had been formulated as exceptions to the general rule in article 58, which the United States Government rightly regarded as a fundamental one governing the effects of treaties on States not parties to them. The principle involved was a crucial element in the theory of the sovereign equality of States in modern international law.

22. The general structure of article 58 was satisfactory and it should be maintained in its present succinct form. Although he agreed with the Chairman that the points put forward by the Government of Cyprus and the Algerian delegation were well taken, there was no need to elaborate the article.

23. During the final reading of the whole draft, the points raised in connexion with article 36 could be considered. The comment of the Netherlands Government prompted him to emphasize the importance of distinguishing between the legal effects and the factual

¹¹ *Yearbook of the International Law Commission, 1964*, vol. II, pp. 180-181.

consequences of a treaty, both direct and indirect. Even in municipal law a distinction was drawn between responsibility for the direct consequences of an act and indirect consequences that might not be attributable to the act giving rise to the responsibility.

24. Although he appreciated the Special Rapporteur's scrupulous concern to dispel the doubts of governments by changing the title of the article, he was not convinced that that was absolutely necessary; perhaps the same purpose could be achieved by clarifying the commentary. Evidently some of the comments had failed to take into account that articles 58, 59 and 60 formed a group that should be considered together; their inter-relationship would need to be given greater emphasis.

25. Mr. TUNKIN said that the article had been discussed at length at the sixteenth session and as it had not drawn many comments from governments or delegations, it could be assumed that the 1964 draft was generally regarded as acceptable. He fully agreed with the views of the Special Rapporteur and Mr. de Luna on the comment by the Netherlands Government—that issue had been frequently raised from different stand-points, mostly as a result of misconceptions of the purport of the article.

26. The Algerian delegation's point was a valid one, but if an obligation were imposed upon a third State without its consent, that would be contrary to the rule in article 59, so that nothing need be added to article 58.

27. The Government of Cyprus had really raised an issue of interpretation, but its point was in fact already covered, though perhaps not expressly, because the whole draft was based on the assumption that situations of the kind envisaged by that Government had no legal effect. The Drafting Committee should give the matter some attention; at that stage he was unable to express a firm opinion on whether it called for more explicit treatment.

28. The 1964 text, though a compromise, was logical and should be retained. The Commission had agreed that, for obligations on third States to be valid, their consent was absolutely indispensable, but where rights were concerned, there were two schools of thought. He was among those who held that the principle of the sovereign equality of States must apply and that, there being no international legislature, no group of States could create rights for third States without their consent. To put it in a different way, an offer could be made to create such rights for third States, which they could accept or reject; if they accepted that would constitute a kind of additional agreement.

29. Mr. PAREDES observed that the governments which had commented on articles 58 to 60 had really discussed problems entirely different from that dealt with in article 58. For example, they had referred to article 36 which dealt with a treaty that had had no legal effect because there had been use of force and consequently no free consent. But articles 58 to 60 referred to a genuine treaty, valid between several States which had intended not only to settle problems existing between them, but also to create obligations for, or confer rights on, third States.

30. As Mr. de Luna had clearly shown, there were natural effects or consequences of treaties which arose from the very fact of the treaty and existed in themselves, independently of the will of the authors. But there were other acts by which the authors intended to establish rights and obligations for States which had not taken part in the conclusion of the treaty. In such cases, given the right of every State to equality and sovereignty, it was impossible for a State to accept the consequences of obligations created or even of rights conferred by other States. It was absolutely essential that there should be consent by the third State. In reality, there was a form of accession or a collateral treaty between the States which made the original treaty and the State on which specific obligations had been imposed. Only the express will of that State could give validity to the obligations created and the rights offered by the States which had concluded the first treaty.

31. Although the drafting of article 58 was excellent, the Commission might perhaps be even more specific and dispel the doubts felt in some quarters by inserting the words "express and free" before the word "consent".

32. The change in the title suggested by the Special Rapporteur seemed to him to be logical.

33. Some Governments had mentioned the obligations arising from a treaty imposed on an aggressor. In his opinion, that was a case of responsibility, of a penalty incurred for unlawful behaviour, which was out of place in the law of treaties.

34. Mr. JIMÉNEZ de ARÉCHAGA said that the comments by Mr. Briggs and Mr. Reuter about the way in which the word "applies" might be interpreted were important, since the text could be read to mean that rights and obligations created by treaties concluded in accordance with the draft articles could not apply to individuals or to international organizations. That point must be examined by the Drafting Committee; a possible solution might be to drop the words "applies only between the parties and".

35. Some changes must also be made in the title so as to make it clear that the rule was concerned not with the repercussions of a treaty, but with the rights and obligations created between the parties; it was important to avoid the kind of misunderstanding exemplified by the Netherlands Government's comment. Mr. Lachs's suggestion that a general title be inserted to cover articles 58, 59 and 60 was a good one, because in their present form they were slightly contradictory.

36. The words "without its consent" should be dropped; that would not mean going back on the compromise reached at the sixteenth session, because without them the rule would be even more categorical, particularly since under article 59 the agreement of the third State would be required and under article 60 its assent.

37. The provisions on what invalidated consent, set out in articles 31 to 37, were applicable to both the acts of agreement and assent required under articles 59 and 60, and the application of the provisions of articles 32 to 35 would cause no difficulties.

38. There seemed to be no loop-hole in article 58 as far as the application of articles 36 and 37 was concerned.

He agreed with Mr. Ago's argument at the previous meeting¹² that the Commission must make clear in its commentary that, as far as obligations were concerned, the case which article 58 was intended to cover would imply a collateral agreement or a second treaty, to which the provisions of articles 36 and 37 would be applicable.

39. But that would not be true in regard to rights, because in the opinion of many members of the Commission no collateral agreement or second treaty would result; that view was reinforced by the fact that the Commission had decided not to include an article on objective régimes dealing with treaties that had come to depend on stipulations in favour of third States, such as treaties regulating navigation on canals. Where rights were concerned, the theory of a collateral agreement was not consistent with reality.

40. However, the provisions of article 36 would be applicable, because every time a right was created in favour of a third State there must be a corresponding obligation deriving from the treaty. If a treaty containing stipulations in favour of a third State became void because it had been procured by coercion, fraud or any other form of invalid consent or because it was contrary to a *jus cogens*, not only the treaty, but every right and obligation deriving from it must fall to the ground, both for the parties themselves and for third States. All the grounds of invalidity set out in part II, section II, of the draft would vitiate the consent required in article 58.

41. Mr. PESSOU said that article 58 had given rise to long discussions in 1964, during which the Commission had heard the same proposals as it was hearing at present. The comments by governments were more relevant to article 60. The Commission was really discussing two rules; while stating that a treaty produced effects only for the parties, it had come upon the contrary principle. He drew attention to the text proposed by Mr. Briggs, as Chairman of the Drafting Committee in 1964.¹³ The idea of combining articles 58 to 60 might be considered, but he thought the text proposed by the Special Rapporteur was worth retaining.

42. The Commission should be grateful to the Netherlands Government for seeking to regulate by international law the questions relating to the continental shelf which were of such vital concern to it, but the solution it proposed went too far and could not be adopted.

43. Mr. BRIGGS said that if the titles of articles 58, 59 and 60 were not combined, the first might be given the title "Treaties and third States: general rule", so as to emphasize that the articles dealt with rights and obligations for States only.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that most of the difficulties that had arisen over article 58 were of a drafting character and the Drafting Committee would examine all the suggestions put forward. Clearly articles 58, 59 and 60 would have to be dealt with together, so as to make their structure as consistent as possible.

45. Whatever the merit of the point made by the Government of Cyprus and the Algerian delegation concerning the applicability of article 36, no change was called for in article 58 and the matter could be considered when article 36 was reviewed.

46. The point made by Mr. Rosenne at the previous meeting, namely, that article 58 failed to cover cases of a treaty seeking to modify or extinguish the rights of third States, had not been taken up by other speakers and he presumed that the Commission did not wish it pursued. The point had been referred to in his original proposal¹⁴ and when it had been discussed he had drawn the Commission's attention¹⁵ to the fact that that aspect of the problem had been considered in the *Island of Palmas* arbitration.¹⁶ But the Commission had regarded the treaties in question as examples of a particular form of treaty imposing obligations on third States and purporting to deprive them of rights. He had inferred from the discussion then that the Commission did not wish to complicate the drafting of article 58 by covering the point, though it was a valid one.

47. There was general agreement that the title was not very satisfactory and the one suggested by Mr. Briggs certainly was more attractive, but the Commission had been chary of using the expression "third States" although it was common in legal usage and had in fact appeared in his original proposal. The suggestion made by Mr. Lachs should certainly also be considered by the Drafting Committee.

48. However general the expression of the rule in article 58, there was the risk that the words "applies only between the parties" might be interpreted as excluding the possibility of rights and obligations arising out of a treaty for individuals or international organizations, and that difficulty would not be overcome by the introductory article which the Commission intended to insert, limiting the scope of the draft articles to treaties concluded between States (A/CN.4/L.115).

49. Although it was natural in English to use the word "applies" or "application", the term was not free from ambiguity and it was difficult to find an alternative that would convey with precision the idea the Commission wished to express: that a treaty was binding only between the parties. The word "valid" would also not be appropriate. Mr. Briggs's suggestion that the words "applies only between the parties and" should be deleted, because the rest of article 58 would suffice to cover the two aspects of the rule, should be considered by the Drafting Committee.

50. The phrase "without its consent" had been inserted at a fairly late stage in the discussion at the sixteenth session, primarily at the instigation of Mr. Ruda,¹⁷ in order to link up articles 58, 59 and 60. It had been argued that without that phrase article 58 would appear to contradict the provisions of articles 59 and 60. Perhaps Mr. Lachs's suggestion of a general title covering the three articles—a device contemplated at the

¹² Para. 86.

¹³ *Yearbook of the International Law Commission, 1964*, vol. I, p. 173, para. 62.

¹⁴ *Op. cit.*, vol. II, p. 17 (article 61).

¹⁵ *Op. cit.*, vol. I, p. 66, para. 71.

¹⁶ *United Nations Reports of International Arbitral Awards*, vol. II, p. 829.

¹⁷ *Yearbook of the International Law Commission, 1964*, vol. I, p. 175, para. 97.

sixteenth session—would help, but some contradictions would still remain. His own proposal of the words “except as provided in articles 59 and 60” had raised strong objections from those members of the Commission who did not admit the possibility of treaties creating rights of their own force. Various other devices for providing some kind of explanation of the relationship between articles 58, 59 and 60 had been considered, and the wording approved had been carefully chosen to cover tacit forms of agreement or assent as well as express agreement. The compromise reached was a delicate balance, but it had secured majority support as finally approved in 1964.

51. Clearly a further effort should be made to remove any appearance of contradiction between the three articles. He would not commit himself to supporting the words “without its consent” as the means for doing so, being one of those who considered that a treaty could create rights in favour of a third State without any agreement on its part. On the other hand, he recognized that ultimately the assent of the beneficiary to the right was necessary, because no State could be compelled to accept a right.

52. He suggested that the article be referred to the Drafting Committee for examination in the light of the discussion.

*It was so agreed.*¹⁸

ARTICLE 59 (Treaties providing for obligations for third States) [31]

[31]

Article 59

Treaties providing for obligations for third States

An obligation may arise for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound.

53. The CHAIRMAN invited the Commission to consider article 59. The Special Rapporteur had suggested that the English text be modified to read:

“An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend that the provision may be a means of establishing the obligation and the State in question expressly agrees to be bound by that obligation.”

54. Sir Humphrey WALDOCK, Special Rapporteur, said that there had been few government comments on article 59. The Government of Cyprus had referred to its comment on the subject of duress, made in connexion with article 58. Since the Commission had already decided to leave that question for further consideration, he would not dwell on it.

55. In redrafting the provision, he had replaced the opening words “An obligation may arise” by the words “An obligation arises”. He had thought that the permissive language used in the 1964 text was not very logical; once the State in question had expressly agreed to be bound, the obligation would in fact arise for it.

56. In paragraph 3 of his observations (A/CN.4/186/Add.2), he had dealt with the suggestion by the Government of Israel that the French text might express the substance of the rule better than the English. On one particular point he did not agree with the suggestion, but with regard to other points, he thought it should be considered by the Drafting Committee.

57. The main issue raised in the government comments was the suggestion by the Governments of Hungary, the Union of Soviet Socialist Republics, the United States and the Ukraine, that the reservation in paragraph (3) of the Commission’s commentary¹⁹ regarding the imposition of an obligation upon an aggressor should be incorporated in the text of the article itself. He had commented on that suggestion in paragraph 4 of his observations, and in case the Commission thought an express reservation of that type desirable, had drafted an appropriate proviso in the form of an additional paragraph which read:

“Nothing in the present article or in article 58 precludes a provision in a treaty from being binding on an aggressor State, not a party to the treaty, without its consent if such provision is imposed on it in accordance with the law of State responsibility and with the principles of the Charter of the United Nations.”

58. A case of that kind would, of course, represent a derogation from an extremely important principle and it was therefore essential to make the language of the proviso very strict, in order to confine its application to cases in which the imposition of obligations upon an aggressor State was effected in conformity with the Charter.

59. Mr. de LUNA pointed out that in 1964 the Commission had been unanimous on the meaning of article 59; he hoped that it would adhere to the formula it had then adopted. If, as four governments had suggested, the Commission introduced a reference to the case of obligations imposed on an aggressor State, it would be dealing with a question of responsibility, which was not within the scope of the draft. From both the doctrinal and the legal point of view, the obligation in question and the penalty applicable if it was not fulfilled, derived not from the treaty itself but from other norms of international law, such as the United Nations Charter or the *pax est servanda* principle, which was a rule of *jus cogens*.

60. From the practical point of view, he had no objection to the exception to the rule in article 59 being mentioned in the commentary, as it had been in 1964.

61. He fully approved of the drafting change proposed by the Special Rapporteur, whereby the too imprecise expression “may arise” would be replaced by the word “arises”.

62. Mr. CASTRÉN said he agreed that the expression “An obligation arises” would make the rule more categorical. He also accepted the other drafting changes proposed by the Special Rapporteur for the English text of the article.

¹⁸ For resumption of discussion, see 867th meeting, paras. 20-23.

¹⁹ *Yearbook of the International Law Commission, 1964*, vol. II, pp. 181-182.

63. There were some arguments in favour of adding a second paragraph to article 59 stating a reservation concerning obligations imposed on an aggressor State which was not a party to the treaty; as the Special Rapporteur had pointed out in his observations, however, the obligations thus imposed on an aggressor did not stem from the law of treaties, but from the law of State responsibility, which the Commission had decided not to prejudge in its draft. It would therefore be better to retain the text adopted in 1964 and to deal with the question of the obligations imposed on an aggressor State in the commentary, as the Commission had then done.

64. All the members of the Commission agreed that an act of aggression should be condemned; but the question of the legal consequences of aggression was extremely complicated and raised difficult problems, particularly as to the extent of the penalties to be imposed on the aggressor State. Grotius had pointed out in his time that a State which had won a just war should treat its adversary with moderation, and that view was shared by several modern writers. Usually, political matters were settled between the aggressor State and the other States in treaties which were also ratified by the former, and then the question dealt with in the new paragraph proposed by the Special Rapporteur did not arise.

65. The new paragraph was cautiously worded, but as a result was rather vague and subject to interpretation. For instance, it accepted the principle of State responsibility, but the rules governing the application of that principle were not yet well defined. Again, there was still much uncertainty about the principles of the United Nations Charter, as had become evident during the long discussions on the subject in the General Assembly and in its special committees which had met in 1964 and the spring of 1966.

66. Mr. BRIGGS said he noted that the additional paragraph put forward by the Special Rapporteur did not represent a formal proposal on his part. He agreed with Mr. de Luna and Mr. Castrén regarding that paragraph, which he found both unnecessary and irrelevant. If a group of States agreed between themselves by treaty to impose a particular policy on a State which they regarded as an aggressor, it was not the treaty provisions as such which were imposed or became binding on the aggressor State, but the policy of the other States. For that reason he considered that the final sentence of paragraph (3) of the 1964 commentary was ambiguous and should be deleted.

67. With regard to the article itself he had no difficulty in principle, but he wished to reserve his position on the Special Rapporteur's rewording.

68. Mr. TUNKIN said that when the question of treaties imposed on an aggressor State had been raised in 1964, no member of the Commission had disputed the principle; all had agreed that treaties of that type existed and should be considered as valid.

69. He agreed with Mr. de Luna that the sanctions imposed upon an aggressor State had their source not in the law of treaties, but in the law of State responsibility. In the case in point, however, the law of State responsibility had a direct bearing on the law of treaties and

called for an exception to the rule stated in article 59. It was true that in 1964, the Commission had introduced a safeguard in the commentary but, as was well known, the commentaries would not endure beyond the conference of plenipotentiaries. After the commentary had disappeared, the concluding words of article 59 would remain: "and the State in question has expressly agreed to be so bound". Those words could be used by an aggressor State to repudiate its obligations, claiming that they referred to *res inter alios acta*. Contemporary practice provided an example: not only writers in Western Germany, but even the Government were now contending that the treaties concluded by the Allied Powers at the end of the Second World War were without effect with respect to Germany, which was not a party to them and could therefore disregard them.

70. For those reasons, he urged the acceptance of the additional paragraph put forward by the Special Rapporteur. A paragraph of that type would not enter into the substance of the matter, namely, what sanctions should be applied to the aggressor; that was a question of State responsibility.

71. Mr. LACHS said he supported the improved wording proposed by the Special Rapporteur; it did not change the substance, but made the provisions of the article clearer and brought them into line with the language adopted in other articles.

72. The additional paragraph drafted by the Special Rapporteur was a sound suggestion and should be adopted. There were three types of international agreement dealing with the situation after a state of war. The first was an agreement under which the victorious powers acted in a dual capacity: as victors, and in the exercise of supreme authority over the territory of the aggressor State in the absence of a government in that State. An example of that type of instrument was provided by the Potsdam Agreement of 2 August 1945.²⁰ The second type was an instrument concluded by the victorious Powers, to which the defeated aggressor was not a party, such as the London Agreement of 8 August 1945 concerning the punishment of war criminals.²¹ The third type was an instrument in the preparation of which the defeated aggressor State participated, which it signed and ratified, but the entry into force of which was independent of its will. The Paris Peace Treaties of 1947²² provided examples of that type of instrument. All three types were valid international agreements and all were, and continued to be, binding on the former aggressor State.

73. It was true that the source of the obligations of the aggressor State lay both in the rules on State responsibility and in the law of treaties, but the effects were felt mainly in the law of treaties. In the Commission's draft articles, it was not usual to enter into the motives behind the conclusion of treaties; the draft articles were intended to provide a framework for the treaty-making activities of States, irrespective of the motives for their conclusion or whether they were of a political, economic, military or other character. It was essential to draw a

²⁰ *British and Foreign State Papers*, vol. 145, p. 852.

²¹ *United Nations Treaty Series*, vol. 82, p. 280.

²² *Op. cit.*, vols. 41, 42, 48 and 49.

distinction between the motives and the consequences of the action of States in regard to treaties.

74. The Commission should not legislate for future aggressors, but should draw up provisions which would restrain aggression in the future. He therefore strongly supported the proposed additional paragraph, which would serve the interests of peace by not offering the same protection of the mantle of law to the law-abiding and the law-breaking State.

75. Mr. VERDROSS said that in his view, responsibility for aggression and the obligation to make reparation derived directly from a rule of general international law, whereas a treaty concluded between victorious Powers was an agreement on the way in which reparation was to be made.

76. After the Second World War, treaties had been imposed on Italy, Bulgaria, Hungary and Romania, in which it was stipulated that the treaties would enter into force upon ratification by the victorious States; the States on which the treaties were imposed could also ratify them, but their ratification was not a necessary condition for entry into force. So far as he knew, that was the first time in the history of peace treaties that the requirement of consent had been dispensed with. He would be interested to know whether the Special Rapporteur regarded that fact as a manifestation of new law or as an exception to general international law.

77. The additional paragraph suggested by the Special Rapporteur was unacceptable as it stood, because its wording implied that a treaty imposing obligations on an aggressor State could be concluded between any States whatsoever; it was necessary to specify that the treaty must be concluded between the States which had been attacked in violation of international law.

78. Mr. ROSENNE said that in his analysis of government comments, the Special Rapporteur had observed that the Government of Israel gave no reasons for its suggestion that the order of articles 59 and 60 should be reversed. That suggestion had been made merely in the interests of presentation, since it had been thought more elegant for the provisions on rights to precede those on obligations.

79. With regard to paragraph 1 of the Special Rapporteur's observations, it would be sufficient to point out in the commentary that the agreement of the third State was naturally subject to the provisions of articles 31-36, and, if made in writing, to those of articles 4 to 29.

80. Expressing general agreement with paragraphs 2 and 3 of the Special Rapporteur's observations, he explained that the inter-ministerial committee which had prepared the comments of the Government of Israel had worked on the three texts in the Commission's working languages, with the assistance of his Ministry's translation services. That was how it had come to make its comments on the apparent lack of concordance between the three versions.

81. With regard to the additional proviso, he suggested the deletion of the words "with the law of State responsibility and". That would make the proviso refer to a treaty provision imposed on an aggressor State in accordance with the principles of the Charter of the

United Nations, thus using the same language as article 36. He was not satisfied, without further study, that the imposition of a treaty on an aggressor State necessarily fell within the scope of the law of State responsibility. Inclusion of a reference to State responsibility might therefore prejudice the Commission's consideration of the whole question of State responsibility. If his suggestion were adopted, the additional proviso would be consistent with the last sentence of paragraph (3) of the commentary on article 59 adopted by the Commission in 1964.

82. The Drafting Committee should carefully consider the concluding words "agreed to be so bound" with a view to co-ordinating the language used with that of other articles of the draft, where the expression "consent to be bound" was used.

83. The CHAIRMAN, speaking as a member of the Commission, said he supported the Special Rapporteur's proposal to replace the words "may arise" by the word "arises", which was more correct.

84. He agreed that the English text did not reproduce the exact meaning of the French phrase "*un moyen d'aboutir à la création de l'obligation*", which the Drafting Committee had taken as a basis in 1964. But that was a point which could be settled by the Drafting Committee.

85. Article 59 involved an essential problem of substance which had been raised by several governments and the Special Rapporteur had made a praiseworthy effort to solve it. He (Mr. Yasseen) shared the view that the case of a treaty imposing an obligation on an aggressor State was not an exception to the rule stated in article 59, since the source of that obligation was not the treaty itself. Nevertheless, that question should not be disregarded, and a number of governments had rightly pointed out that the article adopted by the Commission in 1964 did not reflect what was said in paragraph (3) of the commentary.

86. Apart from a few exceptional cases, the Commission had generally refrained from including in its draft articles any reservations concerning other rules of law. But aggression was one of the most serious problems of international life, and the United Nations, whose tasks included the maintenance of international security, should spare no effort to prevent acts of aggression. Those were reasons enough why the Commission should relax the rule it had adopted and add a proviso on the subject to article 59.

87. The new paragraph proposed by the Special Rapporteur might serve as a basis for discussion in the Drafting Committee, but he himself would prefer the reservation to be worded less specifically. There was no reason to mention the law of State responsibility, since it was only part of international law. It would be better to say "... if such provision is imposed on it in accordance with international law".

88. Mr. REUTER said he agreed with the Special Rapporteur and with several previous speakers on the few minor drafting problems raised by article 59, including that of the words "may arise".

89. The most important question, that of a treaty imposed on an aggressor State, certainly raised a prob-

lem of principle and a problem of form, both of which called for further consideration by the Commission. If the Commission endorsed the idea that the draft should cover the case of aggression, it would not be enough to deal with the case in which the aggressor State was not party to the treaty concluded between the victorious Powers; it would also be necessary to provide for the simpler case in which a defeated aggressor State had become a party to the treaty, but later claimed that it had not acted freely.

90. International law had not so far provided any very convincing reason why a treaty imposed on a defeated State should be binding on that State. One of the less inadequate reasons advanced was that of the *de facto* international government established by the victors. But would not a provision on that subject be better placed among the provisions relating to invalidity of consent? In drafting those provisions, the Commission had shown that it was not very optimistic, since it had found it necessary to state as a rule that a treaty imposed by a victorious aggressor was void. It might perhaps add, in the same article, that a defeated aggressor could not evade the obligations imposed on it by a peace treaty by invoking either the fact that it had been forced to become a party, or the fact that it was not a party to the treaty. In that way, the whole problem would be dealt with at once.

91. As to referring to State responsibility, he agreed with the Chairman that it would be going beyond the scope of the law of treaties. It was also open to question whether the article should mention only "the principles" of the Charter, or the "principles and rules" of the Charter—a broader formula which would include the machinery for determining the existence of aggression.

92. Mr. BARTOŠ said he wished to express his opinion on the question of substance. It was true, as a number of delegations and several members of the Commission had pointed out, that history provided examples of cases in which a treaty had imposed obligations on a State without its express consent. But even if, in the cases mentioned, the solution had been dictated by considerations of equity, he did not think that a rule on the subject came within the scope of the law of treaties as the Commission had conceived it. The United Nations Charter itself (Article 107) authorized the nations which had united in the fight against fascism during the Second World War to take certain measures incompatible with the principles of the Charter, in order to ensure that those principles would be better applied in the future. But that derogation was valid only for the past. Any future derogation from the principle of free determination by States as subjects of international law could only be for the purpose of safeguarding international public order. The object of any measures taken by the international community—in the Security Council, for instance—would be to put an end to aggression and to force the aggressor to make reparation. They would not constitute a treaty and would not impose contractual obligations, since the latter always required an expression of the free will of the State concerned.

93. After the Second World War, under the authority conferred by the Charter on the Allied Powers, treaties had been imposed on certain States regarded either as

direct aggressors or as having collaborated with the aggressors. Those of the victorious Powers which had ratified the treaties had been authorized to enforce them, but those which had not ratified the treaties could not invoke them. The ex-enemy States had in fact ratified the treaties, which had consequently assumed the aspect of genuine treaties, but had they not done so, the treaties would have been executed as treaties between the allies. That example clearly showed that the treaties in question had not created contractual obligations for the ex-enemy States, but had constituted executory decisions of the Allied Powers. The Charter regarded them not as treaties but as "action . . . taken or authorized".

94. He would not express any opinion on the Special Rapporteur's suggested additional paragraph for the moment, but would merely point out that, if it refrained from adding the proposed rule, the Commission would leave unimpaired the principle embodied in the Charter from which it followed that obligations could be imposed on a State, not on a contractual basis, but by virtue of the international law concerning responsibility.

The meeting rose at 6 p.m.

853rd MEETING

Tuesday, 17 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Co-operation with Other Bodies

(resumed from the 849th meeting)

[Item 5 of the agenda]

1. The CHAIRMAN welcomed the observer for the Inter-American Juridical Committee.

2. Mr. CAICEDO-CASTILLA (Observer for the Inter-American Juridical Committee) said that he hoped later to give the Commission an account of the progress made in revising the Charter of the Organization of American States. During the preparatory work at Panama in March 1966, agreement had been reached on a number of points, but there were still differences of opinion between the United States and the Latin American countries on the economic clauses. The Juridical Committee had met at Rio de Janeiro in April and had adopted resolutions on three subjects: a Brazilian proposal for an inter-American peace council; a draft submitted by Ecuador on the peaceful settlement of disputes; and a statute for political refugees.

Law of Treaties

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

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 59 (Treaties providing for obligations for third States) *(resumed from the previous meeting)*¹

3. The CHAIRMAN invited the Commission to resume consideration of article 59.

4. Mr. JIMÉNEZ de ARÉCHAGA said that, as the Commission was not concerned with political questions, the difficult problem raised by the suggested additional proviso to article 59 (A/CN.4/186/Add.2) ought to be examined from the legal standpoint of whether it had any proper place in the structure of the draft articles. Mr. de Luna had pertinently asked whether it might not interrupt the logical sequence.

5. Mr. Tunkin had pleaded for a progressive attitude in the interests of developing contemporary international law, but it was precisely for that reason that the Commission ought not to concern itself with providing a legal justification for any act performed, or to be performed, in connexion with the peace treaties concluded after the Second World War. Such a justification had already been provided in a collective decision of States and expressed in Article 107 of the United Nations Charter which, as Mr. Bartoš had said, constituted a general dispensation for action taken or authorized as a result of that war.

6. There was nothing the Commission could or need add by way of additional legal justification in its draft on the law of treaties. It must look to the future, not the past, and take care lest any *post facto* justification it attempted to provide be interpreted as applying to acts of aggression which had occurred or might occur after the establishment of the United Nations in 1945. The way in which an act of aggression occurring after 1945 should be dealt with on the legal plane was not within the scope of the Commission's task of codification; it was the concern of the United Nations which, by virtue of its Charter, had been legally equipped to handle such problems in a manner that did not affect the law of treaties, or affected it only slightly.

7. Under Article 24 of the Charter, the Security Council was primarily responsible for action in cases of aggression, and under the provisions of Article 39 such action could consist of recommendations or decisions on measures which, in accordance with Article 25, would be compulsory for all Member States, including one which might be the aggressor. If the aggressor were not a Member State, then the provisions of Article 2, paragraph 6 applied. Two consequences could be inferred from that series of provisions. First, that the fundamental element of consent to any action taken by the Security Council had already been given by Member States when they had accepted Articles 24 and 25, and secondly, that the way in which an aggressor was to be treated was no longer a "*diktat*".

8. The suggested proviso for article 59 might imply that a peace treaty of the kind contemplated would be an

imposed treaty, whereas in fact it would be the result of a collective United Nations decision adopted by the required majority and binding on all States including the aggressor State. The issue no longer belonged to treaty law, but to the law of international organizations, with which the Commission was not concerned for the time being.

9. Mr. Tunkin had been apprehensive about the effects that article 59 might have on any attempt to impose a provision on an aggressor State by means of a treaty not accepted by it, but if a Security Council decision took that form, the decision would override any provision in the Commission's draft. Article 103 of the Charter contained sufficient safeguards, and there was no need to provide for any exceptions in article 59 of the draft. The formula suggested by the Special Rapporteur to meet the point made by the four governments (A/CN.4/186/Add.2) was not entirely consistent with the substantive rules of law governing the way in which the United Nations must deal with an aggressor, and could give the impression that an aggressor State, on committing an act of aggression, would be deprived of any legal protection and become, as it were, *alieni juris*, so that anything could be imposed on it and its consent would not be required for any kind of obligation or duty.

10. In reality, the system established by the Charter was rather different and the aggressor State would only be *alieni juris* during the period covered by the provisions of Chapter VII, when the Organization would be engaged in restoring international peace and security. In Article 1, paragraph 1, of the Charter a careful distinction had been drawn between, on the one hand, effective collective measures for suppressing acts of aggression and, on the other hand, the peaceful settlement of disputes, which must be brought about in conformity with the principles of international law. Thus the United Nations did possess discretionary powers for the suppression of aggression, but once that had been accomplished, the rules of international law again came into play, including the principle of the sovereign equality of all States.

11. Once aggression had been stopped, even the aggressor State retained certain rights and neither the United Nations, nor Member States which had taken part in restoring international peace and security on behalf of the United Nations, could partition the territory of the aggressor among themselves, since the Charter referred to the suppression of acts of aggression, but not to the suppression of an aggressor State. The suspension or expulsion of an aggressor State from membership of the United Nations was authorized, but not its physical elimination from the international community. Thus there were limitations on the imposition of treaty obligations without the consent of an aggressor State. An example of the way in which the Charter's provisions operated in such a situation was the case in which, in 1950, the northern part of a State had been declared an aggressor by the Security Council on the ground that it had attempted to unify a divided State by force. The United Nations had succeeded in suppressing the aggression, but had refrained from effecting the unification by force, and an agreement had been entered into in the normal way on the basis of the equality of the parties and not on the basis of a "*diktat*", as might be

¹ See 852nd meeting, preceding para. 53.

inferred from the additional paragraph suggested for article 59.

12. As Mr. Verdross had pointed out at the previous meeting, the suggested text was vague in regard to the beneficiary State that became authorized to impose obligations on an aggressor without its consent. It was admissible that the United Nations might dictate terms to an aggressor under the Charter's provisions during the initial stage of restoring peace; but that was quite a different thing from granting such a right in the case of rival coalitions of States, for they might enter a conflict with different views as to which State was the aggressor and the results of the conflict would determine the terms to be imposed by the victors. No such blank cheque must be given, and the final clause in the suggested paragraph did not provide a sufficient safeguard, because the law of State responsibility in the matter of sanctions was new and far from settled. So far as the principles of the Charter were concerned, the words were open to subjective interpretation, as had been shown by the differing interpretations of Article 2, paragraph 4.

13. For all those reasons he was opposed to the inclusion of the additional paragraph in article 59. Paragraph (3) of the 1964 commentary² should be retained and the Commission should not attempt to go further.

14. Mr. EL-ERIAN said that the discussion on article 59 (then article 62) at the sixteenth session³ had revealed differences of approach. Some members considered that it dealt with an exceptional situation, because the institution of treaties creating obligations for third States was beginning to disappear and the modern trend was towards wide participation in the conclusion of international instruments. Those members regarded the institution as belonging to the era of the European law of nations, when a group of States had acted as self-appointed guardians of the international community. An example of such action was the declaration in the 1856 Treaty of Paris⁴ to the effect that the Sublime Porte should be admitted to participate in the benefits of the public law and the Concert of Europe.

15. Other members had favoured the inclusion of provisions concerning stipulations in favour of third States in treaties based on the principle of the sovereign equality of the parties, merely for the sake of completeness.

16. Agreement had ultimately been reached and he hoped the Commission would now be able to agree on a proviso to article 59 concerning the position of an aggressor State, again preserving a delicate balance between different points of view.

17. At the sixteenth session the Commission had been divided over the question whether a rule on the effects of treaties *vis-à-vis* third parties should be based on analogies with private law, or whether it should be based on public law and, particularly, on the principle of the sovereign equality and independence of States. The commentary on article 58⁵ had shown that, while the

principle *pacta tertiis nec nocent nec prosunt* appeared originally to have been derived from Roman law, in international law the justification for the rule did not rest simply on a general concept of the law of contract, but on the sovereignty and independence of States.

18. Attention was now being concentrated on what bearing article 59 would have on situations arising from acts of aggression and it had been argued, on technical grounds, that the matter did not properly belong to the law of treaties. As always, the Special Rapporteur had carefully analyzed all the comments by governments and delegations, and he had put forward a formula for an additional paragraph.

19. Although both the titles of the articles and the commentaries would disappear if a convention were drawn up, the legal significance of the commentary as part of the *travaux préparatoires* would remain and it would shed light on the interpretation of the articles.

20. To the argument that a rule of the kind suggested by the four governments did not belong to the law of treaties, but to the law of State responsibility and to responsibility in regard to the application of the relevant provisions of the United Nations Charter, he would answer that, when drafting article 36, the Commission had been anxious to make it clear that not every form of coercion of a State would render a treaty void, but only the threat or use of force in violation of the Charter. In other words, force used to carry out collective security measures and the consent procured by such use of force could not be invoked as grounds of invalidity by a party to the treaty. The Commission had not found it difficult to approve article 36, although the rule it stated was not based on consent, which was a fundamental element in the law of treaties.

21. The difficulty that had arisen was due to disagreement about the distinctions to be drawn between various aspects of the use of force. With the adoption of the Charter, a legal concept of aggression had come into being and its legal consequences had been recognized in General Assembly resolution 95(I), when the Nuremberg principles had been affirmed as principles of international law.

22. The proposal to amplify article 59 was certainly not prompted by a desire to introduce a political element into the law of treaties; on the contrary, it provided the Commission with an opportunity of covering one aspect of the legal consequences of aggression. Certain provisions of the Charter itself, such as Article 2, paragraph 6, had caused difficulties of interpretation, in regard to the obligations of non-member States; there, Kelsen⁶ had not hesitated to pronounce that the Charter was the higher law. Furthermore, the language of Article 103 of the Charter was absolute when it stated that, in the event of a conflict between the obligations of Member States under the Charter and their obligations under any other international agreement, the Charter would prevail.

23. It was difficult to formulate an additional proviso to article 59, but the problem was not merely a technical one. It would be reading too much into the suggested text to argue, as Mr. Jiménez de Aréchaga had done,

² *Yearbook of the International Law Commission, 1964*, vol. II, pp. 181 and 182.

³ *Op. cit.*, vol. I, pp. 66 *et seq.* and p. 176.

⁴ *British and Foreign State Papers*, vol. XLVI, p. 12, article VII.

⁵ *Yearbook of the International Law Commission, 1964*, vol. II, p. 180.

⁶ Kelsen. H., *The Law of the United Nations*, London, 1950, pp. 106 *et seq.*

that it would place the aggressor State outside the law. The proviso was necessary in order to make article 59 complete and to regulate future cases of aggression; the problem was not confined to that raised by the peace treaties concluded after the Second World War.

24. Mr. AMADO said he welcomed the proposal before the Commission, the idea of which had originated with the USSR and the United States, among other countries, as a fine example of peaceful co-existence. If only for that reason, he would have liked to agree with those who advocated the inclusion of the additional paragraph suggested by the Special Rapporteur in order to express, in article form, the ideas contained in the 1964 commentary. But he could not find any convincing argument for adding to the draft articles a provision so heavily influenced by private law and of a nature which had made it necessary for able jurists to invent the fiction of the collateral treaty in an attempt to secure its acceptance in international law.

25. In his view, consent was the essential element, and to qualify it as "express" or "free" was superfluous; a treaty to which the parties had not given their consent was not a treaty. He would be glad if the Commission did not accept the suggested addition, with which he was entirely out of sympathy. In view of the misgivings expressed by such important States, he had, of course, considered the matter with all due respect, but the attitude resulting from a certain psychological make-up and years of intellectual and legal training was not easily changed.

26. Mr. TUNKIN said that article 59 was so important that he felt bound to reply to some of the objections made to the proviso suggested by the Special Rapporteur. The issue was a crucial one because, under modern international law, an aggressor State was not in the same position as in the past, and the consequence, for the law of treaties, was that treaties imposed on an aggressor State, which would constitute exceptions to the principle laid down in article 59, did not require the consent of that State in order to be valid treaties.

27. Nearly all the members of the Commission were agreed on the issue of substance, but many seemed hesitant to include the proposed additional rule on the ground that it did not fit in with the system of the draft as a whole and that it belonged to the topic of State responsibility. Admittedly certain aspects of the matter were within the province of State responsibility, but the particular proviso suggested for article 59 was part of the law of treaties and must be stated as a very clear-cut exception to the rule that any treaty, to be effective for third States, required their consent. A treaty dealing with an aggressor State might impose sanctions and affect that State's rights and obligations, but it would still be valid. That was the proposition expressed in the 1964 commentary and accepted by the Commission. The Commission must be consistent with its own opinions.

28. Mr. Jiménez de Aréchaga wished the Commission to look ahead and that was precisely what the proviso did. The action taken with respect to the aggressor States in the Second World War had been accepted by the United Nations in Article 107 of the Charter, but there was no guarantee that aggression would not recur. The Commission must face reality and create rules that would

be effective in preventing aggression. Modern international law was becoming increasingly strict against any breach of the peace and that development should be reflected in the draft articles.

29. It had been argued that the proviso might encroach on the Security Council's special prerogative, but that argument was without foundation in view of the safeguards in Article 103 of the Charter. Mr. Jiménez de Aréchaga had rightly pointed out that the Security Council had to deal with acts of aggression, and it was to be hoped that it would do so, but that did not exclude the possibility of agreements being reached between Member States on a Security Council recommendation, and such agreements must be regarded as valid.

30. Mr. Jiménez de Aréchaga seemed to think that the additional proviso would open the door to arbitrary action against an aggressor and to be following the old principle that in every war the two sides were on an equal footing. That principle had no place in contemporary international law, because the aggressor was not on the same level as the victim. A State guilty of starting a war was performing illegal acts, whereas the victim was using force legitimately, so that the two sides were no longer on the same footing. And when the war was ended the victor would no longer dictate terms to the vanquished as in the past. Only States which had taken part in resisting aggression were entitled to dictate or impose terms on the aggressor; that was the element which belonged to the law of treaties. The question of sanctions, their character and scope, belonged to the law of State responsibility. The argument that the additional proviso would lead to arbitrary action was not justified.

31. He could only deplore the Commission's hesitation. The rule had never been clearly formulated and might seem sweeping to many lawyers, but it was important to realize that contemporary international law was radically different from the law of the past, both in regard to peace-keeping operations and in many other respects. The Commission had a chance of showing that it was not too timid to take a step forward when the defence of international peace so required.

32. Mr. TSURUOKA said he would give his opinion from the practical standpoint and with an eye to the future, for it was in the future that any clauses adopted by the Commission would be applied.

33. Considering the cases in which the suggested proviso would operate, he found it hard to see how it could be applied on legal grounds that were based on justice. The first difficulty was to define "aggression", a task which the Commission itself had attempted and found no easy matter. It would then be necessary to define the obligations which could be imposed on an aggressor, and that would obviously be an arduous undertaking.

34. Suppose two States A and B, which claimed to be victims of aggression by State C, had won the war started by C; that was the only case in which obligations could in fact be imposed upon the aggressor State, since it was the victors which were in a position to impose obligations. To begin with, had the events been as alleged by A and B and was C really the aggressor? Then, to carry the hypothesis to the extreme limit, A and B might decide to divide up C between themselves under

the terms of a treaty they had concluded. State C would then cease to exist, as indeed would States A and B, leaving only two new States, D and E. In the absence of any definition accepted by all States, and in the absence of obligations accepted by all, the proper application of such a clause would thus come up against very great difficulties.

35. The case would be rather different if it were stated that the aggression the Commission had in mind was aggression as defined by the Charter, in conformity with the letter and spirit of that instrument and with the procedures established by the United Nations. Placed in the context of the United Nations and of its activities and purposes, the obligations which it was permissible to impose on an aggressor State could be determined, and even though practical difficulties would remain, there would be possibilities of application which would be in conformity with justice, would safeguard future peace and the well-being of peoples, and would be guaranteed by the Charter.

36. Consequently, if the Commission decided to draft a clause of that kind, he asked that it should contain a very clear statement of the idea he had expressed; for he thought that the Special Rapporteur's proposal, even if it already incorporated that idea, might give rise to more disputes than it would settle.

37. The CHAIRMAN pointed out that the Special Rapporteur's proposal did not permit the imposition of any and every obligation; it referred only to obligations imposed "in accordance with the law of State responsibility and with the principles of the Charter of the United Nations".

38. Mr. JIMÉNEZ de ARÉCHAGA said that in his previous intervention he had not been defending the traditional concept of the two parties to a dispute being on an equal footing. He was as much against aggression as any other member of the Commission and considered that an aggressor State was subject to binding decisions of the Security Council for the suppression of aggression, including those involving the use of force.

39. The difference of opinion lay not in the view of aggression, but in the interpretation of the methods established by contemporary international law to deal with aggression. The old system of dictating a peace treaty at a conference table had been superseded by methods established in the United Nations Charter, whereby the decisions of an international organization had binding force by virtue of having been accepted by all Member States, including the aggressor State. Only if that State ceased to be an aggressor, owing to a change of heart or of government, would the normal procedures of treaty-making based on the equality of the parties and requirements regarding consent be applicable. As Mr. Tunkin had pointed out, during the period while aggression was being suppressed, the Security Council might resort to treaty procedures, as had happened over armistice agreements; nevertheless, the binding force of such agreements would not derive from any rule of the law of treaties, but from the provisions of Article 25 of the Charter.

40. There was no need, in article 59 of the Commission's draft, to attempt to interfere with the Charter's machinery

by referring to the old system of dictated peace treaties. Article 103 of the Charter already provided adequate safeguards against any possibility of article 59 coming into conflict with the Charter.

41. Mr. AGO said that opposition to aggression was not at issue; all the members of the Commission were opposed to aggression and there was not the slightest difference of opinion among them on the need to establish every possible safeguard against an aggressor. Nor should the Commission allow itself to be diverted from the real problem by the difficulty of determining, in any specific case, whether or not aggression had been committed and by which side.

42. What mattered was the rule, already laid down by the Commission in article 36, that the coercion of a State in violation of the principles of the Charter constituted a ground for the nullity of any treaty that an aggressor might succeed in imposing on its victim. By simply stating that rule, which was a notable innovation compared with classical international law, the Commission had thenceforth established the principle of inequality as between the aggressor State and the others, and he agreed with Mr. Tunkin that in contemporary international law, an aggressor State was no longer to be regarded as being on an equal footing with other States. It followed logically from the principle stated in article 36 that coercion invalidated consent only if the State which had suffered it was not an aggressor, and that a treaty imposed upon an aggressor was a perfectly valid treaty, even if it disregarded the will of the State upon which it was imposed.

43. If, however, the Commission thought it had not established that principle clearly enough in article 36 and that some addition was necessary, he would be prepared to agree. What he doubted was whether the Commission need concern itself with that problem in connexion with treaties and third States. A treaty imposed on an aggressor might be a bilateral treaty between a victim of aggression, which had succeeded in defending itself, and the aggressor State, upon which it imposed a treaty that had to be accepted under coercion and was a valid treaty. In such circumstances, the question of a third State did not arise.

44. In other cases, which partly accounted for the proposal before the Commission, peace treaties were concerted among States which had resisted aggression and had formed a coalition against it at some particular time. There were then two different parties to the peace treaties concluded: the aggressor State, and the group of States which had resisted the aggression. No obligations were imposed upon a third State, since the aggressor State, which could not be regarded as a third State, became a party to the treaty imposed on it. Its consent was given under coercion, but it was given and it was valid.

45. It would even be dangerous to use an expression such as "without its consent", which would seem to cast doubt on the proposition that consent given under duress, and not freely and voluntarily, was consent. But it was consent; it was perfectly valid and the coercion was perfectly lawful.

46. Of course, an aggressor State which had lost the war might no longer have a government capable of

entering into an undertaking for it, or its government might even refuse to sign the treaty, but it would be wrong to believe that the treaty would then impose obligations on the defeated State as a third State. In the cases contemplated, peace would not be re-established and obligations could be imposed on the recalcitrant State on the basis of responsibility or of the coercion of war, but not by the treaty in question. It would only be when the defeated State finally gave its consent that the treaty as such would impose obligations on the aggressor State as a party and not as a third State. He therefore considered that the suggested proviso contained an error and should be rejected.

47. The wording also called for comment. For example, if a treaty were concluded between States which had resisted aggression, and the aggressor State was not a party, various groups might be formed among the States which had joined together against the aggression and the members of those groups might conclude separate treaties between each other, the provisions of which concerning the aggressor State were contradictory. If those different treaties could impose obligations on the aggressor State as a third State, what would its obligations be? The exact meaning of the reference to the law of State responsibility was also open to question. But those were only secondary matters. The essential point was that the suggested rule belonged among the provisions relating to aggression, not among those concerning the effects of treaties on third States.

48. Mr. BRIGGS said he was puzzled by the insistence of Mr. Lachs and Mr. Tunkin on the validity of a treaty concluded by a number of States for the purpose of imposing a particular policy on an aggressor State. He saw no reason to doubt the validity of instruments such as the agreements concluded by the victims of aggression during the Second World War. Where a peace treaty was imposed on an aggressor State, that State was a party to the treaty and article 59 had no application. The case envisaged in the suggested additional paragraph was different: it concerned an agreement to impose a policy on the aggressor. Such an agreement was undoubtedly valid, but its validity did not depend on making the aggressor a silent party to the agreement.

49. Since the establishment of the United Nations, contemporary international law concerning peace-keeping activities had changed and developed. The subtlety of certain United Nations actions in the face of breaches of the peace made the word "aggressor" seem a little old-fashioned. In looking towards the future, it was essential to bear in mind those more refined devices which had been developed to meet new problems.

50. As he had pointed out at the previous meeting,⁷ the suggested additional paragraph had nothing to do with the law of treaties. He saw no need to introduce an irrelevant provision into the draft articles merely in order to emphasize the obvious unanimity of the Commission in its condemnation of aggression.

51. Mr. EL-ERIAN said that the suggested additional proviso was very limited in scope, since it was made subject to both the law of State responsibility and the

principles of the Charter; no action could be taken unless it was consistent with both.

52. The proviso was in the nature of an estoppel based on the concept of good faith, which was not a new idea in the Commission's discussions. He recalled that in 1957 and 1958, when the Commission had discussed its draft on arbitral procedure, Sir Gerald Fitzmaurice had drawn attention to the notion of estoppel with regard to certain types of inadmissible evidence. Introduction of the suggested proviso would not mean going completely outside the law of treaties.

53. Mr. REUTER said that, while references to the past were of some value, the Commission should look to the future. There were two ways in which it could solve the problem under discussion: by strengthening article 36 with additional provisions, as Mr. Ago had just suggested, or by inserting a provision in article 59 itself. If the Commission preferred the latter solution, it should omit all reference to the theory of State responsibility, and should take account of the point made by Mr. Jiménez de Aréchaga, that whenever the Commission was trying to develop existing law it should keep within certain limits in order to ensure that it was not directly or indirectly revising the Charter. The Commission was a United Nations body, but its members were not representatives of governments, and he therefore preferred to refrain from expressing opinions on questions—no matter how important—which were being discussed in other bodies, such as the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.

54. If the Commission decided to deal with the problem in article 59, he could only accept a very cautious and negative formula, such as: "Paragraph 1 shall be without prejudice to any consequences which may follow from the Charter regarding the effects of the condemnation of an aggressor". A formula on those lines would avoid various pitfalls, such as the question who was to pronounce the condemnation. Of course, it added nothing and was of little practical value, but if certain members, for psychological or political reasons, thought that a provision of that kind should be inserted in article 59, it would perhaps be a way of meeting their wishes.

55. Mr. LACHS said that all the Commission were devoted to the cause of preventing lawlessness; the differences of opinion concerned methods of achieving that purpose. The question was of particular significance because, in law, prevention was more important than repression.

56. There was also general agreement on the need to look to the future rather than to the past. But certain recent events could not be ignored, because they had helped to shape contemporary international law. Recent history showed that there was no danger of an aggressor being outlawed and thereby deprived of all legal protection. In all the declarations made by the Allied Powers during and immediately after the Second World War, it had been made clear that nothing was further from their minds than subjugation or conquest.

57. The Commission should adopt a scientific approach, but that did not mean abstract contemplation and ignoring reality; law and fact were closely interdependent.

⁷ Para. 66.

58. Several references had been made to the Charter, in particular, to Article 107. In the past 150 years, three fundamentally different systems had been adopted for what were called peace settlements: the first was that of the Congress of Vienna of 1815; the second, that of the Treaty of Versailles of 1919; and the third, that of the San Francisco and Potsdam Conferences of 1945. Under the system adopted after the Second World War, as the provisions of Article 107 of the Charter showed, one procedure had been established for liquidating the remnants of war and another for maintaining peace in the future. The adoption of those special arrangements had been due to the changes which international law had undergone in character and scope. In the collective security system adopted at the San Francisco Conference and embodied in the Charter, however, great care had been taken to ensure that even an aggressor would have the protection of international law. Gradually, ex-enemy States had been admitted to the United Nations to take part in what was meant to be a common effort to maintain peace within a system of collective security.

59. In view of the provisions of such articles of the Charter as Article 39, on United Nations action to maintain or restore peace, and Article 107, it was necessary to include in article 59 of the Commission's draft a stipulation on the lines of the suggested additional paragraph. Since the Commission had already agreed on the matter when it had adopted paragraph (3) of the commentary, the question was not one of substance, but merely one of emphasis; by lifting the provision from the commentary to the text, the Commission would be stressing its importance.

60. At the previous meeting he had drawn attention to the different types of agreements imposing obligations on an aggressor State. The examples he had given did not exhaust all the possibilities and the suggested additional paragraph would leave the way open for other similar cases.

61. With regard to the drafting of the additional paragraph, he agreed that the reference to the law of State responsibility should be dropped. Moreover, he did not think the provision should be confined to agreements to which the aggressor State was not a party; it should also cover agreements to which the aggressor was a party.

62. He also had serious doubts about the use of the word "imposed". If, for example, the Security Council were to take a decision overriding a minority view, the decision could not be said to have been "imposed" on the minority, since all Member States had agreed to be bound by the decisions of the Security Council. He would go even further and say that the very fact that a State was a member of the international community made it incumbent upon it to accept the rules of *jus cogens*, in particular, those relating to the maintenance of peace. He would therefore prefer some more suitable term than the word "imposed". What the Commission had to consider was in fact an obligation which arose for an aggressor State as the result of measures taken in consequence of the act of aggression, in conformity with international law and, in particular, with the United Nations Charter.

63. In his opinion, the subject of the paragraph under discussion was linked with the contents both of article 36 and of article 59.

64. Mr. ROSENNE said that the point raised by the four governments—Hungary, the USSR, the United States and the Ukraine—was a challenge to the Commission to examine whether the draft articles on the law of treaties as a whole covered all the treaty situations that might arise in the future. It was in response to a similar challenge that, in 1963, the Special Rapporteur had formulated the articles which had ultimately been adopted by the Commission as articles 36 and 37 (A/CN.4/L.115).

65. In the comments by governments and in the views expressed by members during the discussion, a convincing case had been made for including in the draft articles a reservation in general terms on the lines suggested by the Special Rapporteur, provided that it was limited to the United Nations Charter and did not stray into the unprobed realm of State responsibility.

66. Such a reservation was needed in order to complete the thought embodied in article 36. But at the present stage he was supporting only the principle of including such a reservation; its wording and position in the draft would have to be decided later. *Ex hypothesi*, the reservation referred to a treaty to which the aggressor State was not a party in any manner of form. If the aggressor State was a party, article 59 would not apply; the question should be dealt with in article 36.

67. Some reference to Article 107 of the Charter should be included in the commentary so as to make it clear that the Commission did not countenance certain views which had been expressed outside it, and that it had no intention of prejudicing the continuing legal validity of situations created following the Second World War.

68. Mr. BARTOŠ said he wished to clarify the statement he had made at the previous meeting. His personal view was that the additional paragraph suggested by the Special Rapporteur, on the basis of comments by certain governments, should be considered first and foremost from the legal standpoint.

69. If the paragraph was to reflect the practice after the Second World War, it must be brought into line with the legal system existing at that time. The practice had been based not only on the rights of the victor, but also on authority conferred on the war-time coalition of nations by the United Nations Charter. For, as Mr. Lachs had pointed out, the authors of the Charter had tried not to repeat the mistake made in the Treaty of Versailles; they had accordingly decided that the war-time coalition of States, not the United Nations, should be responsible for the measures to be taken with respect to the defeated States. One result had been that the peace treaties concluded at Paris had come into force on ratification by the victorious Powers. Italy, Finland, Romania, Bulgaria and Hungary had also ratified those treaties, so that a question which might have arisen in theory had not arisen in practice. But the fact remained that that practice was based on an exception.

70. As Mr. Reuter had pointed out, the Commission was working for the future. But could it state rules for the future which, so far as aggressor States were con-

cerned, were exceptions to the law of treaties? He thought it could, though not on the basis of the law of treaties, but on the basis of the provisions of the Charter concerning the authorities competent to take measures and apply sanctions in cases of aggression. The Security Council—and even, some believed, the General Assembly—could authorize certain States to deal with an aggressor by a treaty concluded between them. In such cases it was immaterial whether the aggressor State was or was not a party to the treaty; there was a delegation of powers by the international community to the States which concluded the treaty.

71. The suggested provision did not clearly establish who was to be regarded as an aggressor. In spite of the efforts made by the Special Committee, of which he approved, there was no definition of aggression or of an aggressor. The suggested paragraph did not say, either, who would be competent to declare a State an aggressor. Discussions in the General Assembly and the Security Council had repeatedly shown that that question was not only a legal one, but involved numerous political considerations. Thus the proposal made use of concepts which were not legally defined.

72. There was no doubt that an aggressor State deserved special treatment that was particularly severe; but it was also essential to ensure that a State which was not an aggressor could not be declared to be one. In the cases referred to the Security Council, the States concerned often accused each other of aggression, and sometimes no decision was taken against States whose aggression was established. Sometimes, too, one State would accuse another State of aggression in order to justify its own use of force by presenting it as legitimate self-defence.

73. Furthermore, the proposal contained no safeguard concerning the number of States which would be required to participate in a treaty dealing with an aggressor. If the treaty were concluded by a large number of States, it would acquire the force of *jus cogens* and the Security Council—or, in spite of constitutional objections, the General Assembly—could authorize such a treaty. But, once again, care should be taken not to formulate a rule which, though designed to serve the noble cause of preventing aggression, could be used for the opposite purpose. In practice, a treaty could not be imposed on an aggressor State unless the aggression was beyond doubt and there was no dispute regarding the identity of the aggressor.

74. The special authorization in the Charter concerning the settlement at the end of the Second World War had already fallen into desuetude, except perhaps in regard to Germany; he could find no rule in the Charter which allowed treaties to be imposed on certain States, and he did not wish to raise the very important question of the revision of the Charter, whether direct or indirect.

75. Efforts to prevent aggression should certainly be intensified but they should also be canalized; and from the legal standpoint it was necessary to consider what was the basis of the obligations arising from treaties of the kind envisaged in the proposal. The treaty itself could not be the basis if the State on which it was imposed did not accept it, for consent was not merely a formality, but a constituent element of the treaty;

without consent, there was no treaty. It had happened, and it would happen again, that obligations were imposed in certain situations or for certain proven or assumed responsibilities; but that was a question which was not within the province of the law of treaties.

76. In short, very severe sanctions should be applied against an aggressor State; the problem was to decide in what instrument those sanctions should be prescribed.

77. Mr. de LUNA said that, like all the other members of the Commission, he was anxious to see effective sanctions applied against aggressors.

78. The case the Commission was now considering was one in which collective sanctions were applied against an aggressor under a treaty with respect to which the aggressor was a third party. In a case of that kind, the source of the obligations imposed should be sought not in the treaty itself or in its specific character, but in other norms of international law—norms forming part of a higher law, namely, the United Nations Charter.

79. If collective sanctions were imposed by a treaty to which the aggressor State was a party, the situation would be governed not by article 59, but by article 36. It should be noted that it was by virtue of a higher law, and not of the treaty provisions, that the 1947 Peace Treaties had been applicable to the defeated aggressor States during the period between their entry into force on ratification by the four Great Powers, and their ratification by the defeated States themselves.

80. Sanctions could also be imposed by means of a declaration subscribed to by the States resisting the aggressor. When a treaty was used, it was largely in order to avoid piecemeal negotiations, which might lead to separate settlements by the different victors, or groups of victors, each seeking some particular advantage. For example, in the 1814 peace settlement, to which Mr. Lachs had referred, the diplomatic skill of Talleyrand had secured for France, the defeated nation, advantages superior to those obtained by Spain, a member of the coalition against Napoleonic aggression.

81. Although he did not believe there was any necessity for the suggested additional paragraph, he would be prepared to abide by the decision of the majority if it wished to include a reservation to the effect that, by virtue of other norms of international law, obligations could be imposed upon an aggressor State. He could accept such a reservation provided that no mention was made of State responsibility and it was made perfectly clear that the case was not an exception to the general rule that a treaty could not impose obligations upon third States without their consent. The reservation should merely serve to show that the provisions of article 59 did not stand in the way of other norms of international law which imposed obligations upon an aggressor State.

82. Mr. AGO said he agreed with Mr. Rosenne that the Special Rapporteur's suggested text referred not so much to a treaty which was imposed on the aggressor and to which the aggressor became a party even if it had not participated in the negotiations, as to another class of treaties—those to which the aggressor State was not a party. The reason why he had specially mentioned the first situation in his earlier statement was that, in practice, the victorious States normally laid the treaty before

the defeated aggressor State, which had no choice but to accept it. With regard to treaties of that kind, it would certainly be useful to stress that the aggressor State could not challenge the validity of the treaty itself on the ground that it had been subjected to coercion. That aspect of the matter should obviously be dealt with in article 36 rather than in article 59.

83. In the other case—that in which the defeated aggressor State was not party to the treaty—the treaty might have been concluded between the finally victorious States during the period of hostilities. Such a treaty created mutual obligations and rights between the victorious States, and its object might be to specify the terms to be imposed on the defeated State and the sanctions to be applied to it. But even in such cases, as he had said in his first statement, the obligations imposed on the aggressor State did not derive from the treaty as such, and could not be represented as effects of the treaty for a third State. Consequently, a provision of the kind suggested had no place in that part of the draft.

84. On the other hand, he would have no objection to the insertion of a provision on the subject in article 59, provided that it was very clearly worded, that it did not give the impression that the obligations imposed on the aggressor State might derive from the treaty, and that it did not have the appearance of an exception to the rule that treaties had no effects on third States. Consideration might accordingly be given to a text of the kind suggested by Mr. Reuter or by the Chairman at the previous meeting.⁸

85. Mr. TUNKIN said he could not agree with the view put forward by Mr. Ago in his 1939 lectures at The Hague,⁹ that a State on which sanctions were imposed was not under any obligation to comply with them. His own view was that if collective sanctions were agreed upon by treaty, they were binding on an aggressor State.

86. It had been pointed out by some members that the basis of the obligation of the aggressor State was the fundamental rule of international law governing the responsibility of aggressors for acts of aggression. The fact that the obligation thus had its foundation in a basic principle of international law should be no obstacle to the inclusion of the suggested proviso. The position was no different from that in regard to article 36, which proclaimed null and void any treaty concluded in violation of the prohibition of the threat or use of force. The basic principles of international law had their repercussions on all its branches; hence it was not possible to ignore them when formulating draft articles on the law of treaties.

87. The lack of a definition of aggression had been mentioned during the discussion. Apart from the fact that history showed that it was the potential aggressors who had prevented the acceptance of any definition of aggression, the lack of such a definition ought not to be allowed to stand in the way of the adoption of the proviso. The fact that there was no definition of the “threat or use of force” had not prevented the Commission from adopting article 36.

⁸ Para. 87.

⁹ R. Ago, “Le délit international”, *Académie de droit international, Recueil des cours, 1939*, vol. II, p. 415.

88. It had also been asked who would decide whether a State was an aggressor. He had little patience with that type of argument, which could be used with regard to any question of international law. In the absence of compulsory jurisdiction of the International Court and of a higher political authority than States to decide whether a violation of international law had been committed, it was possible to use the same argument with regard to any other matter, such as fraud or coercion. If that approach were adopted, the whole work of codification of international law would have to be abandoned and international law itself would be completely undermined.

The meeting rose at 1.5 p.m.

854th MEETING

Wednesday, 18 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 59 (Treaties providing for obligations for third States) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 59.

2. Mr. CASTRÉN said he still doubted the advisability of inserting in the draft a provision authorizing, in respect of a treaty imposed on an aggressor State, a derogation from the principles stated in articles 58 and 59; for if one exception were allowed, it would open the way for others and that would weaken the fundamental rule.

3. He did not deny that certain contractual provisions could be imposed on an aggressor, but everything depended on the content and scope of those provisions. A free hand to deal with the aggressor State could not be given to a State which was a victim of aggression, and still less—as Mr. Verdross had pointed out—to other States. It was therefore necessary to specify the obligations that could legitimately be imposed on an aggressor State; but that was an extremely complicated matter which required thorough study.

4. The wording proposed by the Special Rapporteur did not seem to be satisfactory and had already been

¹ See 852nd meeting, preceding para. 53.

criticized by several members of the Commission. If the Commission wished to add anything to the 1964 text, the wording suggested by the Chairman at the 852nd meeting² would perhaps be preferable. He proposed that the Drafting Committee should reconsider the question both as to substance and as to form.

5. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion on article 59, said that the Commission appeared to be evenly divided on the question whether to transfer the last sentence in paragraph (3) of the commentary³ to the text of the articles. A few members who had no great enthusiasm for the additional proviso would be prepared to contemplate its introduction as a separate paragraph or article in the section dealing with defective consent.

6. The text he himself had prepared had been designed to give effect to a suggestion made by four governments in their comments and to enable the Commission to discuss the point raised by those governments.

7. The discussion had revealed a general inclination to regard the obligation of an aggressor State to observe the provisions of the treaty as deriving from the law of State responsibility or from general international law. The proviso should accordingly be put in the form of a general reservation akin to estoppel, as pointed out by Mr. El-Erian. It was, however, somewhat paradoxical that, although all those in favour of including the reservation considered that the obligation of the aggressor State derived from State responsibility, none of them wished State responsibility to be mentioned in the text.

8. He himself supported the general idea which the Commission had accepted when it had underlined an exception in the case of an aggressor State in its commentaries on articles 36 and 59.

9. As far as the text of the articles was concerned, in article 36 the Commission had used the expression "in violation of the principles of the Charter of the United Nations" so as not to exclude the possibility that an obligation might arise for an aggressor from coerced consent. In article 59, a more specific exception was called for, since the article stated that an obligation could only arise with the consent of the third State. Moreover, there was a need for the same exception to be made also to the provisions of article 58.

10. Some members had put forward the view that the problem did not really arise under article 59 because, in the case envisaged, the aggressor State would sign the treaty and thus not be a "third State". It was difficult to accept that view, because there undoubtedly existed the possibility of cases in which the provisions of the treaty would require to be binding on the aggressor, even without any expression of consent on its part. The aggressor State might disown its representatives who had signed the treaty. Another possible case, which had actually occurred in the Second World War, was that the defeated aggressor might have no government to represent it. Hence it was not possible to claim that the problem did not arise.

11. The problem arose under both article 59 and article 36. His own view was that the reference to the principles of the Charter in article 36 implied that the obligation was imposed on the authority of the international community. In the light of the discussion, he felt great concern that, if an unduly loose formula were used to express the reservation, it might open the way for a group of States to claim to be acting against an aggressor in order to assert the right to impose an obligation.

12. He would be opposed to any alteration of article 36 which might weaken its formulation; the almost unanimous adoption of that article by the Commission represented the recognition of a very important development in modern international law: the denial of the validity of treaties imposed by force. For those reasons, he would prefer the general reservation not to be introduced into article 36, but to be formulated in some other way, possibly, as suggested by Mr. Reuter, by placing at the end of the draft a proviso to the effect that nothing in the draft articles affected questions arising from the treatment of an aggressor.

13. As far as the wording of the reservation was concerned, the Drafting Committee would have to consider the suggested deletion of the reference to State responsibility—to which he himself would have no objection—and the proposal by Mr. Lachs that the term "imposed" be replaced by a more suitable expression. The Drafting Committee should also consider the useful suggestion that the commentary should include a reference to Article 107 of the Charter.

14. He suggested that article 59 be referred to the Drafting Committee in very general terms, without prejudging the Commission's views in any way.

15. Mr. AGO said he feared the question was not yet ripe for referring to the Drafting Committee, whether it was asked to go over the whole discussion again or simply to find suitable wording. The real problem was not so much to find a formula as to decide whether a provision on the point under discussion should be inserted in the draft, and, if so, where.

16. Mr. BRIGGS said that although the Commission was clearly divided on the question of the suggested proviso, it was technically possible for the Drafting Committee to consider the question on the basis of a new draft, or several alternative drafts, submitted to it by the Special Rapporteur, and then report to the Commission.

17. Mr. TUNKIN said he strongly supported the Special Rapporteur's suggestion that the matter be referred in very general terms to the Drafting Committee. It would not serve much purpose to prolong the discussion at that stage and consideration of the matter by the Drafting Committee would produce an alternative text, which might enable the Commission to resume the discussion more fruitfully.

18. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that examination by the Drafting Committee would not prejudice the Commission's freedom of decision. The discussion had reached a deadlock largely as a result of drafting difficulties, though it was true that those difficulties had underlying points of substance. Examination of the matter by the Drafting Committee would make it possible to see how far the difficulties that

² Para. 87.

³ *Yearbook of the International Law Commission, 1964, vol. II, pp. 181-182.*

had arisen were connected with issues of substance and how far they could be solved by a change of presentation. It was not uncommon, when the Commission was split on a particular issue, for the division to seem worse than it was owing to the wording which had been placed before it and on which the discussion was based.

19. Mr. PESSOU said that the two conflicting ideas did not seem irreconcilable. Mr. Ago had not been radically opposed to including a provision on the point in dispute in article 36; nor had Mr. Tunkin apparently any objection to that suggestion, which seemed quite logical, since it was in article 36 that the problem first came up. It should be possible for the Drafting Committee to work on the formula suggested by Mr. Reuter.⁴

20. Mr. TSURUOKA said he had no objection to article 59 being referred to the Drafting Committee, provided the Commission remained entirely free to discuss it again.

21. The CHAIRMAN said that that was always the case; it was, of course, the Commission which took the decisions.

22. Mr. AGO said he was not categorically opposed to referring the article to the Drafting Committee; but Mr. Pessou was perhaps being over-optimistic in thinking that there were only two different views, between which a compromise was possible. In fact, there were several shades of opinion, and important questions of principle were at stake. Rather than instruct the Drafting Committee to seek a compromise, the Commission should ask it to re-examine the whole question.

23. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 59 to the Drafting Committee in general terms, as proposed by the Special Rapporteur.

*It was so agreed.*⁵

ARTICLE 60 (Treaties providing for rights for third States) [32]

[32]

Article 60

Treaties providing for rights for third States

1. A right may arise for a State from a provision of a treaty to which it is not a party if (a) the parties intend the provision to accord that right either to the State in question or to a group of States to which it belongs or to all States, and (b) the State expressly or impliedly assents thereto.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

24. The CHAIRMAN invited the Commission to consider article 60.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that government comments on article 60 (A/CN.4/186/Add.2) had not been very numerous. The Governments of the Netherlands and Turkey had proposed the deletion of the words "or impliedly" in paragraph 1 (b).

He was unable to endorse that proposal because it would call into question the whole basis of the very delicate compromise reached in 1964. Moreover, he thought that those two Governments were mainly concerned with the problem of the possible restriction of the right of the parties subsequently to modify treaty rights, which was dealt with in article 61.

26. The United States Government had made a proposal designed to cover the case of two or more States which dedicated by treaty a right to all States in general, without that dedication being subject to the condition that each State wishing to exercise the right should have first assented thereto. He had considerable sympathy for that proposal, as he had explained in paragraph 4 of his observations (A/CN.4/186/Add.2), and he would like the Commission to consider it.

27. With regard to paragraph 2, the objection put forward by the Turkish Government appeared to be based on a misunderstanding of the intention of the paragraph; its interpretation of the paragraph did not correspond to the natural meaning of the words used.

28. He had given the fullest consideration to the government comments, but had not wished to make any formal proposal, in order to avoid the risk of upsetting the compromise achieved in 1964.

29. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion from paragraph 1 of the concluding words: "and (b) the State expressly or impliedly assents thereto".

30. Circumstances had changed, and the Commission should therefore reconsider the 1964 compromise; it should adopt a text which reflected more accurately the legal situation in regard to stipulations in favour of third States and was better designed to serve the needs of the contemporary international community. Since 1964, the Commission had received such government comments as those of the Netherlands, the United States and Argentina, which favoured that type of stipulation. Another important development had been the deletion of the draft article prepared by the Special Rapporteur on objective legal régimes established by treaty;⁶ as a result of that deletion article 60 would have a much more important role, for example, as the legal foundation of treaty stipulations in favour of all States providing for free navigation on inland waterways.

31. From the legal point of view, the fact that a third State was disposed to profit from a right granted to it in a treaty concluded between other States could never be deemed to constitute the consent or assent to a second, or collateral agreement. The assent referred to in article 60 was an act which merely confirmed pre-existing rights; it was not, like the consent referred to in articles 31-35, an act by virtue of which rights were acquired.

32. His view was supported by the Commission's recognition that the implied assent in paragraph 1 (b) could be revealed by conduct, since one of the commonest forms of assent by conduct was the fact of exercising the right in question. But it was legally untenable to assert that the exercise of the right by the beneficiary State constituted the acceptance of an offer, or consent to

⁴ Previous meeting, para. 54.

⁵ For resumption of discussion, see 867th meeting, paras. 24-28.

⁶ *Yearbook of the International Law Commission, 1964*, vol. II, p. 26, article 63.

a second agreement, from which the very right that was being exercised was supposed to derive.

33. The example of the right of navigation on rivers clearly showed that the third State was exercising a pre-existing right. Under the treaties of San José de Flores of 1853 concluded by Argentina with the United Kingdom⁷ and France,⁸ the Uruguay and Paraná rivers had been opened to free navigation for all States. It would be impossible to contend that, when a ship of Liberian flag used those rivers to proceed to the port of Rosario, there came into existence a collateral agreement between Liberia and Argentina. The captain of the Liberian ship could not be deemed to possess the authority to represent Liberia for the conclusion of a treaty under article 4 of the draft articles.

34. Another example was provided by Articles 32 and 35 of the United Nations Charter authorizing non-member States to participate in Security Council discussions. Whenever the Secretary-General received a request for such participation, he placed it before the Security Council, but it had never occurred to him that there came into existence collateral agreements which should be registered under the provisions of Article 102 of the Charter.

35. It was clear that the third State was not called upon to ratify or accede to the treaty, but merely to appropriate or renounce the rights stipulated in its favour, which it could do at any time. If it was desired to emphasize the fact that the beneficiary State was not compelled to exercise the right granted to it, that should not be done by referring to assent or consent, but by specifying that the stipulation became inoperative if the beneficiary disclaimed the benefit. But such a provision seemed hardly necessary, because it would merely state the obvious.

36. Apart from those doctrinal arguments against the collateral agreement theory, the Commission should bear in mind certain unfortunate results which that theory might have in practice, one of which was the rule embodied in article 61, which made the benefit irrevocable except with the consent of the beneficiary. As pointed out by a number of governments, that rule unduly favoured the third State at the expense of the contracting parties. He hoped that that defect would be remedied when the Commission examined article 61.

37. Another unfortunate result of the approach adopted in article 60 was that its provisions might provide a justification for States interested in creating obstacles to the present unimpeded use of various international waterways. For instance, the territorial State might stop a passing ship on the grounds that it had never received from the State of nationality of the ship a notification of its assent to the treaty granting the right of navigation. The territorial State might also claim, in the case of a ship flying the flag of a new State, that no assent was possible under article 60 because the State claiming the benefit had not been in existence at the time when the right was granted.

38. As the Special Rapporteur had pointed out, the mere fact that the parties had expressed an intention to

confer a right on States in general justified the conclusion that the contracting States fully intended to dispense with the expression of assent by individual third States.

39. Adoption of article 60 as it stood would detract from the use of provisions in favour of third States which had become one of the most useful procedures for giving general scope to rules of international law that could only be put into effect through the agreement of a limited number of States. Even future States could, and did, derive rights from such stipulations, which had certain characteristics of acts of international legislation.

40. The Commission should not allow restrictive principles derived from the Roman law of contracts to check that progressive development of international law. As Judge Cardozo of the United States had said in connexion with third party stipulations, "rules derived by a process of logical deduction from pre-established conceptions of contract and obligation had gradually broken down before the slow and steady and erosive action of utility and justice".

41. Mr. VERDROSS said that a legal distinction should be made between the creation of a right and the will to exercise that right. He had already expressed that view during the first reading of the draft in 1964⁹ and he noted that one government's comment reflected it.

42. A treaty concluded between certain States could create a right for a third State; that had been the view taken by the Permanent Court of International Justice in the *Free Zones* case.¹⁰ Paragraph 1 (b) of article 60 provided, however, that the express or implied assent of the third State was necessary for the creation of such a right. That was strange, to say the least, for the act of assent combined two acts which were quite different in character; participation in the creation of the right and the will to exercise the right. It was a pure fiction to maintain that, if a State exercised a right, it thereby participated in the creation of that right. Far from being a compromise, paragraph 1 (b) represented the opposite view to his own. He therefore proposed that it should be deleted.

43. On the other hand, he could accept paragraph 2, for if States wished to create a right in favour of a third State, they could certainly determine the conditions for its exercise.

44. Mr. CASTRÉN said he was in favour of retaining the text which had been adopted by a substantial majority after a long and difficult discussion in 1964; its wording reconciled the various schools of thought and also seemed satisfactory from the practical point of view.

45. The Commission should not accept the amendments proposed by certain governments—not even that proposed by the United States, for which the Special Rapporteur seemed to have some sympathy. Even if the parties to a treaty wished to confer a right on all third States in general, the assent—at least implied—of those States was necessary to make that right effective.

46. As had been pointed out several times during the 1964 discussions, the exercise of a right based on a treaty could be subject to special conditions, as was provided

⁷ *British and Foreign State Papers*, vol. XLII, p. 3.

⁸ *Op. cit.*, vol. XLIV, p. 1071.

⁹ *Yearbook of the International Law Commission*, 1964, vol. I, p. 81, para. 7.

¹⁰ *P.C.I.J.* (1932), Series A/B, No. 46, pp. 147-148.

for in paragraph 2 of article 60, and those conditions might constitute onerous obligations. That in itself was sufficient reason for denying that the assent of third States could be dispensed with. He regretted, therefore, that he could not accept the proposal made by Mr. Jiménez de Aréchaga, and supported by Mr. Verdross, that paragraph 1 (b) should be deleted.

47. He would propose only a minor drafting amendment, which consisted in replacing the words "may arise" at the beginning of paragraph 1 by the word "arises". The Special Rapporteur had suggested that change in article 59, and the Commission appeared to have accepted it; the two cases were undoubtedly similar.

48. Mr. REUTER said he recognized that article 60 raised some theoretical problems and that the Commission should also bear in mind all the practical difficulties mentioned by Mr. Jiménez de Aréchaga. At the present stage of the work the only question he wished to raise was whether, without disturbing the delicate balance between articles 60 and 61, the Commission could still improve on the wording of the compromise which it had reached in 1964.

49. Without stating any definite opinion on the matter, he wondered whether the rule formulated in paragraph 1 (b) could not be expressed in negative form so as to state that the right was created for the third State unless that State expressly or impliedly rejected it. That wording would have the advantage of retaining the solution adopted in 1964, since it would cover both the conflicting theories. It would suggest that the third State was supposed to have accepted the right, but that if it refused it, the right was not created.

50. The Turkish Government had raised a minor problem, which also related to article 61. There was no doubt that, when a treaty established a right in favour of a third State—particularly if that right had a territorial application and applied, for instance, to a canal or a river—the parties to the treaty retained a power of regulation which was not mentioned in the draft. The Permanent Court of Arbitration had taken a very clear position on the point in the *North Atlantic Coast Fisheries* case,¹¹ and it was quite understandable that it should preoccupy governments.

51. Mr. de LUNA said that although, from the doctrinal point of view, he entirely agreed with Mr. Jiménez de Aréchaga, he would be prepared to accept article 60 in the interests of conciliation.

52. The cleavage of opinion in the Commission, which had led to the compromise text of article 60, had not been due to any political or philosophical differences, but simply to differences in legal training; those members who were imbued with the traditions of Roman law had taken a position completely different from those brought up on Germanic legal concepts. But even Roman law, in the last stages of its development, had made some allowance for stipulations in favour of third parties. In the traditional Roman law, the very formal *sponsio* required the physical presence of the two parties concerned and there was no room for a third party. By the time of Justinian's compilations, however, it had come

to be recognized, in the interests of commercial transactions, that a right could be created for a third party if the contracting parties had an interest in creating that right. It was on the basis of that late Roman law of contract that Grotius and other early writers on international law had constructed the notion of a second collateral treaty. The Napoleonic Code of 1804 marked some progress by comparison with late Roman law, while in the common law system, the fact that agreements in favour of third parties were not recognized was offset by the possibility of achieving similar results by means of trusts.

53. In practice, the process envisaged in article 60 occurred in two stages. The first was the creation of the right: all States were free to create rights in favour of third parties. The second stage was the exercise by the third State of the right conferred upon it; so long as there was no compulsion to exercise the right, the sovereignty and independence of the third State were fully safeguarded.

54. He supported Mr. Reuter's suggestion that the concluding proviso in paragraph 1 (b) be expressed in negative terms. Personally, he would go even further and re-word article 61 in the same way. It would then provide that a provision which conferred a right on a third State could be revoked or amended by the contracting parties unless it appeared from the treaty that the provision was intended to be revocable only with the consent of the third State.

55. Subject to drafting improvements, he supported the United States Government's proposal (A/CN.4/186/Add.2), which could provide a useful compromise between the different views held in the Commission, since it made a distinction between treaties which established rights in favour of States in general, and treaties which required the beneficiary State's assent. That approach would cover the case of treaties which created objective régimes or embodied international settlements, such as those dealing with navigation on international rivers. Objective régimes and settlements could, however, also be justified on the basis of custom, under the provisions of article 62, which would make the United States proposal unnecessary.

56. The Commission should not overlook the difficulties resulting from irrevocability under the provisions of article 61.

57. Mr. TUNKIN said he fully endorsed the Special Rapporteur's conclusion that the application in practice of the two theses in the doctrinal controversy would produce different results only in very exceptional circumstances. The word "impliedly" had been used in the 1964 text in order to explain that, while express consent was not necessary for the creation of the rights in question, their exercise would be regarded as assent and, as it were, a final stage in the creation of the right.

58. Practical considerations had been advanced by Mr. Jiménez de Aréchaga in defence of his new standpoint, but the changes he proposed would not make much practical difference. It was undeniable that in the modern world rules of international law were founded on agreement between States and could have no other basis. Any attempt to derive them from some mysterious

¹¹ *United Nations Reports of International Arbitral Awards*, vol. XI, pp. 179 et seq.

natural law was bound to fail. That proposition was fully consonant with the principle of the sovereign equality of States. To argue that obligations imposed on third States required their consent, but that rights could be created in their favour without their consent, was contradictory.

59. To draw analogies with private law was usually dangerous, because the position of third States on the international plane was so different from the position of third parties in municipal contract law.

60. There might be cases in which a third State did not wish to be considered as having certain rights, and the exercise of those rights might be made subject to unacceptable conditions, so the argument that the interests of the third State were safeguarded in such cases was politically dangerous.

61. The Commission should adhere to the compromise reached at the sixteenth session.

62. Mr. AGO said he did not think that article 60 raised any serious doctrinal problems. All the members of the Commission agreed that a treaty was an agreement and that, by its very nature, an agreement could not by itself produce legal effects—obligations or rights—for any State not a party to it. There was, however, nothing to prevent a treaty between certain States from, as it were, proposing a right to a third State. For the right to come into being either the third State must give its assent, which was equivalent to the conclusion of an agreement between the parties and that State, or such an extension of a right to a third State must be authorized by a rule originating elsewhere than in the treaty.

63. In municipal law too it was not the contract itself that conferred rights on a third party; the right was created in certain cases because it was authorized by law. Hence the problem was to ascertain whether there was any rule of customary general international law under which a treaty could accord a right to a third State; the source of that right would not be the treaty, but the rule of general international law.

64. Although he recognized the force of the arguments advanced by Mr. Jiménez de Aréchaga, he doubted whether any such rule could at present be found in international law, governed as it was by the principle of the sovereignty of States. In contemporary international law, the rule seemed to be rather that a treaty could not create either an obligation or a right for a third State without that State's assent.

65. That rule also seemed preferable for another reason. If the "right" of the third State could be created without its express or implied assent, that State could not prevent the right from being created. It could not "refuse" the right; it would be obliged to "renounce" it after having nevertheless received it against its will and that appeared to be contrary to the conviction of States, which could not conceive of a right being imposed on a State that did not wish to receive it. It was of course, true, as Mr. Verdross had rightly pointed out, that it was sometimes a kind of fiction to maintain that an act performed in the exercise of a right was at the same time an act manifesting the will to assent. But it would also be a fiction to say that an act of opposition was an act of renunciation rather than a refusal. In any case, at some point it was necessary to consider certain acts that

were open to different interpretations. Consequently, he would prefer to leave article 60 in the form in which it had been adopted by the Commission in 1964.

66. With regard to the United States proposal, he did not feel the need to accept so-called compromises between trends. The Commission should decide one way or the other: either a right could arise for third States—whether a single State, a group of States or all States—or it could never arise without their assent. He could not see any clear distinction between the case of a right offered to a single State and that of a right offered to a group of States or to all States, and it would be logical for the Commission to retain the former draft.

67. However, the French text of paragraph 1 (b), as well as the French translation of the United States proposal, needed amendment, since it referred only to "*cet Etat*", whereas paragraph 1 (a) referred to "*cet Etat ou à un groupe d'Etats . . . soit à tous les Etats*". It should be made clear that paragraph 1 (b) applied either to the State to which the right had been offered, or to the various States making up the group, or to all States individually. The English wording "the State" was more satisfactory.

68. Mr. BRIGGS said that at the 738th meeting¹² he had questioned the desirability of drafting an article on doctrinal lines and, in spite of what Mr. Ago had just said, there was a divergence of view as to whether a treaty could directly create a right for States not parties to the treaty or whether there was something in the nature of an offer by the parties which, if accepted, would constitute a collateral agreement. The doctrinal issue was unimportant; the Commission's task was to help solve a practical problem, not to adopt provisions that could hamper the progressive development of international law.

69. He entirely agreed with the revision of paragraph 1 proposed by the United States Government, not because it was perfect but because, in a sense, it reconciled the divergent views expressed in the Commission and provided a means of dealing with the problem without taking sides on the doctrinal question.

70. The 1964 text was based on the presumption that, normally, assent by the third State was required, but it did not make clear what was meant by implied assent. International waterways dedicated to international use could provide an example of the difficulty of interpreting what was meant by implied assent. A question might arise as to whether the consent of a third State to a treaty regulating navigation could be inferred from the use of the waterway in question by private vessels flying that State's flag, or whether it could only be inferred from such use by publicly-owned vessels. R. R. Baxter, in his *Law of International Waterways*, had argued that to require the express consent of a State wishing to benefit from the waterway would be retrograde.¹³ It could even be contended that, once such a waterway had been used by the international community, the right conferred by the relevant treaty did not call for express consent on the part of any individual State. The text suggested by the United States attempted to convey the idea that some

¹² *Yearbook of the International Law Commission, 1964*, vol. I, p. 95, paras. 12 *et seq.*

¹³ *Op. cit.*, 1964 edition, pp. 178-180.

indication of assent would be needed except where States intended a treaty provision to be the means of according a right “(b) to States generally”.

71. Mr. Jiménez de Aréchaga had asked whether the exercise of a right, as well as usage, should be regarded as assent, and that question was left open in the United States proposal. His criticism of the proposed new text for paragraph 1 (b) on the ground that it did not go far enough had been surprising. Perhaps it did not go as far as the Special Rapporteur's original proposal,¹⁴ but it should certainly be retained.

72. Mr. ROSENNE said that, as he had explained at the sixteenth session, he had no strong personal views on the doctrinal controversy over article 60 and considered that there was merit in both points of view. His main concern was with the practical aspects of the problem.

73. He agreed with the implication in paragraph 2 of the Special Rapporteur's observations and proposals (A/CN.4/186/Add.2) that in 1964 the Commission had not altogether succeeded in maintaining a position of neutrality. The difficulty was essentially a drafting one; paragraph 2 of the 1964 text sufficed to cover the questions raised by the problem of the consent or assent of beneficiary States and protected the position of the parties to the main treaty.

74. Leaving doctrinal considerations aside, Mr. Jiménez de Aréchaga had just made out a convincing case for deleting paragraph 1 (b) on practical grounds. As a minimum, paragraph 1 ought to be re-worded on the lines suggested by the United States Government.

75. Paragraph 2 of the 1964 text should be retained for the reasons given by the Special Rapporteur.

76. The CHAIRMAN, speaking as a member of the Commission, said that he fully agreed with Mr. Castrén, Mr. Tunkin and Mr. Ago. In 1964, he had upheld the theory of the collateral or supplementary agreement and he could see no essential difference between imposing an obligation and imposing a right. The important point was that the text the Commission had arrived at was a compromise which should be respected so far as possible at that stage, unless there were compelling reasons for doing otherwise, such as objections by a large number of States or a change in circumstances. As matters stood, he could see no reason for a change in attitude. As Mr. Ago had pointed out, if the *stipulation pour autrui* existed in municipal law, it was by virtue of a rule of law, such as article 1121 of the French Civil Code, whereas it was inherent in the nature of a treaty that its direct effects were restricted to the parties.

77. It would be argued that, since one of the Commission's functions was to promote the progressive development of international law, it would be useful to establish a rule dispensing with the third State's assent. He did not think so; the establishment of such a rule seemed to him to be incompatible with some of the principles which were the very foundation of international life, such as that of the sovereignty and sovereign equality of States.

78. It would also be argued that only a right was concerned. That was true; but in many cases a State would not accept a right conferred by some other State. Admittedly, a right could be created, but to assert that a right was conferred on a particular State was to interfere in its affairs, if the right was regarded as originating solely in an agreement between two States, neither of which was the beneficiary.

79. He was therefore in favour of respecting the compromise reached. He understood the reasons for the comments of the Turkish and Netherlands Governments and for the United States amendment, but to some extent the two ideas cancelled each other out, leaving the 1964 text intact.

80. The text required some minor drafting changes, such as the deletion of the word “may” at the beginning of paragraph 1 and the improvement of paragraph 1 (b). In the French text of paragraph 2 the words “en vertu” should be substituted for “*en application*”, to bring the French version into line with the English and Spanish versions.

81. He was sorry he could not accept Mr. Reuter's suggestion. To say that a right was created for the third State unless the latter either expressly or impliedly rejected it tipped the scales in favour of the thesis that a right could be created without the assent of the beneficiary State. Though prompted by a laudable desire to reach a still better-balanced formula, that proposal would be likely to impair the compromise reached in 1964.

82. Mr. EL-ERIAN said that the carefully balanced formula devised for article 60 in 1964 should be retained. A treaty could not of its own force create a right in favour of a third State. The juridical foundations of international law were not those of municipal law and it would be unwise to base the rule on an analogy drawn from rules of contract law concerning stipulations in favour of third parties. He interpreted Judge Huber's dictum¹⁵ “... whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers” as also covering the case of rights stipulated for third States. But a treaty could confer a benefit in the form of an offer, which would only acquire the character of a right when accepted by means of a collateral treaty. At the sixteenth session, however, his suggestion¹⁶ that the term “benefit” should be used had not been adopted.

83. If a right had existed before the conclusion of the treaty which simply gave it formal expression, the provisions of paragraph 2 would not apply.

84. Mr. REUTER said that Virgil's words “*Timeo Danaos et dona ferentes*” appeared to have been taken to heart by the majority of the Commission: international relations had come to a sorry pass if it had to be assumed that even gifts were dangerous.

85. Mr. AMADO said that in 1964 he too had used the analogy of the Trojan horse in that connexion, his views thus coinciding with those of Mr. Reuter.

86. He could accept the 1964 compromise, subject to certain drafting changes, although he found the text

¹⁵ Island of Palmas case, *Reports of International Arbitral Awards*, vol. II, p. 842.

¹⁶ *Yearbook of the International Law Commission, 1964*, vol. I, p. 92, para. 55.

¹⁴ *Yearbook of the International Law Commission, 1964*, vol. II, pp. 19-20, article 62.

unsatisfactory and disappointing. The Commission had been led into that situation by the influence of classical law, despite the antipathy of international law for such outdated but hallowed institutions. Account must, however, be taken of treaties which were not classical treaties, in other words law-making treaties, which were legislative instruments characteristic of the modern world. Such treaties provided food for thought; through the compromise solution and the law that *could* be, they gave a glimpse of the law that *should* be.

87. Mr. JIMÉNEZ de ARÉCHAGA said that the contention that the creation of rights for third States could be a violation of the principle of the sovereignty of States or a form of interference in their internal affairs was unfounded, because a third State could not be compelled to accept the right offered and need not exercise it. The provisions of Articles 32 and 35 of the Charter were clear examples of stipulations in favour of third States and had been designed to uphold the equality and independence of States. Mr. Tunkin had argued that conditions could be attached to a right rendering it unacceptable, and it was true that the right of a State to bring a matter before the Security Council would require acceptance of the obligations laid down in the Charter concerning the peaceful settlement of disputes, but a non-member State was not compelled to bring a matter before the Security Council.

88. Some members had questioned the existence of a general rule of international law authorizing States to agree in a treaty to confer a right on a third State; but he did not. During the hearing of the *Free Zones* case, Professor Basdevant had denied the existence of such a rule, but Professor Logoz, the agent of the Swiss Government, had affirmed that the rule derived from *pacta sunt servanda*, on the grounds that what had been agreed by the parties was the law.¹⁷

89. When he had proposed the deletion of paragraph 1 (b), he had been referring to the 1964 text.

90. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Ago that there was no rule establishing the stipulation on behalf of a third party. He was quite unimpressed by the argument advanced by the agent of the Swiss Government, for the *pacta sunt servanda* principle could not serve as the basis for establishing a special right for a particular State. The Commission was considering the important problem of the relativity of the effects of treaties, which clearly showed the scope of the *pacta sunt servanda* principle. It was self-evident that States could agree, by means of a treaty, to offer a right to a State, but they could not, by virtue of the *pacta sunt servanda* rule, create a right for a particular State which became part of its heritage.

91. Mr. BRIGGS said he had obviously misunderstood Mr. Jiménez de Aréchaga's suggestion about deleting paragraph 1 (b); he had thought it was directed at the proposed new paragraph 1 (b). He largely agreed with what Mr. Jiménez de Aréchaga had just said.

92. Mr. LACHS said that it was always tempting for lawyers to use analogies, and that had been the Commission's tendency in handling the issues covered in articles 58, 59 and 60. On a number of occasions he had

spoken in the Commission of the dangers of drawing too close a parallel between international and municipal law.

93. He would refrain from repeating the arguments he had developed at the sixteenth session, and would only stress the importance of bearing in mind the essential differences between institutions of municipal and of international law. He continued to think that States could create new rights or confirm existing customary rights in favour of an individual State or group of States not parties to the treaty, or in favour of the international community as a whole. One example was the Declaration of Legal Principles governing the Activities of States in the Exploration and Use of Outer Space adopted by the General Assembly in 1963.¹⁸ He held that that Declaration had some legal effects and confirmed some rights of all States, whether Members of the United Nations or non-Members. But if the Declaration had taken the form of an international convention, there could be no doubt that a whole complex of rights would have arisen for States not parties to it.

94. He was unable to agree with Mr. Jiménez de Aréchaga that the rule had its source in the *pacta sunt servanda* principle. It derived from the capacity of States acting unilaterally, or in concert, to dispose of rights within the sphere of their sovereign attributes. It thus had its source in the general principles of law and in the fundamental rights of States as its subjects. The third State or States could refuse to accept the right and, as Mr. Castrén had rightly argued, might regard it not as a right, but as an obligation. It was free to act as it wished.

95. It was important not to confuse three elements: the treaty provision stipulating a right, the use of that right, and the consequences of both. A right which a third State refused to accept might remain in existence, though a dead letter. A right of which it could not avail itself for a time, for lack of the necessary physical means, might be impliedly accepted and taken up later, the classical example being freedom of navigation on international waterways. Finally, a right established for all States, such as that accorded in Articles 32 and 35 of the Charter, might not have to be used for many years, but that did not mean that it lapsed. The formula to cover implied acceptance must therefore be flexible.

96. The 1964 compromise text should be maintained more or less as it stood, subject to drafting changes which could be left to the Drafting Committee.

97. Mr. CASTRÉN said he had not been convinced by Mr. Jiménez de Aréchaga's second statement either. He had quoted examples to support his argument, but it was easy to choose examples to fit a special case. For instance, to take another fairly extreme example, if several States concluded a treaty granting a third State the right of transit through their territory, but on condition that the third State accorded to others the right of free passage through its own territory, the treaty could come into force at once; thus without waiting for the third State to exercise its right, the other States could begin to exercise theirs.

98. Mr. AGO said that the argument advanced by the Swiss agent before the Permanent Court of International

¹⁷ P.C.I.J. Series C, Nos. 17, 19 and 58.

¹⁸ General Assembly resolution 1962 (XVIII).

Justice had not been valid and had added nothing to the case he had been pleading.

99. The *pacta sunt servanda* principle meant that the parties to a treaty had an obligation to observe it, but the principle had never been interpreted as conferring rights and obligations on a State which was not a party to the treaty.

100. Mr. Jiménez de Aréchaga had quoted other examples intended to prove the existence of a general rule of customary law according to which rights could be conferred on a third party. In particular, he had cited the peace treaties signed in 1947 under the terms of which the States bound by the treaties waived certain rights vis-à-vis third parties. He (Mr. Ago) was not convinced that that was an example of a treaty conferring a right; the third parties would perhaps gain advantages in fact, but not actually in law. Italy, like Finland, had assumed an obligation vis-à-vis the other parties to the treaty: the obligation not to claim a right vis-à-vis a third party; the third party had gained an advantage, but it could not be said to have acquired a right vis-à-vis Italy. Italy had an obligation to the other parties to the treaty, but not to third parties. Such examples might be quoted either way and proved little.

101. Some speakers had maintained that acceptance of the theory that a right could be conferred on a third State by a treaty meant that the third State was always safeguarded, because it could always refuse the right. But as he had pointed out before, according to that theory the third State could not refuse the right; it could renounce it, but it possessed it. For if the treaty could confer the right without the third State's assent, that State could not refuse it, because refusal meant refusal of assent, and according to the theory assent was not required. The third State must take note of the fact that it possessed the right and perform a unilateral act to divest itself—in other words renounce the right. That point was worth reflecting on.

102. He was convinced that there was no general rule of customary law to the effect that rights could be conferred on a third State. Of course the Commission could establish such a rule, but would that really be an advance? Much had been said of the progressive development of international law, but what progress would be made by adopting one system rather than the other—the system which permitted a right to be conferred without the assent of the third State rather than that which required its assent?

103. Mr. EL-ERIAN said that article 60 was not intended to cover rights arising out of constituent instruments of international organizations or general multilateral treaties of a law-making character which created general rules regulating the conduct of States and which, in the Commission's view, should be open to participation by all States. He did not mean, however, that a State acquiring independence and taking its place in the community of nations was not bound by customary law, even though it had not taken part in the formation of the custom.

104. Article 60 was concerned with rights for individual States or particular arrangements between groups of

States. After a long discussion at the sixteenth session,¹⁹ the Commission had decided not to include in its draft an article concerning objective régimes, since that would take it too far into a very complicated subject falling within other branches of international law besides the law of treaties.

The meeting rose at 1 p.m.

¹⁹ *Yearbook of the International Law Commission, 1964*, vol. I, pp. 96-109.

855th MEETING

Friday, 20 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 60 (Treaties providing for rights for third States) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 60.

2. Mr. TSURUOKA said that, at first sight, the two articles 59 and 60, as drafted in 1964,² appeared to deal, the first with obligations for third States and the second with rights for third States. He rather thought, however, that article 60 dealt with a mixture of rights and obligations, and that with regard to obligations it covered some of the same ground as article 59. But even if articles 59 and 60 did not follow quite the same pattern, that did not affect the substance in any way and generally speaking he could accept the ideas they stated.

3. He had a suggestion to make concerning the drafting, however, which was that the problem should be approached from a different angle. Would it not be possible to take as the point of departure the obligations and rights of States parties to a treaty vis-à-vis third States, in other words, to start out from the opposite end? With that idea in mind, and on the understanding that if the Commission accepted his proposal article 59 would be redrafted on the same lines, he proposed a new text for article 60 which read:

¹ See 854th meeting, preceding para. 24.

² *Yearbook of the International Law Commission, 1964*, vol. II, pp. 181-182.

“ The States parties to a treaty shall respect the right of a State which is not a party to the treaty to enjoy the advantage stipulated (a) if the parties to the treaty intend by a provision of the treaty to accord that advantage either to the State in question or to a group of States to which it belongs or to all States, (b) and if the State complies with the conditions laid down in the treaty or established in conformity with the treaty for the enjoyment of that advantage.”

4. Mr. PAREDES said that a treaty was, by definition, an agreement between two or more States on one or more matters, but such agreement did not and could not exist on the question of imposing obligations or rights on a third State. In both cases, the consent of the parties, which was the reason or basis for the treaty, was lacking.

5. The obligations imposed by a State or group of States on an aggressor might be necessary, proper and just. They were necessary inasmuch as the paramount rule governing co-operation between States in the modern world was peace among the nations, and peace was one of the essential purposes of the United Nations. It was obvious that in that sense the imposition of sanctions on an aggressor was an absolute necessity. That necessity did not, however, derive from a contract between the victim of aggression and the aggressor, even if a treaty was concluded between them, as might well be the case, for it was self-evident that an aggressor might at some point accept as a lesser evil the obligations it had negotiated with the victim of aggression. But that could never in any circumstances be regarded as an agreement, for it was inconceivable that an aggressor would accept its status as an aggressor and conclude a treaty establishing the obligations devolving on it as a result of its aggression. There could undoubtedly be a valid and lawful treaty between the victorious victims of aggression and the defeated State, but there could be no treaty relationship between the victims of aggression and the aggressor.

6. The same could be said of rights. In view of the principle of the sovereign equality of States, it was impossible to impose a right on a third State. The right must be accepted by that State, which was the sole judge of whether the right was to its advantage or disadvantage. It was only when a third State voluntarily accepted rights conferred on it that those rights produced their effects. Otherwise, even if it was maintained that the third State retained the capacity to accept or reject the right, relations between the States could be vitiated by a number of circumstances.

7. For instance, a right created by a treaty between two or more States in favour of a third State might not have been brought to the notice of that State and be known only to the parties to the treaty. The third State, being unaware of the right conferred on it, might in certain circumstances perform acts which seemed to signify a tacit acceptance, whereas that was not in fact the case. A right might thus become prejudicial to the State on which the original parties had believed they were conferring a benefit. The third State was the only one that knew whether, having regard to the circumstances and the relations arising from the right, that right was to its advantage. It was therefore essential that the third State should recognize and accept the right before

exercising it. For that reason, he was satisfied with the wording adopted in 1964, although he would like the words “ expressly or impliedly ” to be deleted.

8. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said there was general agreement that the rule in article 60 should be stated in a more positive way in preference to the present permissive language. The discussion during the past two meetings had been on a high level, but not much fresh ground had been broken, and the general attitude of members was much the same as it had been at the sixteenth session. Some found it impossible to accept the idea of a right arising directly from a treaty and interpreted article 60 in the sense that the rights provided for by a treaty would require the express consent or assent of the third State. Other members, for whose thesis Mr. Jiménez de Aréchaga had been the principal spokesman, took the opposite view and in 1964 had, as it were, allowed the text to go through because they regarded it as the greatest measure of agreement the Commission could achieve, rather than as a correct statement of the law.

9. It was evident from the present discussion that the Commission would have to adhere more or less to the 1964 text, but the Drafting Committee should consider the extent to which the various points raised could be met.

10. As a member of the Commission, his point of departure was the same as that of Mr. Jiménez de Aréchaga. In his opinion, under the existing rules of international law, the objection to the proposition that a treaty could create of its own force a right in favour of a third State could not be sustained. He remained unconvinced by the argument that the proposition was contrary to the principle of the equality of States, because there was no obligation on the third State to take up the right, even if no conditions were attached to its exercise.

11. On the question of the source of the right, the rule *pacta sunt servanda*, though an element, did not provide the whole answer because it did not explain why the right was binding vis-à-vis the third State. Nor must the source of the right necessarily be found in a *pactum*. Even a unilateral declaration by one State might in particular circumstances create a legal relationship with another. In the case of a treaty purporting to create rights for third States there was a double relationship because, as between the parties, any refusal to accord the right to a third State would be a violation of the treaty with respect to the parties to the treaty as well as a violation of the right of the third State.

12. He had set out the reasons for the conclusion that the right was recognized as a rule of customary law by international jurisprudence in his third report,³ and no argument advanced since that time had shaken his own appreciation of the light thrown on the matter by international jurisprudence. It had been surprising to hear Judge Huber invoked in defence of the opposite thesis, because Judge Huber, who had been one of the members of the Committee of Jurists in the *Aaland Islands* case,⁴

³ *Yearbook of the International Law Commission, 1964*, vol. II, pp. 21-26.

⁴ League of Nations, *Official Journal*, October 1920, Special Supplement No. 3.

had clearly been a proponent of the position taken by Mr. Jiménez de Aréchaga.

13. Leaving aside the purely legal issue, about which there was a difference of opinion in the Commission, it was important not to include in the draft articles anything that might be open to an interpretation which could weaken the position of third States.

14. He understood the consensus of opinion to be that an application by a third State to use the right was in itself a form of assent that could create a legal nexus between the parties to the treaty and that State. If that were so, the substantive difference of opinion in the Commission was not as great as it appeared. There might be special cases in which a third State could only secure the enjoyment of the right provided for in the treaty through one of the parties, but that need not call for any fundamental change in the text of article 60.

15. Mention had been made during the discussion of the special problems raised by objective régimes or by new States entering the international community, but even there the position of the third State under the provisions of article 60 was not necessarily weak, particularly if it were borne in mind that customary law developed parallel to the régime established by the treaty.

16. The Drafting Committee would certainly need to consider the proposal made by Mr. Tsuruoka to invert the whole structure of articles 59 and 60 and state the law in terms of the legal position of the parties to the treaty. But what the Commission was trying to do in those articles was to state what should be the position of third States. Clearly, as between the parties, *pacta sunt servanda* would apply. It was their legal position vis-à-vis third States and vice versa which the Commission was seeking to formulate.

17. For the sake of brevity he would not comment on many of the other points made during the discussion, interesting though that would be.

18. Mr. AGO said that, convinced though he was of the principle that the consent of the third State was necessary in order to establish a right in its favour and that it was impossible for a right to arise for any subject of law whatever against its will and without its consent, he nevertheless appreciated the underlying reason for certain misgivings expressed by Mr. Jiménez de Aréchaga and by the Special Rapporteur. He wondered whether there was not some way of preserving the principle while at the same time taking account of those misgivings.

19. As he had already said, if it were assumed that a right arose from the treaty itself without the assent of the third State, the absurd result would be that the third State could not even reject the right: it would have to recognize that the right had arisen and then renounce it. He found that idea unacceptable. Leaving the principle aside and viewing the matter from the standpoint of practical consequences, he wondered whether some objections did not arise from the expression "expressly or impliedly". He had been struck by Mr. Jiménez de Aréchaga's observation that there were sometimes manifestations, such as the exercise of a right, in which it was hard to discern a manifestation of implied assent. In such cases the implied assent had probably been given previously, but in some other way.

20. He himself would be inclined to think that what really happened was something entirely different. When the parties to a treaty wished to confer a right on a third State, the assent of the third State was either expressed, or was presumed to have been given unless there was evidence to the contrary. In fact, instead of using the word "impliedly", the Drafting Committee should consider the possibility of replacing sub-paragraph (b) by the wording: "if the State assents thereto. Its assent shall be presumed in the absence of any indication to the contrary".

21. That wording would make it possible to preserve the principle of assent, which was essential, while at the same time taking account of the misgivings of those who wished to clarify the concept of implied assent. It would thus go some way to meet the objections that had been raised and would gain a wider measure of support.

22. Mr. BARTOŠ said that, in principle, he supported the amendment proposed by Mr. Ago, provided that the Drafting Committee considered the question of the time within which the third State would have to give an "indication to the contrary", for after a certain lapse of time, it might be dangerous to reserve the presumption that assent had been given.

23. The CHAIRMAN, speaking as a member of the Commission, said he appreciated that in theory the form of words proposed by Mr. Ago did not impair the principle on which the article was based. But Mr. Bartoš had brought up an important practical point: after how long could the silence of the third State be regarded as signifying assent, and what time-limit did a State have to rebut the presumption that it had assented?

24. Mr. AGO said that, under his proposal, a third State could reject the right at any time.

25. Mr. de LUNA said that, where the parties to a treaty assumed an obligation *inter se* to accord a right to a third State, that obligation between the parties was complete, irrespective of the will of the third State, by virtue of the *pacta sunt servanda* rule. That did not mean that the right conferred on the third State arose from that rule, but that by virtue of the principle that whatever was not prohibited was permitted, all States could assume obligations vis-à-vis each other by means of a treaty, provided that it did not infringe any rule of international law. Regardless of the importance which members of the Commission, who were divided on that point, attributed to the *Free Zones* case,⁵ to the practice reflected in peace treaties or to the example of accession clauses quoted by Mr. Verdross in 1964,⁶ he knew of no principle of international law that prohibited States parties to a treaty from assuming an obligation among themselves to accord a right to a third State.

26. Whether they considered that a right was effectively created for a third State or that there was an offer which only gave rise to a right when it was expressly or impliedly accepted by the third State, all the members of the Commission were obviously agreed that by virtue of the principle of good faith, whatever the parties had promised *animo obligandi* they were bound to perform. It would

⁵ P.C.I.J. (1932) Series A/B, No. 46.

⁶ *Yearbook of the International Law Commission, 1964*, vol. I, 736th meeting, para. 51.

obviously be contradictory to maintain that the right was created solely by the *pacta sunt servanda* rule, which bound only the parties.

27. Mr. El-Erian had mentioned estoppel, but that was a different aspect of the same idea.

28. In any event, Mr. Ago's proposal did not affect the principle on which the Commission was divided into two camps; but on the other hand it did solve a number of practical problems which would be greatly complicated by the concept of implied assent. The presumption of assent which it enunciated was satisfactory to those who considered that the assent was given for the purpose of exercising a right, to those who considered that it was assent to the creation of a right, to all the members of the Commission who had difficulty with the legal interpretation of the concept of implied assent, and lastly, in regard to the practice of States, which would be relieved of their uncertainty; for the concept of implied consent was not conducive to the security and stability of international relations.

29. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's proposal was close to what he had originally put forward in his third report⁷ in an attempt to meet both points of view in the doctrinal controversy. If the proposal were found generally acceptable and secured wide support in the Commission, he would be very much in favour of a change on those lines. His personal preference would be to make no reference in article 60 to express or implied assent, because of the difficulties of interpretation it might cause.

30. The CHAIRMAN suggested that article 60 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁸

ARTICLE 61 (Revocation or amendment of provisions regarding obligations or rights of third States) [33]

[33]

Article 61

Revocation or amendment of provisions regarding obligations or rights of third States

When an obligation or a right has arisen under article 59 or 60 for a State from a provision of a treaty to which it is not a party, the provision may be revoked or amended only with the consent of that State, unless it appears from the treaty that the provision was intended to be revocable.

31. The CHAIRMAN invited the Commission to consider article 61, for which the Special Rapporteur had proposed a new text as a basis for discussion, reading :

" 1. When an obligation had arisen for a State not a party to a treaty under article 59, the parties afterwards may :

(a) terminate the obligation in whole or in part on giving notice to such State;

(b) modify the obligation in any other respect only with the consent of such State.

" 2. When a right has arisen for a State not a party to a treaty under article 60, the parties afterwards may :

(a) terminate the right in whole or in part, after giving X months' notice to such State, unless it appears that the right was intended to be irrevocable except with its consent;

(b) modify the right in any other respect only under the rules laid down in articles 59 and 60. "

32. Sir Humphrey WALDOCK, Special Rapporteur, said that article 61 was closely linked with article 59 and, more particularly, article 60 (A/CN.4/L.107). Some interesting comments had been made by governments which he had analysed in his report (A/CN.4/186/Add.2), possibly at greater length than might at first sight appear necessary, because they raised points of principle that would make it necessary for the Commission to take a closer look at the article.

33. More than one government considered that the article should be deleted, but he found that view unacceptable because the rules set out in the two preceding articles called for a provision on the position of the parties regarding the revocation or amendment of provisions in a treaty concerning the obligations or rights of third States. The issue had caused difficulties in a case before the Permanent Court of International Justice. The Commission would remember the statement in the joint dissenting opinion of Judges Altamira and Hurst in the *Free Zones* case.⁹

34. There was force in the Netherlands Government's argument that the provisions of articles 59 and 60 ought to apply to transactions revoking or amending provisions regarding obligations or rights of third States, but the question was whether the Commission should endorse the logic of that contention or treat the relationship between the parties to a treaty and a third State on which the treaty had conferred an obligation or a right as a special case, owing to the manner in which the obligation or right had arisen. The Commission had in fact adopted the latter standpoint, which as Special Rapporteur he regarded as correct, but the position between the parties and the third States ought to be indicated more clearly. After examining the observations by governments and delegations he had come to the conclusion that article 61 was more intricate than appeared on the surface and would need further discussion.

35. It might be desirable to deal separately with obligations and with rights, as had been done in the preceding articles, because there was force in the criticisms that the Commission had gone too far in protecting the position of third States in regard to rights, and that it was not appropriate to require the consent of third States to the termination of an obligation. For those reasons he had prepared a new text for discussion.

36. Mr. VERDROSS said that, if the Commission retained articles 59 and 60, and even if the latter were amended as proposed by Mr. Ago, the text of article 61 adopted by the Commission at the first reading was preferable to the new text suggested by the Special Rapporteur. Articles 59 and 60 were based on the idea that there could be no obligation or right for a third

⁷ *Op. cit.*, vol. II, document A/CN.4/167, article 62.

⁸ For resumption of discussion, see 868th meeting, paras. 2-52.

⁹ *P.C.I.J.* (1932), Series A/B, No. 46, p. 185.

State without its consent; it followed logically that such an obligation or right could not be modified without the consent of the third State unless it appeared from the treaty that the provision establishing the obligation or right was revocable.

37. Even if the Commission wished to follow the Special Rapporteur, it did not seem possible to say that an obligation thus created by a treaty could be modified merely by giving notice to the third State. The treaty would first have to be amended, and it was that amendment which would be notified to the third State.

38. If, as seemed unlikely, the Commission wished to revert to the Special Rapporteur's original idea, which had been supported by Mr. Jiménez de Aréchaga, Mr. de Luna and himself, he saw no need to specify that if the States parties to the treaty had created a right in favour of a third State, they could not modify the treaty in that respect unless the third State had not exercised that right.

39. Mr. BRIGGS said that he was inclined to favour the Special Rapporteur's suggestion that the revocability of obligations and of rights of third States should be dealt with separately, but wondered whether the emphasis in the article should be placed on revocability or on the other aspect, namely, that of the right of the parties to amend a treaty provision, thus making the obligation or right inoperable for non-parties.

40. The question was what were the rights of the non-party and of the parties in the matter, and whether an obligation acquired or a right accepted by a non-party could be revoked or amended without its consent. The answer given to that question in the 1964 text was in the negative, but some governments had criticized it for being too rigid.

41. The Special Rapporteur's new text for paragraph 1 (a) was probably a correct statement of the rule, but how should the new paragraph 1 (b) be construed? Did it mean that an obligation acquired under a treaty provision could not be amended for purposes of giving it greater precision without the consent of a non-party? The question was a real one and had arisen in connexion with Article 2 of the Charter when, in the Final Act of the London nine-Power Conference of 1954, the Federal Republic of Germany had declared that it "accepts the obligations set forth in Article 2 of the Charter".¹⁰ Could not the Charter nevertheless be amended without the consent of the Federal Republic of Germany? The consequence of a contrary interpretation would be to confer upon a non-party an absolute veto over the modification of treaty provisions, and that would be inadmissible. If, as he supposed, the Special Rapporteur's intention in paragraph 1 (b) was to indicate that a State not party to the treaty should be allowed to participate in the process of revision and that it could not be bound by the obligation in the revised provision without its consent, that should be made clearer. He doubted whether the Commission could go further.

42. With regard to the new paragraph 2, it was preferable to express the rule in terms of the termination or amendment of a treaty provision and then to set out the

consequences for the third State. The problem was not merely one of juristic logic, depending upon whatever theoretical views were held in regard to articles 59 or 60, but was one of policy. The purpose of the Special Rapporteur's new text in paragraph 2 was acceptable in so far as the parties had the right to terminate or modify the provisions of a treaty after giving due notice.

43. The difficulty to which that paragraph gave rise concerned the alleged irrevocability of a right flowing from a treaty provision and the power of veto a non-party might have over modifying such a provision. The revocability of a particular treaty provision or of a right accepted by a third State might vary considerably with the treaty. To take as an example the case of a treaty providing freedom of passage for merchant vessels of all States through a canal, could the parties to the treaty terminate one of its provisions simply by giving notice? Could they amend a provision by stipulating, without the consent of the users of the canal not parties to the treaty, that the freedom of passage would be limited to non-nuclear merchant vessels? The second hypothesis would be less a revocation of a right than a limitation upon it. Was the essence of the right of a non-party a right of user under the original conditions laid down in the treaty, or did it include the right to participate in the modification of that right even to the extent of preventing any such modification? A State not party to the treaty might only be interested in one of its provisions, and in that eventuality the rights of such a State in respect to termination or modification of the provision in question might be regarded as less important than the rights of the parties in regard to the treaty as a whole. Finally, would the same argument hold good of a right deriving from a bilateral treaty governing navigation through a canal that might be used by some hundred States not parties to the treaty?

44. Questions of that kind were easier to raise than to answer and on balance his conclusion was that, while the question of objective régimes in international law should be completely reserved, for the purposes of article 61 the presumption on which the 1964 text had been based ought to be reversed, as suggested by the Special Rapporteur in the new paragraph 2. Subject to drafting changes, something on those lines might provide a solution.

45. Mr. JIMÉNEZ de ARÉCHAGA said that he would comment on the Special Rapporteur's text. He thought the Netherlands Government was right in suggesting that there was no need for a provision on the lines of paragraph 1 dealing with the revocation or amendment of obligations. For either such a provision eliminated the obligation of the third State, or made it less onerous, so that in fact it conferred a right on the third State, which would be governed by article 60; or it made the obligation more onerous, and thus imposed an obligation on the third State, which would be governed by article 59.

46. If paragraph 1 were deleted, that would also take account of the Hungarian Government's comment that there was a certain lack of concordance between article 61 and the two preceding articles.

47. Paragraph 2, on the other hand, provided the answer to a very real problem which had arisen in inter-

¹⁰ *British and Foreign State Papers*, vol. 161, p. 405.

national practice. He fully supported the Special Rapporteur's suggestion to reverse the rule laid down in 1964 as to the irrevocability of rights. The formula now proposed would thus conform fully with the decision of the Permanent Court of International Justice in the *Free Zones* case on the question whether a right conferred on a third State could or could not be abolished by the contracting parties without the consent of the beneficiary.

48. The issue before the Court, as it concerned the Free Zone of Gex, was of particular interest. That zone had been created in 1815 by the Treaties of Vienna and Paris, which provided that France should grant the benefit of the zone to Geneva. In 1919, France had secured from all the parties to the Treaty of Vienna the inclusion in the Treaty of Versailles of article 435, which stated that the stipulations of 1815 concerning the Free Zones were no longer consistent with present conditions. France had then proceeded to contend before the Court that she had in consequence been relieved of her obligations, since the third State, Switzerland, which was not a party to the 1815 and 1919 treaties, had no right to claim that the abrogation of the treaty depended on its consent.

49. Switzerland had replied that the intention of all the parties in 1815 had been to grant to it an irrevocable right and that it therefore possessed a vested right which could not be abolished without its consent. The Court had found in favour of Switzerland, stating: "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such".¹¹

50. The Court's reference to "the will of sovereign States" which were parties to the treaty as having the "object and effect" of creating a right for the third State, meant that it had accepted the Swiss argument that the *pacta sunt servanda* rule constituted the legal foundation of the rights in favour of the third State. The Court did not base its conclusion on the theory of the offer and collateral agreement, which had only been invoked in a separate opinion by Judge Negulesco.

51. In the Court's language, "actual right" meant one which could not be abolished without the beneficiary's consent. Since, however, the Court had stated that the intention of granting an irrevocable right could not be "lightly presumed", it was appropriate to formulate the rule as the Special Rapporteur now suggested in his proposed paragraph 2 (a).

52. An example of an intention to grant an irrevocable right was provided by the treaties opening the rivers Uruguay and Paraná to the free navigation of all flags. Those treaties were the outcome of a long conflict between the Province of Buenos Aires, which had wanted

to close the rivers and thus have the monopoly of international trade, and the other provinces higher up the River Plate, which wanted international shipping to have free access to their ports.

53. Articles 32 and 35 of the United Nations Charter, which provided for the right of non-member States to appear before United Nations organs in certain cases, were an example of treaty provisions granting to third States rights which could be modified or abolished without the beneficiary's consent, by amendment under Articles 108 or 109 of the Charter. He was not convinced, however, of the wisdom of requiring a notification in such cases. To take the example of a possible amendment of Article 32 or Article 35 of the Charter, it was difficult to see what States would have to be notified under the provisions of the Special Rapporteur's paragraph 2 (a).

54. He saw no necessity for the provision embodied in the Special Rapporteur's paragraph 2 (b), because the modifications would already be covered by articles 59 and 60. Paragraph 2 (b) would to some extent conflict with paragraph 2 of article 60, which allowed for the establishment of new conditions for the exercise of a right, and laid down that that modification could be effected "in conformity with the treaty" and not necessarily by means of a treaty.

55. The point raised by Mr. Briggs on the right of passage would be covered by paragraph 2 of article 60, relating to the conditions for the exercise of the right; article 61 dealt with the revocation of the right.

56. Mr. AGO said he agreed with Mr. Verdross that the Commission should be consistent and should bear in mind the position it had taken in the preceding articles. If, as he believed, the third State's right or obligation was based on an agreement between the parties to the treaty and the third State, obviously that right or obligation could not be modified or revoked without its consent. From that point of view, article 61 as adopted by the Commission in 1964 was certainly preferable, despite a slight drafting error, for it was not the "provision" of the treaty which could not be revoked or amended without the consent of the third State, but the third State's obligation or right.

57. However, the rule stated in the 1964 text was perhaps too rigid and went too far in the direction of safeguarding the right or obligation of the third State. Since an agreement had been formed between the parties to the treaty and the third State, that agreement should be governed by all the rules relating to agreements in general; it would be absurd for that particular agreement to receive better protection than was normal. To state that the obligation or right could not be revoked or amended without the third State's consent unless it appeared from the treaty that the provision was intended to be revocable was to make the right or obligation virtually inviolable. No provision had been made for the case in which the treaty constituting the basis of that right or obligation became void as a result of a fundamental change of circumstances or the emergence of a new rule of *jus cogens*. But in such a case, the offer contained in the treaty obviously became void and the obligation or right of the third State could not continue to exist although the treaty from which it derived was void.

¹¹ P.C.I.J. (1932), Series A/B, No. 46, pp. 147-148.

58. Moreover, though he was grateful to the Special Rapporteur for having tried to find a more flexible wording for the article, he was afraid that his suggested text went too far in that direction, since it virtually eliminated the idea of the third State's consent.

59. He was not sure, either, that a separate system need be established for rights and for obligations. A State might be reluctant to accept a right offered to it by other States and equally reluctant to lose an obligation which it had previously accepted. International life was such that an obligation might be an essential safeguard for a State, and that State might be placed in a very awkward position if it were deprived of that safeguard by a unilateral act of the parties to the treaty. A third State might have had good reasons for accepting the obligation and it might also have good reasons for wishing to retain it.

60. The Special Rapporteur's text was perhaps also rather imprecise with respect to rights; it might be difficult to prove that it "appears from the treaty that the right was intended to be irrevocable".

61. Like the 1964 text, it also failed to cover the two cases he had mentioned, those where a treaty became void owing to a fundamental change of circumstances or as a result of the emergence of a new rule of *jus cogens*.

62. There was one other point that should perhaps be taken into account in article 61, or at least in the commentary, namely, that all the defects of consent were applicable to the agreement between the parties to the treaty and the third State which had given rise to the right or obligation of the third State.

63. The Commission should reconsider the article carefully and try to arrive at a more satisfactory drafting.

64. Mr. ROSENNE said he would be grateful if the Special Rapporteur would clarify a number of points with regard to the new text he had put forward. The first was what meaning was intended to be attached to the word "terminate"? In the Commission's discussions, two possible meanings had been suggested: one, that the draft articles did not cover all cases of termination, with special reference to such matters as obsolescence; the other, that it only referred to termination in accordance with one of the substantive provisions of part II of the draft articles. It was precisely in order to avoid that difficulty that in 1964 the Commission had decided not to use the word "terminate" but to use instead the word "revoke".¹²

65. Secondly, what was the meaning of the expression "in whole or in part", used in paragraphs 1 (a) and 2 (a), and was that expression intended to establish a connexion between the provisions of article 61 and those of article 46 on separability?

66. Thirdly, did the term "modify", which was used in paragraphs 1 (b) and 2 (b), have the same meaning as that given to it in the group of articles on modification?¹³

67. Fourthly, what were the Special Rapporteur's reasons for replacing the expression "unless it appears from the treaty" by "unless it appears"?

68. He questioned whether article 61 was necessary at all, since its real content was, or should be, covered by

an adequate formulation of articles 59 and 60, to which it in fact referred on the crucial question of rights.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that the changes of phraseology noted by Mr. Rosenne were largely due to the fact that the revised text referred to the modification of the obligation or right of the third State, and not to the modification of the treaty provision establishing the obligation or right. In particular, the reference to the termination of an obligation was intended to cover renunciation by the parties of their right to enforce the obligation undertaken by the third State. The use in the 1964 text of the verb "to revoke" was due to the fact that the article had been drafted in terms of the modification of the treaty provision. The amendment of a treaty provision was a matter for the parties to the treaty; in the new approach, the emphasis was on the relation between the parties and the third State.

70. The question of renunciation in part might prove extremely complicated because it might involve a change in the rights of the third State. Perhaps it would be better to deal with the matter as one of modification under paragraph 1 (b).

71. In paragraph 2 (a), after the words "unless it appears", the words "from the treaty" had been omitted unintentionally and should be restored.

72. The question of the need to retain article 61 should be dealt with when the Commission had fully discussed the provisions of the article.

73. The CHAIRMAN, speaking as a member of the Commission, said the new version of article 61 put forward by the Special Rapporteur was a laudable effort and he could accept the change in the method of formulation whereby it was the third State's obligation or right, and not the provision of the treaty, that might be modified.

74. The new version, however, went rather further than was desirable, since it was essential that there should be some correspondence between the rule on the creation of a right or obligation for a third State and the rule on the modification or termination of that right or obligation. The Commission had required the express consent of the third State in the case of an obligation and had conceded that such consent need only be implied in the case of a right. Mr. Ago had helped to bring conflicting doctrinal views still closer together by proposing that article 60 should contain a presumption in favour of acceptance of the right by the third State. That being so, it would be logical to provide that an obligation might be modified or terminated with the implied consent of the third State, but, for practical reasons which had been ably stated by Mr. Ago, it would be going too far to say that an obligation could be terminated merely by giving notice. It was not possible, from the theoretical point of view either, to terminate by mere unilateral notification an obligation which had been created by the effect of a collateral agreement between the parties to a treaty and a third State.

75. In 1964, he had supported the presumption in favour of the irrevocability of the right of a third State, and he hoped that that presumption would be maintained. An intention to accord a right was assumed to mean a desire for the permanent existence of the right,

¹² *Yearbook of the International Law Commission, 1964*, vol. I, 751st meeting, paras. 71-95.

¹³ Articles 65-68.

in the absence of an explicit statement that it was revocable.

76. He shared Mr. Ago's concern about the fate of a third State's obligation or right, should the treaty from which that obligation or right had arisen be voided as a result of the emergence of a new rule of *jus cogens*.

77. Mr. BARTOŠ said that he had little to add to the views which had just been expressed by Mr. Ago and Mr. Yasseen and with which he was in complete agreement. At the first reading, he had upheld the thesis that there was a presumption in favour of the irrevocability of established situations. The great principles of freedom and self-determination argued in favour of giving a third State the possibility of divesting itself of an obligation, even if that obligation had the appearance of an international obligation. For the reasons put forward by Mr. Ago and Mr. Yasseen, he adhered to the position he had taken at first reading, namely, that revocability was not presumed and that the consent of the State affected by revocability must be expressed.

78. Mr. de LUNA said that he was inclined to favour a reversal of the presumption, as was done in the Special Rapporteur's new text, since selfishness was more common than generosity in international relations.

79. It was essential to bear in mind the need to safeguard the security of legal transactions. At the same time, the protection extended to the third State should not go beyond what was afforded to the parties themselves and he commended the Special Rapporteur for his efforts to prepare a text which took that aspect into account.

80. At the same time, the Commission must be consistent. It had based the rules embodied in articles 58 to 60 on the consent of the third State, and consequently on a collateral agreement. The logical consequence of that system was that no rights or obligations could be established for the third State without its consent and the same approach should prevail in article 61.

81. A new point had been raised by Mr. Ago when he had referred to the possibility of the nullity of the treaty which had established the right or obligation for the third party. The question would then arise whether the collateral agreement with the third party could continue to exist independently of the main treaty. That problem involved the difficult issue of conflicting treaty obligations.

82. The Special Rapporteur's new formulation was much closer to his own doctrinal position, and he himself would have favoured even greater flexibility. It should be recognized, however, that the governments had not asked for that and had in fact expressed considerable anxiety at the possible consequences of the presumption embodied in the article.

83. Finally, the rule in article 61 should not place the third State in a better position than it would have enjoyed had it been a party to the treaty. In the discussions which had led to the Hay-Pauncefote Treaty of 1901 on free navigation in the Panama Canal, the United Kingdom had advocated making the treaty open to accession by all States, but the United States had not agreed and had preferred to make provision in the treaty for the rights of free navigation for all flags. The position

given in cases of that type to a third State under article 61 should not therefore be better than that which would result from accession.

The meeting rose at 12.45 p.m.

856th MEETING

Monday, 23 May 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 61 (Revocation or amendment of provisions regarding obligations or rights of third States)
(continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 61.

2. Mr. TUNKIN said that the Special Rapporteur's redraft² of article 61 was hardly an improvement on the 1964 text. In the first place, there was a logical contradiction between paragraphs 1 (a) and 1 (b); modification could come close to termination and it was difficult to see why mere notice should suffice for the termination but consent should be required for the modification of an obligation.

3. A more important point, however, was that raised by Mr. Ago at the previous meeting. There was no basis for assuming that an obligation invariably represented a burden from which the third State would be glad to be released. In fact, it was not uncommon for the third State to have some interest, or to derive some advantage, from the obligation which it had agreed to perform.

4. The obligations of the third State arose from a collateral agreement between that State and the original contracting parties. That collateral agreement could only be terminated with the consent both of the original parties and of the third State, unless it had been otherwise agreed.

5. Paragraph 2 dealt with the rights of the third State and the same principles should apply. He saw no justification for reversing the presumption embodied in the 1964 text, which was consistent with articles 59 and 60 and also with such basic principles of inter-

¹ See 855th meeting, preceding para. 31.

² *Ibid.*, para. 31.

national law as that of the sovereign equality of States. At the same time, he agreed with Mr. Ago that the 1964 text was unduly rigid and that the Drafting Committee should try to improve on it.

6. Mr. ROSENNE said that he doubted if either the 1964 text or the Special Rapporteur's redraft provided a solution to the difficult problems involved in article 61, which, as governments had observed, required further study. In principle, he agreed with Mr. Ago that no essential difference should be made in the article between the rights and the obligations of third parties.

7. He had been struck by the fact that hardly any mention had been made of the only relevant judicial authority in the matter, the 1952 judgment of the International Court of Justice in the *Case concerning Rights of Nationals of the United States of America in Morocco*.³ Admittedly it dealt with a matter arising from a most-favoured-nation clause, but it offered an extreme example of a problem similar to that dealt with in article 61. The International Court had said nothing about the consent of the beneficiary of the most-favoured-nation clause: when the treaty specifying the rights enjoyed through the most-favoured-nation clause fell, the treaty containing the most-favoured-nation clause also fell to that extent. In its judgment, the Court had laid particular emphasis on the intention of parties. If that was the position when the third State was acting by virtue of an express clause in a treaty, he saw no reason why the position should be any different in the case envisaged in article 61.

8. The position he was advocating was fairly close to the views expressed by Sir Gerald Fitzmaurice in his second⁴ and fifth⁵ reports and by the present Special Rapporteur in his commentary to article 62.⁶ The Commission had made a mistake when it had reversed that trend in 1964 and had omitted to take into account the only judicial precedent which existed in the matter.

9. In his sixth report, the Special Rapporteur had attempted to draw a fine distinction between the termination or modification of the treaty provision itself and that of the rights or obligations of the third State. But if the third State had assented in writing to the creation of those rights or obligations, the result would be a treaty within the definition adopted by the Commission, and the problem would then be one of compatibility between that ancillary treaty and the main treaty. In those circumstances, article 63 would be relevant. The conclusion would probably be the same if the consent were not given in writing, by virtue of the general reservation contained in article 2.

10. He was concerned at the Special Rapporteur's explanation that the omission of the words "from the treaty" after the words "unless it appears" in paragraph 2 (a) was accidental. He himself had supposed that it was deliberate, so as to cover not only the original treaty but also the ancillary agreement, or assent of the

third State. With the narrower interpretation which followed from the Special Rapporteur's explanation, the article might prove somewhat unbalanced.

11. The 1964 text had been criticized by governments as giving excessive rights to third States, but the Special Rapporteur's redraft hardly provided an answer to those criticisms. Both texts seemed to allow the third State to terminate unilaterally and at will any right or obligation it might have assumed under articles 58 to 61 without even informing the principal parties. Such a solution could not be right. Stability and reciprocity must be maintained between the principal parties and the third State. The only answer to the problem was to make it clear that both the principal agreement, as between its parties, and the ancillary agreement, as between its parties, could be terminated or modified only in accordance with the various provisions of the draft articles with all the consequences and all the safeguards therein specified. The United Kingdom Government's observations gave an indication of the direction in which an adjustment of article 61 should be sought.

12. Mr. CASTRÉN said that the comments of governments gave the impression that the text adopted by the Commission in 1964 was too favourable to the State for which an obligation or a right had arisen from a provision of a treaty to which it was not a party and thus unduly restricted the freedom of action of the parties. That text probably also had the defect of being too concise; it would be more satisfactory to deal separately with rights and obligations and with their respective modification and termination. Moreover, according to the text adopted in 1964, it would be the "provision" of the treaty which would be revoked or amended, whereas in fact, as the Netherlands Government had pointed out, it was only the obligations or rights arising from that provision which would be revoked or amended. Unlike Mr. Rosenne, he considered the distinction justified.

13. The new draft proposed by the Special Rapporteur was much more carefully worked out, more detailed and better balanced. He was prepared to accept it as a basis for discussion, but would like to suggest a few amendments.

14. First, for the reason he had already given, the words "provisions regarding" should be deleted from the heading of the article. Secondly, for the sake of conformity with other articles, particularly article 59, as well as for other reasons, the word "consent" in paragraph 1 (b) and paragraph 2 (a) should be replaced by the word "agreement". And lastly, the proviso at the end of paragraph 2 (b) should refer only to article 60, since article 59 related solely to obligations.

15. It was possible, as Mr. Jiménez de Aréchaga had said, that paragraph 1, and probably also paragraph 2 (b), were unnecessary; the deletion of those two provisions would avoid the doctrinal difficulties which had been mentioned by Mr. Verdross, among others. Everything depended, however, on the final form given to articles 59 and 60.

16. Mr. TSURUOKA said that there were two possible solutions to the problem dealt with in article 61. The

³ *I.C.J. Reports*, 1952, p. 176.

⁴ *Yearbook of the International Law Commission*, 1957, vol. II, document A/CN.4/107, para. 211.

⁵ *Yearbook of the International Law Commission*, 1960, vol. II, document A/CN.4/130, para. 89.

⁶ *Yearbook of the International Law Commission*, 1964, vol. II, p. 20, para. (3).

right or obligation of the third State might be held to be based on a collateral agreement between the parties to the treaty and the third State. In that case, the amendment or revocation of the right or obligation did not present any special problem: they were governed by the relevant articles applicable to treaties in general. If the Commission took that view, it would be logical to delete article 61.

17. If, on the contrary, it decided in favour of the alternative solution, which was to lay down special rules in the matter, he would prefer the new wording proposed by the Special Rapporteur to the formula adopted in 1964. He would merely propose that the words "X months" be inserted between the words "giving" and "notice" in paragraph 1 (a), so that notice would be required for termination of an obligation just as it would be required for termination of a right in accordance with paragraph 2 (a). It was necessary to safeguard the stability of international relations, and, under rules of that kind, the obligation affected not only the parties to the treaty and the third State, but sometimes other States as well. For example, say States A and B had created an obligation, by means of a treaty, for State C; then State D, which was in the same situation as State C vis-à-vis States A and B, might find itself in a privileged position because of the fact that it had not been asked to assume the same obligation as C. In such a case, it was desirable that the change of rule should be smooth and orderly and a few months' notice would enable State D to prepare itself for the change.

18. Mr. PAREDES said that he adhered firmly to the principle that both obligations and rights could only arise from the agreement of the parties, and that principle should be applied in the case dealt with in article 61. If a right was conferred upon, or an obligation laid down for, a third State, that right or obligation could not be terminated without the consent of the third State. The same process which had been used for creating an obligation or a right must be used for modifying or extinguishing it. The consent of the parties was the decisive element both for the main treaty and for the collateral agreement between the third State and the original parties.

19. Considerations of justice and fairness supported that view; where a third State accepted an obligation, it did so because it thereby gained some benefit or acquired some right. For example, a third State might have agreed to sell its surplus oil production to the member States of a common market treaty; if, in consequence of that agreement, the third State made investments to increase its production, it would then be unfair to face it suddenly with a decision by the original parties to terminate the agreement and stop buying its oil.

20. He did not believe that rights could be imposed upon a third State, because they invariably involved corresponding obligations. The third State concerned was therefore alone entitled to accept or reject the rights. If it decided to accept and exercise the rights, it often carried out acts which affected its whole existence. It was therefore unfair to permit the original contracting States to terminate the rights.

21. There was a discrepancy between the provisions of articles 59 and 60 on the one hand and the Special Rapporteur's article 61 on the other. The latter specified that notice was required for the termination of an obligation, whereas articles 59 and 60 contained no such provision. A situation could thus arise in which a third State might not be aware of the creation for it of certain rights or obligations, and some action by that third State might be construed by the original parties as acceptance, whereas nothing of the kind was intended. The rights of small countries must be safeguarded and, for that reason, he could not accept the Special Rapporteur's redraft.

22. As had been pointed out during the discussion, there was a difference between the creation of rights or obligations for a particular State and the laying down by the contracting States of a certain programme for the benefit of other States which fulfilled certain conditions. The latter type of situation was similar to an offer of freight rates by shipping companies; if the offer was accepted, a contract was brought into existence; there was no question of any obligation being imposed on a third party. The situation was different in articles 59 and 60, where obligations or rights were imposed on the third State. He could not accept the idea that rights could be imposed upon a third State, or that once created they could be abrogated without the consent of that State, since there was then a collateral agreement between that State and the original parties.

23. Mr. AGO said he wished to draw the attention of the Drafting Committee to the point which had been raised by Mr. Rosenne. At the previous meeting, the Special Rapporteur had said that the words "from the treaty" had been omitted unintentionally after the words "unless it appears" in paragraph 2 (a) of the English text, but he personally considered the omission felicitous. The Commission had already on several occasions questioned the accuracy of the expression "it appears from the treaty", since texts other than the treaty might be taken into account. In the case under consideration reference might be made, *inter alia*, to the correspondence between the parties to the treaty and the third State.

24. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Ago that it would serve a useful purpose to drop the words "from the treaty" after "unless it appears".

25. Mr. AGO said that it might perhaps be desirable to replace the expression "unless it appears" by some expression which was slightly more precise, such as, in French, "*s'il est établi*".

26. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that it was perhaps arguable that paragraph 1 of article 61, dealing with obligations, could be dispensed with on the ground that it was covered by the general principles set forth in the other articles. Paragraph 2, dealing with rights, was, however, essential.

27. As far as a third State's obligations were concerned, there was undoubtedly a need in international relations for consultation and perhaps assent for revocation or amendment. Nevertheless, it would be inadmissible

in law to hold that those who had a right to enforce an obligation could not renounce that right; for certain classes of obligations, therefore, consent would obviously not be necessary. However, for certain other obligations of an objective character, or which formed part of a settlement, termination by the original States would not be a simple matter.

28. In paragraph 1, particularly in sub-paragraph (a), he had had in mind the case of renunciation and it might perhaps be better to use the verb "renounce" instead of "terminate". With regard to Mr. Tunkin's remarks on the difference between sub-paragraphs (a) and (b) of paragraph 1, the use in sub-paragraph (b) of the words "in any other respect" was intended to make it clear that the modification envisaged would have an effect other than that of terminating the obligation in whole or in part.

29. On the question of rights, dealt with in paragraph 2, the Commission was obviously divided on his suggestion to reverse the presumption. It was not as yet clear to him how many members favoured that reversal and how many opposed it.

30. The question had been raised by Mr. Rosenne of the distinction between the modification or termination of provisions regarding the third State's obligations or rights and the modification or termination of those obligations or rights themselves. His own view was that article 61 was essentially concerned with the relationship between the original contracting parties and the third State. The question of that relationship could not be ignored; it was undoubtedly a separate one from that of the relationship between the original contracting States themselves, and that point was in fact illustrated by the case mentioned by Mr. Rosenne.

31. He suggested that article 61 should be referred to the Drafting Committee with the comments made during the discussion and that the Drafting Committee be asked to attempt a redraft.

32. Mr. ROSENNE said that he did not dispute the fact that there were two different processes at work; there were indeed two sets of relationships, but they were very closely linked. His earlier remark had simply been to the effect that the distinction between the revocation or amendment of the provision and the revocation or amendment of the right or obligation was too fine to form the basis of an article in an international convention.

33. Mr. AGO said he would like to help to remove the Special Rapporteur's uncertainty as to the preferences of members of the Commission with respect to the reversal of the presumption in paragraph 2 (a) of his new text. The crux of the problem lay in the difference of opinion as to the source of the right possessed by the third State. A majority of members considered that source to be the assent of the third State. If that were the case, then the inescapable conclusion was that the termination of such a right should be neither easier nor more difficult than the termination of the other rights which arose from an act of assent. For that reason, he was on the whole opposed to the presumption of revocability; he could not support a formula by which the right of the third State could be abolished merely

by giving notice unless the third State could prove that the right was irrevocable.

34. Mr. JIMÉNEZ de ARÉCHAGA said that the fact that the assent of the third State was necessary was not necessarily a decisive factor on the question of revocability. For example, the original parties could offer a conditional or revocable right.

35. Mr. VERDROSS said he entirely agreed with Mr. Ago, provided articles 59 and 60 were retained, since obviously if the Commission decided to modify those two articles as he (Mr. Verdross) had proposed, it would have to modify article 61 as well.

36. Mr. EL-ERIAN said that he had not taken part in the discussion on article 61 because in 1964 he had adopted a negative attitude towards the whole question of the effects of treaties on third States. He had therefore not wished to discuss the amplification of that system.

37. The discussion on article 61 had shown that it was difficult to combine provisions on rights and obligations of third States when the basis on which rights and obligations rested was not the same. Where rights were concerned, the doctrinal differences between members sprang from the two different conceptions in the matter: the conception of offered rights and that of conferred rights.

38. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Jiménez de Aréchaga that the offer of a right could be subject to certain conditions and could be accepted on those conditions. But he was still convinced that the presumption should be based on the general rule, not on an exception; and the general rule was that a right was offered unconditionally. The presumption should therefore be that the right offered was irrevocable.

39. Mr. BRIGGS said that, as he had already pointed out at the previous meeting, the question was not so much one of juristic logic as one of policy, and as he had then indicated, he favoured the reversal of the presumption.

40. Mr. TUNKIN asked what Mr. Briggs meant by the term "policy".

41. Mr. BRIGGS replied that what he meant was that course which best served the community interests of States.

42. Mr. TUNKIN said that the Commission should seek to embody in the draft articles the norms best suited to international relations and most likely to promote peace.

43. Mr. AGO said that, even from the point of view of legislative expediency, there was no reason why it should be possible for a right given to a third State to be revoked *ad libitum* by the parties to the treaty unless it could be proved that the parties had intended conferring the right irrevocably. It seemed, rather, that the opposite should be the case.

44. Mr. de LUNA said that he was in favour of the reversal of the presumption in paragraph 2, although he did not deny the logic of the argument that the modification or termination of the collateral agreement required the consent of the third State.

45. The Commission should adopt as neutral a formulation as possible, taking into account the fact that the majority of governments in their comments had stated that they considered the rights granted to the third State excessive. As he had said at the previous meeting, States were more often selfish than altruistic and, if they made provision for rights for third States, it was usually in order to avoid making the treaty open to accession.
46. The case cited by Mr. Rosenne did not deal with a question of rights granted to a third State. The rights invoked in that case did not arise from a collateral agreement but from the most-favoured-nation clause.
47. Mr. JIMÉNEZ de ARÉCHAGA said that presumptions were usually based on two elements: facts, and considerations of convenience or policy. As far as the facts were concerned, a rebuttable presumption generally followed the line of the majority of cases. In the problem under discussion, the normal situation was that where the parties to a treaty wished to make some provision in favour of third States; their intention was usually to grant a benefit which could be utilized while it was kept in force by the original parties to the treaty; there was usually no intention to grant a right and to bind themselves to the third State. That was the meaning of the statement by the Permanent Court in 1932 in the *Free Zones* case, which he had quoted at the previous meeting,⁷ that it could not be "lightly presumed" that stipulations favourable to a third State had been adopted with the object of creating a right and of binding the parties toward that third State.
48. The presumption should therefore be in favour of revocability and considerations of convenience or policy supported that conclusion. It was desirable to promote third party stipulations; if a rule were to be laid down that the parties were irrevocably caught by the stipulation, contracting States would not be inclined to include such provisions in their treaties.
49. Mr. TUNKIN said that although the members of the Commission were divided on doctrinal issues, they were united as far as their practical objectives were concerned; it was undoubtedly those practical objectives which Mr. Briggs had had in mind when he had referred to policy considerations. In the circumstances, the article could safely be referred to the Drafting Committee, which would endeavour to formulate a text that would obviate the doctrinal difficulties.
50. Mr. AGO said that, as Mr. Jiménez de Aréchaga had urged, he would consider what happened in practice. In practice, if the parties to a treaty wished to give a third State a right which they intended should last only as long as they wished, they would normally take the precaution of saying so in the treaty. If they did not include any specific provision to that effect in the treaty, the third State was entitled to consider that the right had been offered to it irrevocably. That was why he considered the presumption of revocability to be just as unacceptable as the idea that the third State should be placed in a position where its rights came and went without its having any say in the matter at all.
51. Mr. AMADO said he agreed with Mr. Ago and especially because the right conferred on the third State was not just nominal but might lead to a whole series of actions by the State. Except from the doctrinal standpoint, his views coincided with those of Mr. El-Erian. But he feared that the article was going to give the Drafting Committee a lot of trouble.
52. The CHAIRMAN, speaking as a member of the Commission, said that the presumption of irrevocability was not prejudicial to the States which offered the right, because it was they who were taking the initiative and they were consequently able to take their precautions, lay down conditions which limited the right, offer it for a specific period, or make it revocable. If no such provisions were contained in the treaty, the right of the third State should be regarded as irrevocable.
53. Mr. CASTRÉN said that since the Special Rapporteur had asked for more definite guidance, he would inform him that he shared the view expressed by Mr. de Luna. For practical reasons, and leaving pure logic and theoretical considerations aside, he was in favour of including the presumption suggested by the Special Rapporteur.
54. Mr. TSURUOKA said that he too would support the Special Rapporteur's proposal, though he regretted he could not follow Mr. Ago. In practice, owing to the mentality of States and their conduct in international relations, it often happened that treaties intended to be permanent were very soon amended, and that temporary arrangements were liable to last for a very long time. A delicate balance was therefore needed and he was sure that the Drafting Committee would manage to find one.
55. Sir Humphrey WALDOCK, Special Rapporteur, said it was clear that the Commission was fairly evenly divided on the doctrinal question. The Drafting Committee would have to devise a practical formula likely to attract general support.
56. It was a fact that the few governments which had commented on article 61 had found that its provisions went too far in protecting the third State. Those comments should be taken into account, even if it were assumed that many of the States which had not sent any comments were prepared to accept the 1964 text.
57. The main point which had arisen was partly one of legal policy. It was undoubtedly highly desirable that, when a right was created in favour of third parties, especially in such matters as navigation on international waterways, that right should be as firm and as solid as possible. There was also considerable force in the argument that, if the contracting States wished to make the third party's rights revocable, they could specify as much in the treaty.
58. He would repeat his proposal that the article be referred to the Drafting Committee with instructions to prepare a new text in the light of the discussion.
59. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt the Special Rapporteur's proposal.

*It was so agreed.*⁸

⁷ Para. 49.

⁸ For resumption of discussion, see 868th meeting, paras. 53-79.

ARTICLE 62 (Rules in a treaty becoming generally binding through international custom) [34]

[34]

Article 62

Rules in a treaty becoming generally binding through international custom

Nothing in articles 58 to 60 precludes rules set forth in a treaty from being binding upon States not parties to that treaty if they have become customary rules of international law.

60. The CHAIRMAN invited the Commission to consider article 62, for which the Special Rapporteur had no new proposal.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that article 62 seemed to have been misunderstood by some governments. The Commission had intended it to constitute a general reservation to the provisions in articles 58 to 60. Some members had attached special importance to the article because of the decision not to include in the draft an article on objective régimes on the ground that the time was not ripe to attempt codification on that subject, although the problems involved had been fairly thoroughly discussed.

62. Members had admitted the existence of the phenomenon whereby treaty provisions acquired the force of customary rules of international law through being recognized as authoritative statements of existing law and the Commission had been anxious to ensure that the provisions of articles 58 to 60 should not be misconstrued as a denial of such a proposition.

63. In his report he had analysed the objections by governments and delegations to the article and had reached the conclusion that it ought to be maintained more or less on the lines approved in 1964.

64. Mr. VERDROSS said that he too was in favour of leaving article 62 as it was. He would merely suggest inserting the word "general" before the words "international law" at the end of the article, in order to draw a clear distinction between customary rules of general international law, which were what the Commission was referring to in the article, and customary rules of regional international law or local customary rules.

65. In the *Case concerning Right of Passage over Indian Territory*,⁹ the International Court of Justice had recognized the existence of a local custom. But the problem of local custom was dealt with in article 65, which implied that a treaty could be amended even by an unwritten agreement.

66. The existence of a regional custom, on the other hand, was very difficult to prove. In the *Asylum* case, for instance, the International Court had found against the existence in Latin America of a regional custom concerning the right of diplomatic asylum¹⁰, because a State in that region had not ratified a convention on the subject.

67. Mr. CASTRÉN said that although three governments, including that of Finland, had suggested that article 62 should be deleted, he personally, after con-

sidering the observations of the Special Rapporteur, had no objection to its being retained. It did not seem to be essential, but at least it could do no harm. He would therefore accept it, subject to certain drafting changes.

68. Mr. TUNKIN said that there was no difference in the Commission over the substance of article 62, but the text lacked clarity. There were rules generally binding through international custom on the one hand and customary rules of a regional or local character on the other. The Commission's intention had not been to exclude the latter and if the amendment proposed by Mr. Verdross were adopted, the consequence would be restrictive. The scope of application of rules embodied in a treaty might become extended in the course of time. He therefore suggested that the final words of article 62 be amended to read "if they have become binding through international custom".

69. Mr. AGO said that he was in favour of the underlying idea of the article, but the drafting could be improved. The Commission did not intend to say that the rule in the treaty, as such, would become binding on a third State, but that, should a customary rule emerge that was identical in content with the rule in the treaty, the customary rule would be binding on the third State.

70. He was not sure that the Commission had really covered all possible cases in using, in the French text, the word "*deviennent*". A treaty might contain a rule which merely reproduced an already established customary rule, as was true of some examples recently cited in connexion with *jus cogens*, and it was hard to tell whether the rule in the treaty had preceded or followed the customary rule. The drafting might therefore be improved.

71. Like Mr. Verdross, he was rather sceptical about local custom; it was frequently mentioned, but no really convincing example had been quoted so far. He saw no need to speak of "general" custom, because customs were either all general, in which case any reference to customs meant general customs, or else there were local customs also, in which case there was no reason to exclude them. Assuming that there were customs peculiar to the American continent, a treaty made between American States might embody rules that were binding on American States not parties to the treaty because of the existence of an American custom.

72. Too narrow a definition should therefore be avoided, and it would be preferable to adopt a text on the lines suggested by Mr. Tunkin, referring to custom but not specifying whether the custom was general or local.

73. The CHAIRMAN, speaking as a member of the Commission, said that the article might be regarded as useful. In 1964 he had pointed out that it covered only one aspect of the general problem of the relationship between custom and written rules, and had suggested that the problem should be treated as a whole in a general study.¹¹

74. He saw no objection, however, to retaining the article in the draft. Custom could, of course, be general,

⁹ *I.C.J. Reports*, 1960, p. 6.

¹⁰ *I.C.J. Reports*, 1950, p. 277.

¹¹ *Yearbook of the International Law Commission*, 1964, vol. I, 740th meeting, para. 81.

but although the existence of local customs was contested, he himself believed that such customs existed and that there was nothing to prevent their formation; therefore he saw no reason for excluding that possibility.

75. Most of the difficulties raised by governments did not detract from the value of the article. He agreed in principle with the Syrian delegation on the need for including in the text the element of recognition in connexion with custom. Recognition of a custom by a State was an essential element in the formation of that custom, so far as that State was concerned, but that was not the right place to deal with the matter, which formed part of another topic, that of the technique of the formation of custom as a source of international law.

76. In his view, the article could be accepted, with some drafting changes.

77. Mr. JIMÉNEZ de ARÉCHAGA said that, while he was in favour of maintaining the 1964 text, subject to drafting improvements, he considered that it should be regarded as covering regional or local rules of customary law. In the *Asylum* case, the International Court had not rejected the possibility of a customary regional law existing but had denied on the basis of the evidence the existence of a particular rule of customary law, which one of the parties had sought to deduce from the existence of a regional custom, namely the right to define unilaterally the political crimes which authorized the grant of asylum. One factor taken into account by the Court had been the refusal of one party to the dispute to ratify a treaty providing for such unilateral definition, on which the other party had relied.

78. Mr. de LUNA said it might be worth considering a text reading:

“ Nothing in articles 58 to 60 precludes the rules set forth in a treaty from being equally binding upon States not parties to that treaty if they are binding because they are rules of customary international law. ”

Mr. Tunkin's suggestions could be taken into account by referring at the end to the binding character of the rules. It should be remembered that at other periods of international law customary general rules had had features which were now excluded by the sovereignty and independence of States.

79. Mr. ROSENNE said that he agreed with the Special Rapporteur's conclusions and with what had been said by Mr. Tunkin and Mr. Ago. Strictly speaking, even a rule of regional or local customary law ultimately obtained its validity from general international law, and as far as that point was concerned, the wording of article 62 should be left unchanged.

80. He was more concerned about the Commission's decision to insert a new article 30 (*bis*) (A/CN.4/L.115) on the obligations of parties under other rules of international law which had been approved during the second part of the seventeenth session.¹² That article and article 62 dealt with two aspects of the same problem, and the

possibility of their being amalgamated should be considered when the Commission examined the whole question of the arrangement of the articles in the draft.

81. Mr. REUTER said that the English text was certainly more satisfactory than the French and Spanish. The expression “ *devenir obligatoire pour des Etats tiers* ” struck him as very poor drafting. What the text should say was “ *pour des Etats non parties au traité* ”, because the States which would be affected if the rules became binding had not remained third parties, so far as the formation of custom was concerned. That point must be made clear.

82. He was not sure whether the Commission wished to refer to “ custom ” or to “ customary rule ”; a distinction was sometimes made between the two but he would support whatever was the Commission's usual practice.

83. Mr. BRIGGS said that he had no difficulty in accepting the principle enunciated in article 62, but the drafting must be improved. He favoured the suggestion by the Israel Government to revise the opening words to read “ Nothing in these articles precludes . . . ”.

84. The Special Rapporteur was right in his view that the article should be kept in its present position because of its close connexion with articles 58 to 60.

85. The reason why he was critical of the text was that it failed to make clear whether the customary rules of international law referred to had existed before the treaty was concluded or whether they derived from the treaty itself and became rules of customary law subsequently. There were numerous historical examples of treaty provisions becoming accepted as rules of customary law after a long process of appearing in a great number of treaties.

86. The article should certainly not exclude rules of international custom which had not yet become general.

87. Mr. EL-ERIAN said that article 62 must be maintained because the decision not to include an article concerning objective régimes had been accepted by some members on the understanding that article 62 would at least partially fill the gap. It was a useful provision because it dealt with something in the nature of a combination of treaty and customary law. The phrase “ international custom ” which was used in Article 38(1)(b) of the Statute of the International Court was the right one, because it comprised both general and local customary rules of international law.

88. Mr. de LUNA said that regional or local custom should obviously not be excluded. But in his opinion, the repetition of a rule in many treaties, or in all treaties of a similar kind, was not evidence of the formation of a custom. Such clauses were often repeated precisely because States were aware that the rule they were stating would not be binding unless it was embodied in the treaty. It was therefore a little venturesome to conclude from the presence of a rule in one or more treaties that States had the legal conviction that that rule was binding: its inclusion in a treaty was often evidence to the contrary. It should be noted that the customary rule was in many cases neither precedent nor subsequent to the treaty, but the act by which given

¹² *Yearbook of the International Law Commission, 1966, vol. I, part I, 842nd meeting, paras. 71-78.*

States embodied it in a treaty as a legal provision was sufficient to establish it as a customary rule.

89. Mr. AGO said he thought that the Commission should avoid using a form of words such as "Nothing in articles 58 to 60 precludes". What the Commission was proposing to state in the article was an absolute truth, which it could not impugn by the draft it was preparing on the law of treaties. Whatever the Commission included in the article, it could not prevent the formation of customary rules nor hinder them from governing certain matters and according rights and obligations. In any case, the rule might be stated much more simply in the following terms: "Rules stated in a treaty may be or may become binding upon States which are not parties to the treaty if they are at the time or if they become customary rules of international law".

90. Mr. TUNKIN said that the formula put forward by Mr. Ago would cover a much wider field than what the Commission had originally intended to cover in article 62, which was cases of rules deriving from a treaty acquiring the force of customary rules for certain States, since it would also cover rules which had already become customary rules before the conclusion of the treaty.

91. Mr. BRIGGS said he supported Mr. Ago's suggestion. Many provisions in the Vienna Convention on Diplomatic Relations had been customary rules of international law long before the Convention had been drawn up, but a saving clause concerning customary law had been included in the preamble. A text on the lines suggested by Mr. Ago would also overcome the drafting difficulty he had mentioned earlier.

92. The CHAIRMAN, speaking as a member of the Commission, said that the new proposal that had just been made showed the justice of his observation that the article dealt with only one aspect of a general problem, that of the relationship between custom and written law, more particularly in the light of the existing trend of codification.

93. Mr. TUNKIN said that the Drafting Committee must scrutinize Mr. Ago's text with great care. He still thought its effect would be too broad. It must be remembered that the provisions of a treaty might alter rules of customary law for the parties.

94. Mr. AGO said it was certainly possible that a treaty might alter an existing custom, but that situation did not fall within the scope of article 62, which was exclusively concerned with the case in which the customary rule and the rule in the treaty were identical in content. It would therefore be rather dangerous to consider only the case where a rule in the treaty subsequently became a customary rule, without providing for the case where the customary rule either already existed or came into existence simultaneously with the rule in the treaty.

95. Mr. TUNKIN said he recognized the existence of the difficulty mentioned by Mr. Ago, but it should not be discussed in the present context. The purpose of article 62 was to deal with the effect of rules in a treaty becoming generally binding through international custom upon States not parties to the treaty. The problem of the

relationship between customary and treaty rules was an entirely different one, which the Commission was hardly in a position to tackle at that juncture.

96. Mr. AMADO said that, in his view, if the rules set forth in a treaty were already law or became law, that law was binding. That was the whole point: if such rules were law, they produced the effects of law and were binding. A customary rule arose and in due course became the law. A treaty between two or more States could not possibly conflict with the law which was in effect in the form of custom.

97. Mr. EL-ERIAN said that he shared Mr. Tunkin's misgivings. The Commission should not go beyond the limited objective it had had in mind when drafting article 62 at its sixteenth session. The article dealt with rules which had their origin in a treaty and not in international custom.

98. Mr. REUTER said that the main question now before the Commission was whether to retain an extremely restricted article or to adopt a rather longer one. Mr. Rosenne had already pointed out that there was perhaps a connexion between article 62 and an earlier article. The Commission should also bear in mind that paragraph (c) of article 68 dealt with the relationship between a treaty and a subsequent custom conflicting with it.

99. So without wishing to be specific about it, he thought that, at least in the commentary, the Commission would have to touch on a problem it had raised in such general terms. To the best of his knowledge, the existence of a custom had never been established before any international court or in any exchange of diplomatic correspondence merely by referring to a body of precedents drawn from the conclusion of earlier treaties.

100. Thus, if the article was interpreted in a restricted sense, he was not opposed to its retention, though it had no great practical importance. On the other hand, the question whether the customary rule continued to exist on the conclusion of a codification treaty, though perhaps a difficult problem, was also a very practical one, on which there was a good deal of case-law. Anyone who examined the provisions of The Hague Conventions on the laws of war, instruments that had had the character of customary law, then had given rise to treaties from which—according to the Nuremberg Tribunal—a general custom had again been derived, would almost be prepared to justify the existence of a special article defining the limits of codification. In other words, codification did not affect the existence of a prior autonomous customary rule, a point of some consequence in relation to a draft convention on the law of treaties, which the Commission could not be sure would be accepted and ratified by all States. That was why the question seemed difficult and deserved more attention.

101. Sir Humphrey WALDOCK, Special Rapporteur, said that the problem to which article 62 gave rise was not a new one and had been discussed at the sixteenth session, when the Commission had deliberately decided to frame an article of a restricted character.¹³ As Mr. Tunkin had pointed out, the suggestion to amplify its

¹³ See *Yearbook of the International Law Commission, 1964*, vol. I, 740th, 741st and 754th meetings.

scope would entirely change the basis of the agreement reached in 1964.

102. It might be argued that the article, which had been inserted to obviate any possible misunderstanding about the implications of articles 58 to 60, was unnecessary because any competent lawyer would be aware that the latter could affect the fundamental principle concerning the force of customary law. The Commission's desire to include article 62 had been reinforced by the compromise reached over article 60 and the reluctance of some members to drop an article dealing with objective régimes.

103. Both the Commission and the Drafting Committee had discussed the relationship between customary and treaty law, but had decided, possibly out of timidity but nevertheless wisely, not to go too far into the subject. The codification of the relation between customary law and other sources of law should be left to others. The problems it posed had come up during the consideration of the Commission's draft articles on the law of the sea and on diplomatic and consular privileges and immunities. They were not peculiar to the codification upon which it was at present engaged.

104. The amendment put forward by Mr. Ago had brought out into the open a slight discrepancy between the English and French texts. In the former, the word "being" had been chosen deliberately, to meet the point of view of those who wished the article to be wide enough to cover the case of a treaty which embodied already existing customary law. But the article had originated in one of his own proposals—article 64—to cover the case of treaties giving rise to rules of customary law through the formation of custom as a kind of incrustation on the treaty.¹⁴

105. The problem of the concordance of the text in the three languages would certainly have to be examined in the Drafting Committee in the light of the suggestions made during the discussion. But at the present stage the Commission could hardly embark upon a general study of the relationship between treaty and customary law.

106. The CHAIRMAN said that it seemed to be the general view that the article could be referred to the Drafting Committee.

*It was so agreed.*¹⁵

Co-operation with Other Bodies

(resumed from the 853rd meeting)

[Item 5 of the agenda]

107. The CHAIRMAN invited the Deputy Secretary to the Commission to report on the receipt of communications from other bodies.

108. Mr WATTLES, Deputy Secretary to the Commission, said that the Secretariat had just received copies of three papers prepared by a study group of the American Society of International Law, which had been examining the Commission's draft articles on the law of treaties. The Secretariat, which was simply acting as

a channel for transmission of the papers, would be glad to make them available to any member.

109. A letter had also been received from the Secretary of the Asian-African Legal Consultative Committee, informing the Commission that the Committee's eighth session was to be held at Bangkok from 1 to 10 August 1966. A copy of the provisional agenda had been enclosed with the letter. Among the items to be discussed was the consideration of the Commission's report on the work of its seventeenth session and the law of treaties. It would be remembered that the Commission had a standing invitation to be represented by an observer at the Committee's sessions.

110. Mr. de LUNA proposed that the Commission should be represented at the Asian-African Legal Consultative Committee's session by its Chairman, Mr. Yasseen.

111. Mr. JIMÉNEZ de ARÉCHAGA, Mr. TUNKIN, Mr. AGO, Mr. TSURUOKA, Mr. BRIGGS, Mr. ROSENNE and Mr. REUTER supported that proposal.

112. The CHAIRMAN thanked the Commission for his nomination, which he accepted in principle, on the understanding that, if he found it quite impossible to travel to Bangkok, he could delegate the duty to any other member of the Commission who was willing to undertake it.

The meeting rose at 6 p.m.

857th MEETING

Tuesday, 24 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(resumed from the previous meeting)

(Item 1 of the agenda)

ARTICLE 63 (Application of treaties having incompatible provisions) [26]

[26]

Article 63

Application of treaties having incompatible provisions

1. Subject to Article 103 of the Charter of the United Nations, the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs.

¹⁴ *Op. cit.*, vol. II, p. 34.

¹⁵ For resumption of discussion, see 868th meeting, paras. 80-115.

2. When a treaty provides that it is subject to, or is not inconsistent with, an earlier or a later treaty, the provisions of that other treaty shall prevail.

3. When all the parties to a treaty enter into a later treaty relating to the same subject matter, but the earlier treaty is not terminated under article 41 of these articles, the earlier treaty applies only to the extent that its provisions are not incompatible with those of the later treaty.

4. When the provisions of two treaties are incompatible and the parties to the later treaty do not include all the parties to the earlier one:

(a) As between States parties to both treaties, the same rule applies as in paragraph 3;

(b) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty applies;

(c) As between a State party to both treaties and a State party only to the later treaty, the later treaty applies.

5. Paragraph 4 is without prejudice to any responsibility which a State may incur by concluding or applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

1. The CHAIRMAN invited the Commission to consider article 63. The Special Rapporteur's only proposal was for a revision of paragraph 3 (A/CN.4/186/Add.3, para. 4).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the problems dealt with in article 63 had engaged the Commission's attention on several occasions. In particular, the Commission had devoted close attention to the co-ordination of article 63 with article 41, which dealt with the termination or suspension of the operation of a treaty implied from entering into a subsequent treaty. During the second part of its seventeenth session it had adopted what it believed to be a good solution for article 41, and it now had to deal with the formulation of article 63.

3. Government comments on the text adopted in 1964 had not been very extensive. The Government of Israel had suggested that paragraph 1 should refer to rights as well as obligations. Although the emphasis of article 63 was on obligations, he would himself have no objection to that proposed change.

4. In paragraph 2, the United Kingdom Government had suggested that the reference to "an earlier or a later treaty" should be changed to "any earlier or later treaty" and he believed that change to be a drafting improvement. The Government of Israel had suggested that paragraph 2 should admit the possibility of a material examination of the treaty to determine the existence of any inconsistency. As he had explained in paragraph 2 of his observations, he did not consider that suggestion apposite, because paragraph 2 concerned cases where the treaty contained an express provision regulating its relation to other treaties.

5. With regard to the interrelation between article 63 and article 41, the Government of Israel had suggested that the question of partial termination should be removed from article 41 and placed in article 63. Since, at its last session, the Commission had removed the question of partial termination from article 41, that point had been largely covered. As for the Government of Israel's suggestion that suspension should be separated

from termination, that had already been discussed both by the Commission itself and by the Drafting Committee, and it had been found that it would be difficult to achieve without introducing other complications. Moreover, there were articles in which it was essential to deal with suspension and termination together.

6. The Netherlands Government had found paragraph 4 "one-sided" and "unsatisfactory". There was at the heart of that objection a point which the Commission had already closely examined in 1964, namely, whether the rule in article 63 was sufficient and satisfactory with respect to all categories of treaties. He was thinking of law-making treaties and of such treaties as disarmament treaties, which created a special relationship between the parties. The underlying issue was whether a State could, by a prior treaty, diminish its own competence to conclude treaties; the majority of the Commission had felt that no such diminution of competence occurred. The questions which arose were therefore matters of State responsibility.

7. The Yugoslav Government had suggested that article 63 should be co-ordinated with articles 66 and 67. He sympathized with the idea underlying that suggestion but did not think that a combination of the three articles would answer the purpose. Articles 63, 66 and 67 dealt with problems that were inherently complex. The Commission should adopt precise wording for the rules embodied in those articles and co-ordinate their provisions; careful attention should be given to that co-ordination when the Commission considered article 66, and especially article 67.

8. In paragraph 7 of his observations he had dealt with the comment by the Government of Israel on obsolescence or desuetude as an independent cause of termination. That question had already been raised in connexion with another article of the draft and the Drafting Committee had been invited to consider it and to report to the Commission. Since the Drafting Committee would thus have to advise on the desirability of including a specific provision on obsolescence or desuetude, it was not necessary to discuss the matter at length at that stage. Personally, he did not believe that obsolescence constituted a legally separate ground of termination. The real ground of termination in cases of obsolescence was some form of implied agreement by the parties.

9. Mr. JIMÉNEZ de ARÉCHAGA said that article 63 did not fulfil the promise contained in its title. Instead of solving the real problem of the application of treaties having incompatible provisions, it merely stated the obvious in its subparagraphs 4 (b) and (c), which contained the real substance of the article.

10. Article 63 dealt with those cases where it was possible, both from a practical and from a legal point of view, to apply simultaneously the earlier and the later treaties vis-à-vis different parties, but those cases did not in fact involve incompatible provisions. The article ought to deal with the case of treaties having incompatible provisions which could not be applied simultaneously vis-à-vis different parties. That situation occurred in particular in the case of treaties which laid down interdependent or integral obligations that required a

particular line of conduct from the State accepting the obligation, and one which could not be different vis-à-vis different States. The implication of article 63 was that, in that case, a State which had assumed two contradictory obligations was free to choose to conform with any one of them, and that its only duty was to give reparation to the State party to that particular treaty which the State bound by the two treaties had chosen not to perform.

11. The Commission had retreated gradually from the proposals submitted to it by its three Special Rapporteurs who had dealt with the matter until in 1964 it had adopted article 65, now 63, in a form which, as pointed out by the Netherlands Government, was hardly compatible not just with progressive development, but even with existing international law. In 1953, a proposal¹ had been made by Sir Hersch Lauterpacht which would provide for the invalidity of the later treaty if entered into with the intention to violate the earlier treaty and in 1958 a proposal² had been made by Sir Gerald Fitzmaurice which would provide for cases where the earlier treaty was a treaty creating "interdependent" or "integral" obligations, but the Commission had not had an opportunity to consider either proposal. In 1964, Mr. Tunkin had expressed concern at that omission and had suggested that the Commission ought to consider at second reading whether that point should be expressly covered in the article itself.³

12. In rejecting the tendency to give pre-eminence to the earlier treaty when the later one was obviously a violation of it, the Commission had gone too far in the other direction, and was now placing the two treaties virtually on the same level. It was thereby giving a sort of *carte blanche* to violate a treaty by means of a new agreement. The Commission had condemned breach in article 42, but in article 63 it appeared to legitimate it and give it a semblance of respectability, provided the State wishing to commit the breach could find another State to act as accomplice and thus enable it to present the breach in the guise of a new treaty.

13. In article 42, as approved at the previous session, the Commission had already recognized the existence of the integral type of treaty, described in paragraph 2 (c) of that article as being "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". Where such a treaty was in existence, it could hardly be disputed that if one of the parties to it entered into a later treaty incompatible with it, with other partners, that act would constitute at least a repudiation of the former treaty.

14. When a State party to an earlier integral treaty concluded a later treaty incompatible with it with a State which was aware of the pre-existing obligation, the later treaty was not void, since the Commission had not accepted the theory of invalidity, but the conclusion

of the later treaty undoubtedly constituted a violation of international law; the State which was bound by the earlier treaty was under an obligation not to enter into the later treaty and, if it did so, it was obliged to suspend the application of the later treaty and take steps to release itself from it as soon as possible. And the partner to the later treaty, if it had participated in it in full awareness of its unlawful character, would not be entitled to claim any rights which might otherwise have arisen from the non-performance or premature termination of the later treaty.

15. In 1964, the Special Rapporteur had proposed that formula in a somewhat broader form but his very modest proposal had not been accepted by the Commission. Personally, he regarded that formula as representing the least that the Commission should provide in order not to place the two treaties on the same level and so as to induce compliance with the earlier treaty. He therefore proposed the addition, at the end of paragraph 4 (c), of the following proviso:

"However, in the case of a prior treaty of the character described in article 42, paragraph 2 (c) of the present articles, a party to that treaty is under an obligation not to enter into a subsequent agreement whose execution is incompatible with the earlier treaty, and, if such subsequent agreement has been concluded, that party is bound to suspend its execution and take the steps necessary for its termination. A party only to the later treaty is not entitled to invoke any right arising from such non-performance or termination, if it was aware of the existence of the previous treaty."

16. Mr. CASTRÉN said he accepted the two drafting changes proposed by the Special Rapporteur, the first to paragraph 2, in response to the suggestion by the United Kingdom Government—although he personally considered that the paragraph was sufficiently precise—and the second to paragraph 3, in response to the suggestion by the Government of Israel. Otherwise, in his view, the Special Rapporteur had rightly concluded that the criticisms of some parts of the text adopted in 1964 were groundless.

17. The Commission had devoted much time to the question of the incompatibility of treaties in connexion with other articles, particularly article 41. Article 63 was based on recognized principles, such as respect for the rights of third States, as well as on State practice and international jurisprudence. It seemed possible and advisable to retain it as it was, subject to a few drafting changes.

18. With regard to the question of the obsolescence of treaties raised by the Government of Israel, he agreed with the Special Rapporteur that that was a general point which should be considered in all its aspects, first by the Drafting Committee and then by the Commission itself.

19. In principle, he was inclined to accept Mr. Jiménez de Aréchaga's proposal for the addition of a new provision to paragraph 4, if paragraph 5, which reserved the question of responsibility, was regarded as inadequate. The ideas underlying that proposal were sound in themselves, but the exact wording would need further consideration.

¹ *Yearbook of the International Law Commission, 1953*, vol. II, document A/CN.4/63, article 16.

² *Yearbook of the International Law Commission, 1958*, vol. II, document A/CN.4/115, article 19.

³ *Yearbook of the International Law Commission, 1964*, vol. I, 755th meeting, para. 19.

20. Mr. PESSOU said that article 63 had caused a lot of difficulty in 1964, and was now presenting the same problems as it came up to be examined afresh. A solution to those problems was being sought by two different approaches. The first was by reference to general principles of law such as *lex posterior derogat priori* or *pacta sunt servanda* but those principles were taken from private law and were not very apposite. The second was by including incompatibility clauses in advance, as was now the tendency in international practice. But experience showed that the efficacy of legal solutions of that kind was limited, since the incompatibility of treaty provisions raised problems which mainly involved political factors.

21. During the discussion on the doctrine of *rebus sic stantibus* in 1963, he had mentioned⁴ the practice worked out in the case of fourteen new African States, in their relationships with France and the United Kingdom as a solution to the problems resulting from the existence of successive conventions. That new practice had achieved a harmonization of contractual obligations in a spirit of mutual understanding and in accordance with the principle of good faith.

22. The Commission could certainly refer the article to the Drafting Committee, together with the proposals before it, especially that of Mr. Jiménez de Aréchaga, but he feared that it would be hard to find a solution along the lines on which the Commission was now working. It might, however, re-examine the matter and try to reconcile the contradiction with which article 63 was concerned.

23. Mr. AGO said he had some comments to make on both the substance and the form of article 63. In paragraph 1 he agreed with the Special Rapporteur that, as suggested by the Government of Israel, mention should be made of rights as well as of obligations. The Commission should also give careful consideration to the expression "the provisions of which are incompatible", which was not perhaps quite correct. Under article 41, if a later treaty was wholly incompatible with an earlier treaty, the latter terminated. Article 63, paragraph 1 dealt with the case of treaties the provisions of which were partially incompatible. It was particularly necessary to add the word "partially", since paragraph 2 dealt with the case in which the parties to the later treaty had taken care to specify that the two treaties must be compatible.

24. Paragraph 2, at least in the French version, was not very lucid; it should be made clearer that the paragraph referred to a treaty the provisions of which specified that it was subject to another treaty or must not be incompatible with another treaty.

25. With regard to paragraph 3, he agreed with the Special Rapporteur that both the situations dealt with in article 41, suspension as well as termination, should be mentioned. It might perhaps also be desirable to word the last sentence affirmatively so that it would read: "the earlier treaty applies to the extent that its provisions are compatible with those of the later treaty".

26. Paragraph 4 was the paragraph which, in his opinion, raised the most serious problems. Sub-paragraph (a) really stated a consequence of paragraph 3 and might thus be amalgamated with the latter, since the problem was the same, whether all or only some of the parties to the treaty were involved. Sub-paragraphs (b) and (c) were statements of the obvious but were quite irrelevant to the question of the incompatibility of treaties; the rules they stated held good even if the two treaties were wholly incompatible. If the article was taken to relate to the incompatibility of treaties, those two sub-paragraphs should therefore be dropped. The whole of paragraph 4 would thus disappear. The Special Rapporteur had rightly stated that paragraph 4 had no bearing on a treaty conflicting with a rule of *ius cogens*, which was void by virtue of another article. The question of the desuetude of treaties would certainly have to be considered, either in that article or in another.

27. Lastly, the Commission should give some thought to the proposal by Mr. Jiménez de Aréchaga for paragraph 5.

28. Mr. REUTER said that while the Commission should avoid saying anything unnecessary in the article, it should, on the other hand, not be afraid to leave some uncertainty and vagueness, for such an extremely difficult problem could be solved only by adopting a flexible approach, not by seeking perfection.

29. As Mr. Ago had said, paragraph 2 could certainly be improved, at least in the French text. It dealt with the case in which a treaty took into account the problems arising out of its subjection to or inconsistency with another treaty.

30. The Special Rapporteur had suggested that, in considering article 63, the Commission should bear in mind the following articles, especially article 67. It might therefore be wise to insert in article 63 an explicit reference to article 67, the effects of which might be far-reaching, since paragraph 1 (a) of that article could mean that, if the possibility of concluding an agreement to modify the treaty as between certain parties was not provided for by the treaty, such an agreement would be void or possibly non-existent. If that was the correct interpretation of that provision it was much stricter than the rule relating to incompatibility of treaties in article 63, and that would justify including a reference to the provisions of article 67.

31. With regard to paragraph 5, it seemed to him that many of the problems that had been raised, especially by Mr. Jiménez de Aréchaga, might be affected by whatever view the Commission took of the consequences of responsibility. The theory of responsibility was not at present before the Commission, but the conclusions it reached on that subject might perhaps give some satisfaction to those who regretted that the Commission's draft was rather narrow in its treatment of the relativity of treaties. If, ideally, the consequence of responsibility was *restitutio in integrum*, it would follow that the unlawful act must be completely extinguished. Would the fact that a third State had been an accomplice in the breach of a previous undertaking by its partner in the conclusion of a treaty be an act of complicity in an international delinquency and so attract a penalty?

⁴ *Yearbook of the International Law Commission, 1963*, vol. I, 696th meeting, para. 11.

32. Those were bold ideas, but they had already been raised in practice. An organ of the United Nations had, for instance, already had to consider whether a State was entitled to collaborate in an act which it knew to be a breach of a particular undertaking; though it had hesitated to find that a breach of the law had been committed, that organ had nevertheless expressed the opinion that there had been a breach of a moral obligation.
33. If those considerations were valid, paragraph 5 would have to be drafted in as general terms as possible, so that the door remained open to all the consequences arising from the theory of State responsibility. A wording of that kind would not commit the Commission in any way, and would have the advantage of making things easier for the future.
34. Mr. de LUNA said that, subject to remedying the defects to which attention had been drawn by Mr. Ago, he was in favour of retaining the 1964 text with drafting improvements.
35. There appeared to be a tendency on the part of some members of the Commission to assign to international law a sort of policing role. International law would then be called upon to prevent offences by States, and even the concept of complicity had been mentioned. But it would not be wise to try to limit the freedom of States to make treaty stipulations. Even in private law, it was not an offence to purchase an object from a person who was not the owner; the only consequence was that the purchaser might ultimately find himself without the object and with a claim against the vendor as his sole remedy. There was in fact nothing illicit about a sale of that type under a *pactum de contrahendo*; the vendor merely undertook to do everything in his power to make the object available to the purchaser; if he failed to do so, the purchaser could claim compensation from him.
36. In international law, the matter was governed by the principle of the relativity of the effects of treaties, which was a consequence of the *pacta sunt servanda* rule. It would be at variance with international practice, and at the same time completely impracticable, to require a State which wished to enter into a treaty with another to investigate whether its prospective partner was already bound by some earlier treaty which was not compatible with the treaty under negotiation. The treaties to be examined could be extremely numerous, bearing in mind that there were estimated to be some 30,000 treaties at present in force among States.
37. The position would be completely different in the event of the conclusion of a treaty which violated a rule of *jus cogens*, but in that case the nullity was not attributable to the earlier treaty but to the higher law represented by the *jus cogens* rule.
38. There was no rule in international law which limited the capacity of a State to enter into treaties regardless of its ability to perform its obligations. As for its partner, even if it happened to be aware of the incompatibility of the later treaty with an earlier one, it was entitled to assume that the State which had subscribed to the two treaties would take the necessary steps to release itself from its obligations under the earlier treaty, and to perform those embodied in the later one.
39. He supported the Special Rapporteur's approach to the article.
40. Mr. TUNKIN said that he still felt the same concern as in 1964 with regard to article 63; he doubted whether article 63 really dealt with the question of the application of treaties having incompatible provisions.
41. Paragraph 1 was a saving clause relating to Article 103 of the Charter. Paragraph 2 stated a useful rule, but the case which it covered was not one of incompatibility; as Mr. Jiménez de Aréchaga had pointed out, that case really arose when the later treaty made it impossible to perform the obligations under the earlier treaty, especially, but not exclusively, with regard to States which were not parties to the later treaty. Paragraph 3 stated the rule *lex posterior derogat priori* and did not deal with the question of incompatibility as such. As for paragraph 4, its sub-paragraph (a) was already covered by the provisions of paragraph 3, while sub-paragraphs (b) and (c), as demonstrated by Mr. Ago, did not involve questions of incompatibility.
42. In 1964, he had drawn attention to the danger of giving the impression that there was nothing reprehensible about entering into a later treaty which was incompatible with an earlier one. There was very often no justification for analogies from private law; in international law, the conclusion of a later treaty incompatible with an earlier one could in some cases constitute a very grave violation of the first treaty. The Commission should therefore examine with great care the proposal by Mr. Jiménez de Aréchaga, which was intended to deal with cases of real incompatibility.
43. Mr. BRIGGS said that, subject to drafting changes, he found article 63 satisfactory. The most important drafting problem was that of the use of the term "incompatibility".
44. Paragraph 1 was unobjectionable and he agreed with the Israel Government's suggestion that provision should be made for rights as well as obligations. Paragraph 2 accurately reflected existing State practice. And with regard to paragraph 3, since the Commission had adopted article 41, which he himself had opposed on the ground that the question it dealt with should have been treated as a matter of relative priority, it was only logical that it should also adopt paragraph 3.
45. Paragraph 4 raised questions of legal policy. The problem involved was that of the creation by the later treaty of obligations which a party to both treaties could not consistently perform; it was the performance of the obligations which was incompatible. An effort should be made to devise some form of words which would avoid the logical dilemma to which attention had been drawn in the course of the discussion.
46. With regard to the text of paragraph 4, he agreed that sub-paragraph (a) stated the same rule as paragraph 3 and he would have no objection to the two provisions being combined. Sub-paragraphs (b) and (c) dealt with the relative priority of obligations and stated in which case the obligation to perform one treaty prevailed over the obligation to perform the other.

47. He would reflect on the amendment proposed by Mr. Jiménez de Aréchaga; his first impression was that the idea embodied in it might help to improve paragraph 4 (c).

48. He agreed with the Special Rapporteur that obsolescence was not a distinct ground of termination.

49. Mr. AGO said that, in his opinion, the rules stated in paragraphs 4 (b) and (c) were correct when two treaties were wholly compatible as well as when they were wholly incompatible, but a completely different problem was perhaps concealed behind those two subparagraphs, that of the incompatibility that existed when a State party to a prior treaty, because of the obligations vis-à-vis a certain State provided for in that treaty, found itself unable to comply with the provisions of a later treaty vis-à-vis another State or vice versa. In that case, a problem of responsibility inevitably arose, since, owing to the incompatibility of the two obligations, the State could not fulfil its obligations towards its partners in one treaty or the other. In such a case, it was pointless to say that one of the two treaties should prevail over the other. A breach of one or the other would necessarily occur and the re-establishment of a situation fully in conformity with the law was impossible; if it was re-established in one case, it could not be in the other, and vice versa.

50. Mr. ROSENNE said that the discussion had confirmed his conviction that the Commission had been right in not dealing with the problems article 63 sought to cover in the section on invalidity; but at the same time he was disturbed by the present debate.

51. His main concern was with the question whether it would not be preferable to formulate two separate articles, one dealing with the aspect termed the "relativity" of treaties, which if he understood the purport of article 63 correctly was covered in paragraph 4, and the other with the real issue of incompatibility. The latter was at present covered in paragraph 5, which was closely connected with the revised version of article 41 as approved at the second part of the seventeenth session. On the face of it Mr. Jiménez de Aréchaga seemed to have made out a convincing case in defence of his amendment, especially after the revision of article 42 at that session. If the two sets of problems were dealt with in separate articles it would probably be easier to find a way out of the difficulties facing the Commission.

52. Paragraph 2 in the 1964 text, though not objectionable, was self-evident and could be dropped: its purpose was met by other provisions concerning interpretation and the *pacta sunt servanda* rule.

53. From the outset he had found it difficult to accept paragraph 3 in its present form, for it raised far more difficult problems of interpretation than other articles in the draft; and he doubted if either article 41 or paragraph 3 of article 63 ought to be maintained as entirely separate provisions. They should be combined, and then the Commission would need to consider the proper place for such an article.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that he wished to make a number of comments before the discussion went any further. The difficulties to which article 63 had given rise were not as great as

might appear. Possibly the word "incompatible" had not been a very good choice, but it had been a deliberate one on the part of the Commission and the Drafting Committee. In his original proposal he had used the expression "conflicting treaty provisions".⁵ The word "incompatible" had also been chosen for article 41, but in that context it referred to the application of incompatible provisions.

55. In article 63, the Commission's purpose had been to cover the case which was frequently met in practice and which was usually the result of attempts to amend treaties when the provisions of two treaties could not be applied in their entirety at the same time. He would have thought that the Commission had been very nearly successful in expressing that idea in the 1964 article, which had not been misunderstood by governments, though some objections had been raised.

56. Drafting changes apart, paragraph 1 was not causing serious difficulty.

57. Paragraph 2 was worth keeping because many treaties contained express provisions concerning future agreements that might be incompatible with what might be called the "master" or original treaty, or clauses about the relative priority of the earlier or later treaty. The statement in paragraph 2 might be self-evident, but should be made in a general article.

58. Paragraph 3, which was the result of protracted discussion in the Commission and the Drafting Committee, was necessary and must be closely co-ordinated with article 41.

59. On paragraph 4 he disagreed with Mr. Ago. It might be a statement of the obvious, but the point at issue was extremely important, namely whether, as between two States, one of them could invoke the fact that it was already a party to a prior treaty with another State as a ground for non-performance of the later treaty. That in essence was the problem of the relativity of treaties, and it had real practical significance in the case of a conflict between treaty obligations. The point had arisen in cases brought before the Permanent Court of International Justice, which had applied the principle of relativity fairly strictly.

60. The argument advanced by Mr. Jiménez de Aréchaga in defence of his amendment was not new and he himself had put forward a shorter proposal to the same effect at the sixteenth session, which had been rejected. Sir Hersch Lauterpacht and Lord McNair would have agreed with the proposition that a State party to the second treaty, but not to the first, that had had knowledge of the fact that the provisions of the second violated those of the first, would not be entitled to invoke the second treaty as a ground for non-performance of the obligations under the first treaty.

61. The Commission would have to decide whether, and if so to what extent, the notion of complicity should be introduced in paragraph 4 (c), bearing in mind that it would then be dealing with a question of actual capacity, namely, whether in law a State was actually incompetent to enter into the second treaty knowing it to be a violation of the first. He had understood the consensus

⁵ *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/167, article 65.

of opinion in 1964 to be against such a proposition and that the Commission wished to leave the matter aside as one that should be dealt with when it came to study the topic of State responsibility.

62. Paragraph 4 could not simply be jettisoned out of hand: it stated legal rules of practical significance, as the jurisprudence of the Permanent Court showed.

63. If an effort were made to reintroduce the notion of complicity the proper place would be in paragraph 4, because the separate issue of responsibility had been explicitly reserved under the terms of paragraph 5, which, as far as the English version was concerned, seemed to be sufficiently clear.

64. Mr. AGO said that he entirely agreed with some of the points just made by the Special Rapporteur. Unfortunately, paragraph 4 did not say at all what the Special Rapporteur meant it to say, a fact for which he himself accepted his share of responsibility as a member of the Commission and of the 1964 Drafting Committee.

65. It was essential to draw a clear distinction between two separate problems. First, in the case of incompatibility or conflict between two treaties to which the same States were parties, the problem was essentially one of interpretation. In that situation, either the provisions of the two treaties were so far incompatible that the earlier treaty must be deemed to have terminated; or they were not, in which case it was necessary to determine which provisions of the earlier treaty still applied and which had ceased to do so.

66. Secondly, in the case of two successive treaties to which different States were parties, the rule to be stated was the one just given by the Special Rapporteur: a State could not invoke the existence of a treaty with a third State as a ground for non-performance of the obligations arising from a treaty made with other States; in other words, a treaty concluded between A and B could not be a pretext for the non-performance of a treaty between A and C. That rule could hardly be extracted from the text of paragraph 4 as it stood. The rule should perhaps be stated in a separate clause, but the Commission would have to consider how such a clause should be worded and where it should be placed in the draft.

67. Mr. TUNKIN said he wished to amplify his earlier comments which might not have been clearly understood. He had no objection to the provisions set out in article 63 and regarded them as useful, but in its present form the article failed to counter a general risk, namely, the possibility of a new treaty being concluded in violation of a previous treaty. Indeed, the present text could be so construed as to suggest that such a case was normal. Some members had talked of the freedom of the parties but it must be remembered that the parties had freely assumed the obligations laid down in the first treaty and that those obligations were binding.

68. Some members might have had in mind obligations of a type to be found in private law when the rule of complete restitution would be relevant, but treaties could impose obligations of a very different character, such as those imposed by the 1954 Geneva Agreement on the Cessation of Hostilities in Viet Nam.⁶ The

provisions of article 63 in the Commission's draft could be wrongly construed to imply that any party to the Agreement was free to conclude a new agreement concerning Viet-Nam containing provisions incompatible with the earlier Agreement. The United States Government had often made public references to its solemn obligations undertaken in respect of South Viet-Nam, but its fulfilment of those obligations consisted in supplying armaments, etc., to that area in violation of the 1954 Agreement.

69. That example was a very pertinent one. Paragraph 5 could hardly be regarded as an adequate safeguard because the remainder of the text could still give the impression that the parties to a treaty were completely at liberty to conclude new agreements in violation of the old. In such situations the rule *pacta sunt servanda* would have been broken with all the implications that would have for the law of treaties. That being so, the priority as between two sets of obligations should be made clear, because it was a matter that fell within the province of the law of treaties, not of State responsibility. A more general formula would have to be devised to meet his points.

70. Mr. TSURUOKA said that he was prepared to accept the text of the article which the Commission had adopted at the first reading. Two treaties some of the provisions of which were incompatible were valid and could be applied. The problem of obligations which it was materially impossible for a State to fulfil and which gave rise to responsibility of the State, had been relegated to paragraph 5 where it was dealt with in very general terms. The text did, admittedly, contain several statements of the obvious; but it had some value as a means of dispelling the doubts which sometimes arose, and its general arrangement was well thought out.

71. Though he was not opposed to a more thorough study of the questions at issue, he feared that, if the Commission became involved in details, it would never succeed in extricating itself. He also feared that certain wordings which seemed at first sight to provide solutions might give rise to abuse. The notion of incompatibility, for instance, which appeared to be an objective one, was open to subjective interpretation, as was clear from actual experience. As a form of sanction was involved, the question was one of some consequence.

72. Consequently, instead of going too deeply into the problem, the Commission should deal with it in general terms and avoid drafting an article containing too many rules which could be open to subjective interpretations.

73. Mr. BARTOŠ said that the Commission had got on to very dangerous ground. Differences between treaties were further complicated by the fact that the parties were not always the same. It would, therefore, be preferable to adhere to the wording already accepted in 1964.

74. He was not in favour of the proposal by Mr. Jiménez de Aréchaga, although it was undoubtedly based on a very detailed study. The situation described by Mr. Tunkin clearly illustrated the danger which arose when a State changed its attitude towards an existing agreement by concluding with other States an agreement which was incompatible with the first. Para-

⁶ H.M. Stationery Office, Cmd. 9239.

graph 5 of the existing text left the responsibility of that State intact. But if the Commission inserted in the article a provision whereby the party that was not bound to participate in the new treaty was invited, after the other party had changed its attitude, to suspend execution of the first treaty and to take the steps necessary for its termination, it would be encouraging that State to act on the assumption that a new policy called for a new treaty and would be helping to bring about the termination of the first instrument.

75. Mr. Jiménez de Aréchaga's proposal was therefore unacceptable. In his opinion, the case of conflict between treaties should not be taken into account in the convention on the law of treaties. The Commission had laid down that the party bound by the first treaty must comply with the *pacta sunt servanda* rule, and that the second treaty applied to the party which was not bound by the first. It should leave matters there, and not specify whether the first treaty continued to exist or not. If it did so, it might give one of the parties a pretext for evading the obligations it had assumed under the first treaty. That was certainly not Mr. Jiménez de Aréchaga's intention, but his text might imply it.

76. He hoped that the Drafting Committee would consider the question and make the minimum number of changes in order to avoid introducing further confusion into a situation already complicated by the existence of successive treaties and different parties.

77. Mr. EL-ERIAN said that the Commission's decision to deal with the application of treaties having incompatible provisions in the context of the application and modification of treaties had resulted in separate provisions dealing on the one hand, with cases of conflict with a preemptory norm, old or new—in articles 37 and 45—and on the other hand, with cases of explicit or implied termination by reason of the conclusion of a treaty conflicting with a previous one so that the two could not be applied at the same time, in article 41.

78. Article 63 was intended to deal with cases of successive treaties, the parties to which might or might not be identical and which contained incompatible provisions, as well as with the effects of such treaties for non-parties. The overriding rule was stated in paragraph 1. And when analysing the rest of the article it was important to bear in mind that its main object was to provide a residual rule, since other cases of nullity and termination were dealt with in other articles.

79. As indicated in the 1964 commentary, treaties usually contained clauses providing against conflict with a later treaty.⁷ For example, provision might be made allowing for a supplementary agreement between two parties which would not derogate from the obligations of the original agreement. Article 73, paragraph 2, of the Vienna Convention on Consular Relations⁸ was an example. Another type of clause was that contained in the 1958 Geneva Convention on the High Seas, article 30,⁹ in which the parties had declared that the

treaty was not incompatible with or would not affect their obligations under another treaty, such as a regional agreement. Such clauses provided a rule of interpretation in case of conflict between the provisions of two treaties. Article XIV of the 1962 Convention on the Liability of Operators of Nuclear Ships¹⁰ was an example of a clause purporting to override the provisions of an earlier treaty.

80. He did not subscribe to the criticisms that certain elements in article 63 were self-evident and failed to add much to legal knowledge. That criticism held true of other articles, but should not be given too much weight because the Commission was engaged in preparing draft articles designed to be as comprehensive as possible.

81. He agreed with the Special Rapporteur's general conclusion about the observations presented by governments. Obsolescence should be treated as a ground of termination usually due to a fundamental change of circumstances and need not be covered in article 63.

82. The amendment proposed by Mr. Jiménez de Aréchaga had been useful in focusing attention on an important problem. Article 63 provided a rule of interpretation, the question of State responsibility being fully reserved under the provisions of paragraph 5. However, Mr. Jiménez de Aréchaga was right in thinking that the issue was not merely one of relative priority of treaty obligations. His amendment would lengthen an article that was already rather long, and perhaps the point could be covered by an express reference in paragraph 1 to the applicability of the *pacta sunt servanda* rule. That would make clear that States were bound to perform in good faith the obligations imposed in a treaty to which they were a party, and that they should refrain from entering into a subsequent treaty that imposed obligations in conflict with the earlier ones. The Drafting Committee should be able to devise a text that would take account of the point.

83. Mr. VERDROSS said that no serious objection had been raised to paragraphs 1, 2 or 3 or to paragraph 4 (a). Those paragraphs could, in fact, be of some value although, on close examination, they appeared to be self-evident. If two States concluded two different treaties, the problem to be solved was one of interpretation, and not of compatibility.

84. Difficulties did arise, however, with paragraphs 4 (b) and (c). According to existing law, Mr. Ago was, he thought, right and the two treaties were valid. But the Commission did not exist merely to take note of existing law; its function was, rather, the progressive development of international law, and it could fulfil that function by adopting simple proposals such as that made by the Special Rapporteur.

85. It was questionable whether the Commission should go as far as Mr. Jiménez de Aréchaga had suggested. Personally, he did not think so. The Commission was still engaged in codifying the law of treaties, and it could leave to its successors the task of considering the implications with regard to State responsibility.

86. The CHAIRMAN, speaking as a member of the Commission, said that the problem raised by paragraph 4

⁷ See *Yearbook of the International Law Commission, 1964*, vol. II, p. 186, paras. (6) and (7).

⁸ United Nations Conference on Consular Relations, *Official Records*, vol. II, p. 187.

⁹ United Nations Conference on the Law of the Sea, 1958, *Official Records*, vol. II, p. 138.

¹⁰ *American Journal of International Law*, vol. 57 (1963), p. 275.

was not the problem of nullity, but that of responsibility and of priority as between treaties.

87. In reply to the Netherlands Government, which had commented that the problem was not yet ripe for codification, the Special Rapporteur had stated that his proposals were founded upon fundamental principles of treaty law—the *pacta tertiis non nocent* principle and the principle that States entering into a new agreement were presumed to intend that its provisions should apply between them. Those principles could undoubtedly be applied without difficulty in the case of treaties concluded between the same parties, but not in the case of successive treaties concluded by different parties.

88. He himself could not understand why priority should be given to the first treaty rather than the second, except on the basis of responsibility. Accordingly, the solution should be sought elsewhere, namely in the principles governing responsibility. He therefore believed that paragraph 5 was indispensable, as the question of responsibility should be reserved.

89. The proposal of Mr. Jiménez de Aréchaga was undoubtedly based on very praiseworthy principles. International agreements must be observed, and States should not be encouraged to try to violate treaties already concluded between them. On the other hand, the Commission would be going a little too far if it introduced that idea into the text; it would be entering into the details of the problem of responsibility, which it was inappropriate to discuss in connexion with conflict between different treaties. Wrongful conduct should undoubtedly be subject to sanctions, but the issue in question fell within the topic of responsibility and it would be better to consider it when the Commission came to deal with that topic.

90. Mr. AGO said he entirely agreed with the Chairman. When a State concluded with different parties and at different times two treaties so drafted that the performance of one excluded the performance of the other, he could not understand why preference or priority should be given to the first treaty rather than the second. Nor could he understand why it should be more important to safeguard the rights of the States which had concluded the first treaty, rather than those of the States which had concluded the second.

91. It was obvious that in international practice all kinds of possibilities had to be envisaged. Mr. Tunkin had mentioned one example in which the second treaty was less general, and less favourable to the cause of peace, than the first. But the converse was equally likely. It could easily happen that one State first concluded with another State a treaty in which it undertook to supply that State with arms, then later concluded with other States a treaty in which it undertook not to supply arms to the State which was the beneficiary under the first treaty. Which of those two treaties was the more general in scope, and which was the more important for peace? It was impossible to give an *a priori* answer to that question or to decide which course of action was more favourable to the advancement of international law. The Commission should be on its guard against any over-simplified idea of what was meant by contributing to the progressive development of international

law. Such an idea might in the end lead to confusion rather than progressive development.

92. He therefore saw no reason for departing from the principles previously adopted. Apart from a proviso on the question of responsibility, drafted in the most general terms, the Commission should avoid introducing any idea of priority or preference between treaties concluded successively by the same party with different parties.

93. Mr. de LUNA said he must make it clear that he was far from advocating the non-fulfilment of contractual international obligations. Such obligations should be strengthened by every possible means, since the peace of the world depended on them, but not by the means which certain members of the Commission had suggested.

94. The attitude adopted by those members was not in keeping with their position on other articles. While the Commission had been divided on the question whether a treaty did or did not create rights for third States, it had agreed unanimously that obligations could not be imposed on third parties without their assent. But now, through the medium of an incompatibility clause, it was considering imposing on all third States which might be parties to a second treaty an obligation never to make any stipulation which was inconsistent with an earlier treaty. Such an obligation represented an undue limitation on the sovereignty and independence of States; and, what was more, it was to be imposed on third States in the name of the sacred principle of *pacta sunt servanda*. That applied, of course, to the first treaty but not to the second. He was opposed to the inclusion of a rule to that effect in the draft. He could understand the concern expressed by Mr. Tunkin, but he questioned whether a State which wished to violate an international obligation had no other means of doing so than by concluding another treaty.

95. Furthermore, if the Commission laid down the rule that the first treaty had priority over the second, even *vis-à-vis* a third State which had not been a party to the first treaty, what guarantee was there that the rule would be observed? Only the same as that imposed with respect to the first treaty, the knowledge that a violation would involve international responsibility—though not for having violated the provisions of the first treaty but for having violated the rule in the Commission's draft.

The meeting rose at 1 p.m.

858th MEETING

Wednesday, 25 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 63 (Application of treaties having incompatible provisions) *(continued)*¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 63.

2. Mr. TUNKIN said that several members shared his uneasiness about article 63 which, as formulated, might give the impression that the Commission regarded the conclusion of a later treaty in violation of an earlier one as a normal event. He would like to make two suggestions, without being sure that he was right, just to help the discussion.

3. It seemed to him that the Commission was considering the situation in which no breach of an earlier treaty was involved. But was the rule stated in paragraph 4 (b) correct for the case where the second treaty was a violation of an earlier treaty? It was not, because article 42 (A/CN.4/L.115) conferred upon the injured State the right to terminate or suspend the operation of the earlier treaty in case of breach. If paragraph 1 were revised so as to make clear that what was envisaged was only those cases where no violation of the previous treaty was involved, then that would certainly cover the preoccupation that paragraph 4 (b) sanctioned any new treaties whatsoever, even those concluded in violation of the international obligations of the previous treaty.

4. His second suggestion was that the Commission should speak in article 63 simply of the relationship in time between treaties, but not of their incompatibility, because a new treaty could develop an earlier one without that necessarily leading to incompatibility of obligations.

5. Mr. JIMÉNEZ de ARÉCHAGA said that Mr. Tunkin's suggestions would be very useful to the Drafting Committee in its task of preparing a new and clearer text. Some members had been more concerned with the problem of successive treaties when the later treaty involved a breach of the earlier treaty, and others with the problem of the relationship between successive treaties concluded between different parties.

6. The CHAIRMAN, speaking as a member of the Commission, pointed out that the temporal element was quite clearly indicated in the article by the use of the words "an earlier or a later".

7. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that the text of article 63 was not as wide of the mark as some members seemed to think. It represented an attempt to deal with a problem resulting from the fact that a State might not be able to apply provisions on the same subject in successive treaties at the same time. Perhaps the scope of paragraph 1 ought to be confined to that matter.

8. Mr. Tunkin's suggestion had been inspired by the desire to produce a text which did not appear to condone possible cases of breach. He himself shared that desire, and believed that it had led the Commission to frame paragraph 5 in the form of a comprehensive reservation to the effect that the rules set out in the preceding paragraphs concerning the relative priority of treaty obligations as between the parties involved in any given case, would not affect the responsibility that might be incurred as a result of acts by the parties.

9. At the sixteenth session he had repeatedly emphasized that the problem was not merely academic and that the situations which paragraph 4 sought to cover constantly arose in practice over the amendment or revision of treaties. The provisions of two successive treaties dealing with the same or similar subjects might not be entirely compatible because the second was usually intended to modify the first, and an exact identity of parties was rare owing to the familiar phenomenon of political inertia or a change of mind on the part of a State that had contemplated ratifying the later treaty but failed to do so for one reason or another. In the present state of international relations and treaty law, regrettable though it might be, the statement of the law set out in paragraph 4 was correct. As he had explained before, the later treaty must be binding between the parties because it was the most recent expression of their will; otherwise, if they were also parties to the earlier treaty containing provisions on the same subject, they would be in the difficult position of having to discharge two differing sets of obligations that could not be performed simultaneously.

10. The legal problem was usually resolved by reference to the circumstances of the case and by the application of the principle of relativity of treaties. If there were an exact identity of parties, the later treaty applied, but the situation was different if they were not identical and parties to the second treaty, but not to the first, lodged a complaint about an inconsistency between the provisions of the two instruments. Any dispute arising from such a situation had to be settled by rules that fell partly within treaty law and the relativity of treaty obligations and partly within the law of State responsibility. It was extremely difficult in a provision such as article 63 to cover comprehensively all the legal facets of the problems involved.

11. The drafting could certainly be improved but the Commission must be clear about what it was trying to accomplish. In view of the importance of the subject, surprisingly few objections to the article had been raised by governments. The Netherlands Government was the author of the main criticism that the text did not make clear whether the rules set out in the article were valid for all types of treaties, but it had not contested the fundamental principles set out in the article.

12. Most members, and he shared their view, seemed opposed to introducing any idea of a hierarchy of treaties in article 63. In a sense the Commission had accepted that idea by including an article on *jus cogens*, but if it went further and provided for a special category of treaties that prevailed over others simply by reason of their character, that would be an entirely new approach and might confer upon such treaties something in the

¹ See 857th meeting, preceding para. 1.

nature of *jus cogens* force. For the reasons he had expounded at length in his third report,² the Commission could hardly pursue such a course at the present stage in the development of international law.

13. His main objection to the amendment proposed by Mr. Jiménez de Aréchaga³ was for the same reason. He had always been sympathetic to the idea underlying the amendment but his own proposal on the subject had been definitely rejected at the sixteenth session. Mr. Jiménez de Aréchaga had reintroduced it, but in connexion only with a special category of treaties, and that was quite unacceptable. The Commission must avoid formulating a rule that could be construed to mean that States were bound to respect certain kinds of treaty obligations but were not bound to respect others. No lawyer could accept a rule framed on that basis.

14. With regard to the actual text of the article, paragraph 1 had been intended as an introduction and to safeguard the interpretation of Article 103 of the Charter. He had not been greatly impressed by the criticism of the phrase "the provisions of which are incompatible", which was meant to convey the idea that the application of two sets of treaty provisions relating to the same subject matter would not be possible simultaneously.

15. Paragraph 2 was straightforward and reflected the existence in many treaties of clauses dealing with their relationship to other treaties, and indicated which provisions would prevail.

16. There seemed to be general agreement that paragraph 3 should be brought into line with article 41 and that it should refer to the question of suspension.

17. While he was not opposed to Mr. Ago's suggestion for making the rule in paragraph 4 (a) applicable to the situation covered in paragraph 3, he was inclined to think the two provisions should be kept separate because the situations covered in paragraph 4 (a) belonged to the complicated subject of *inter se* agreements and might involve questions of State responsibility, whereas paragraph 3 was designed to deal with cases in which the normal rules about the intention of the parties applied.

18. It was important to bear in mind that the general reservation laid down in paragraph 5 was applicable to all three sub-paragraphs of paragraph 4, so that the problems raised by Mr. Ago's suggestion were perhaps more intricate than might appear at first sight; it would, however, be examined by the Drafting Committee.

19. In sub-paragraphs (b) and (c) of paragraph 4, the Commission had tried to set out the principle of the relativity of treaties, and all the necessary weight must be given to the words "as between", the purpose of which was to limit the application of the rule in the way that the Commission had decided would be appropriate in the context. There was always a possibility of a new treaty violating the rights of States not parties to it, but parties to an earlier treaty. Probably all members shared the concern of Mr. Tunkin and Mr. Jiménez de Aréchaga lest the Commission's text might be construed

as in some way condoning such violations. The difficulty was possibly one of presentation and had resulted from paragraph 5 not being sufficiently explicit. The Drafting Committee could consider moving up paragraph 5 to the beginning but that too would create drafting problems.

20. His conclusion remained that in its present form, the article was more or less correct. Existing rules about the relativity of treaty obligations might not be to the taste of some members, but they were the law. The article could now be referred to the Drafting Committee for consideration in the light of the discussion and he hoped it would be possible to devise a generally acceptable text.

21. Mr. AGO said that the Commission should refer the article to the Drafting Committee and give it a free hand to decide in favour of whichever formula it preferred, since it was clear that many members were still unable to make up their minds regarding alternative wordings for the various paragraphs and even for the title. He was attracted by Mr. Tunkin's suggestion that the reference to incompatibility should be dropped from the title and that the scope of the article should be extended by referring to relationship in time.

22. If one looked closely at the various possibilities envisaged, including the one just mentioned by the Special Rapporteur—the case of a general treaty followed by a new treaty on the same subject which was not ratified by all the parties to the general treaty—what was in fact the position? There was no suggestion whatever that the later treaty must be incompatible with the earlier or in any way constitute a violation of the earlier treaty: it might be different, but still perfectly compatible. In that case, there was no disagreement among the members of the Commission. If the later treaty had been concluded by all the parties to the earlier treaty and had completely replaced it, the earlier treaty disappeared and the later treaty was applicable. But if that were not the case and if only some of the parties to the earlier treaty were parties to the second treaty, the earlier treaty applied between the parties which were not parties to the later treaty and those which were, while the later treaty applied between those which were parties to both treaties, though the earlier treaty might continue to exist in respect of the articles which had not been replaced or which were compatible with the provisions of the later treaty. In substance, then, the whole matter was a problem of relationship in time.

23. Perhaps the Commission ought to leave the matter there and refrain from introducing into the article, either directly or indirectly, the question of the possible violation of an earlier treaty by the conclusion of a new treaty. If it did raise that question, it might go too far and broach the whole problem of responsibility and the possible priority of obligations. It would be better to deal only with the problem of relationship in time, having regard to any possible incompatibility in which it might result. In that case, it could very probably dispense with paragraph 5, which seemed to be more or less self-evident.

24. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Ago, said that at its sixteenth session the Commission had discussed the relationship between two

² *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/167.

³ See 857th meeting, para. 15.

treaties on the same subject and between treaties and customary law, but had decided not to cover the first matter from the standpoint of the temporal element. Certain problems connected with the temporal element had been dealt with in some other articles, but possibly not in a very comprehensive or adequate manner.

25. If article 63 were amplified in the manner suggested by Mr. Ago, its very nature would be changed radically and the Commission would be confronted with even greater difficulties. His reason for saying so was that if article 63 dealt with the question of the relationship between treaties in point of time instead of with the question of incompatible treaties, the Commission would find itself trying to state the law in an even more absolute fashion than had been done in the 1964 text, where the question of responsibility had been reserved and an express reference had been made to incompatibility. If the whole of article 63 were refashioned so as to state that, in cases of conflicting treaty provisions those of the later treaty prevailed, the whole problem of incompatibility, which was the real point of interest, would remain unsolved.

26. Mr. JIMÉNEZ de ARÉCHAGA said that article 63 could be sent to the Drafting Committee with a broad directive to devise a solution either by discarding those elements in the article that could be interpreted as condoning the conclusion of treaties with provisions that were incompatible with earlier treaties, or by making provision for the contingency that *inter se* agreements might be incompatible with earlier treaties. If the latter alternative were chosen, a strong safeguarding clause in regard to both responsibility and breach would be needed.

27. Replying to the comments made by the Special Rapporteur on his amendment to article 63, he said that its purpose had been not to establish a hierarchy between treaties but to give priority to a previous treaty over a violation of a treaty in the guise of a later treaty. Surely the Commission would endorse that approach. He had not been trying to single out a certain category of treaties with the idea of implying a condonation of the violation of other treaties not in that category; he had based his proposal on the fact that, at the Special Rapporteur's own suggestion, the Commission had dealt differently with a category of treaties which Sir Gerald Fitzmaurice had described as "integral" or "interdependent". By the terms of article 42, paragraph 2, entry into a subsequent treaty incompatible with one of that type was presumed to constitute a material breach.

28. Mr. BRIGGS said that he agreed with much of what had just been said by the Special Rapporteur. If Mr. Ago's later suggestion were taken up, the Commission would find itself involved in problems of State succession which it had wished to leave aside, and the result would be to bypass the real point at issue, which was not the incompatibility of provisions of successive treaties when the parties were not identical, but the incompatibility of obligations assumed by a particular State in successive treaties. It was not merely a temporal problem.

29. The Drafting Committee might examine article 22(c) in the 1935 Harvard Research Draft⁴ to see whether the wording used there might not offer some way out of the difficulty and a means of avoiding the word "incompatible", though admittedly even drafting changes would not fully resolve the problem.

30. The Drafting Committee could also consider whether the question of breach, which had been raised during the discussion, called for changes in the text.

31. The CHAIRMAN said it was his understanding that the Special Rapporteur had suggested that article 63 be referred to the Drafting Committee, and that Mr. Jiménez de Aréchaga and Mr. Ago wished it to be so referred without any specific instructions.

32. Mr. TSURUOKA said he thought that the article should be referred to the Drafting Committee in accordance with the Commission's usual practice.

33. Mr. REUTER pointed out that a decision to refer article 63 to the Drafting Committee with a request that all the various observations that had been made should be taken into account might result in the complete deletion of the article, since the case of the relationship of multilateral treaties in time was dealt with in article 66, paragraph 2.

34. Mr. AMADO said he hoped that the Drafting Committee would give careful consideration to the wording of paragraph 5 since, if the idea underlying the paragraph were clearly expressed, it might perhaps be possible to drop the reference to responsibility, which was in fact involved in all international law.

35. The CHAIRMAN said that some members wished the article to be referred to the Drafting Committee according to the usual practice—which was not very clearly defined and varied from article to article—while others wished it to be referred without any instructions apart from the comments which had been made during the discussion, leaving the Drafting Committee to decide what the trend of opinion was. It seemed to him that the two approaches, in fact, coincided, and he proposed that the article be referred to the Drafting Committee on those terms.

*It was so decided.*⁵

ARTICLE 64 (The effect of severance of diplomatic relations on the application of treaties) [60]

[60]

Article 64

The effect of severance of diplomatic relations on the application of treaties

1. The severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty.

2. However, such severance of diplomatic relations may be invoked as a ground for suspending the operation of the treaty if it results in the disappearance of the means necessary for the application of the treaty.

⁴ *Research in International Law*, "III, Law of Treaties"; Supplement to the American Journal of International Law, vol. 29, 1935.

⁵ For resumption of discussion, see 875th meeting, paras. 2-8.

3. Under the conditions specified in article 46, if the disappearance of such means relates to particular clauses of the treaty, the severance of diplomatic relations may be invoked as a ground for suspending the operation of those clauses only.

36. The CHAIRMAN invited the Commission to consider article 64. The Special Rapporteur in paragraphs 4 and 7 of his observations had proposed revised wording for paragraph 2, and a possible additional paragraph to meet the United Kingdom Government's point (A/CN.4/186).

37. Sir Humphrey WALDOCK, Special Rapporteur, said that the comments of governments and delegations would need careful examination. As the Drafting Committee would be considering the whole scheme of the draft, the point raised by the Israel Government about the place of the article could be left aside for the time being, though he agreed that the article would need to be moved.

38. The general view of governments seemed to be that paragraph 2 should be more stringent and expressed in terms of the temporary impossibility of performance due to severance of diplomatic relations whenever such severance had any effect at all. It was, of course, important to remember that the text of article 43 had been revised during the second part of the seventeenth session (A/CN.4/L.115) and was no longer the same as that which governments had had before them when preparing their comments on article 64.

39. There was force in the argument that cases in which severance of diplomatic relations could have any effect on treaty obligations ought to be few and to be regarded as exceptional; the touchstone of impossibility of performance might be the right one. There were different categories of treaties liable to be affected by the severance of diplomatic relations; one example was treaties of alliance, but whether or not they should be provided for was a separate issue. Personally he was inclined to favour revising paragraph 2 to read:

"If the severance of diplomatic relations should result in a temporary impossibility of performing the treaty in consequence of the disappearance of a means indispensable for its execution, article 43 applies" (A/CN.4/186).

40. The Netherlands Government's suggestion to drop paragraph 3 could be followed now that article 46, the special article on the separability of treaty provisions, had been revised (A/CN.4/L.115).

41. The Israel Government had emphasized that the severance of diplomatic relations ought not to be allowed to serve as an excuse for the temporary suspension of the operation of a treaty when that was the very contingency for which the treaty was intended to provide, and had cited the 1949 Geneva Conventions as an example. If the criterion of impossibility of performance were laid down in a clear manner, that point would be met.

42. He doubted whether the United Kingdom Government's point, that treaty obligations in respect of the peaceful settlement of disputes ought not to be capable of being suspended by mere severance of diplomatic relations, needed to be covered in article 64; but if the

Commission wished to do so, an appropriate provision might read:

"In no circumstances may the severance of diplomatic relations between parties to a treaty be considered as resulting in an impossibility of performing any obligation undertaken by them in the treaty with respect to the peaceful settlement of disputes" (A/CN.4/186).

43. The United States Government had suggested the addition of a new paragraph stipulating that any suspension of the operation of a treaty resulting from the severance of diplomatic relations could only be invoked for the period of time during which the application of the treaty was impossible. That idea was comprised in the notion of impossibility of performance and need not be covered in article 64. However, that suggestion had prompted him to consider whether greater stress ought not to be placed in article 43 on the fact that suspension must come to an end the moment that the reason for impossibility of performance ceased to exist.

44. The Hungarian Government had raised an interesting but difficult point in suggesting that article 64 ought to apply also to cases of severance of consular relations. Instances of impossibility of performance could arise, particularly over establishment treaties, but when such treaties contemplated the use of consuls for purposes of applying the treaty it seemed doubtful whether it would be admissible to terminate consular relations, thereby defeating the purpose of the treaty. The existence of a large number of conventions specifically dealing with consular relations would also have to be borne in mind if that point were to be covered in article 64. The main purpose of article 64 was to refute the idea that the severance of diplomatic relations implied the severance of all relations between the States concerned. As treaties were a product of diplomacy, there might be a disposition in some quarters to suppose that they lapsed with the severance of diplomatic relations. The severance of consular relations did not have the same general relevance to treaty law and he would therefore hesitate to follow the Hungarian Government's suggestion, though it would need to be given careful thought.

45. Mr. ROSENNE said that article 64 had been inserted rather at his insistence. When, at the sixteenth session, the Special Rapporteur had introduced an article on the effect of breach of diplomatic relations on the application of treaties⁶ he had been in favour of a short statement of principle of the kind proposed by Sir Humphrey Waldock.⁷ Now that article 43 had been revised (A/CN.4/L.115)—though he was inclined to favour the Special Rapporteur's suggestion for its further revision—such a short statement of principle would seem to him to be adequate and any amplification would only complicate the article unnecessarily.

46. The text of article 54, however, should be made more precise in regard to the point at which suspension must come to an end, for the reasons he had given at the 848th⁸ meeting and which the Special Rapporteur

⁶ *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/167, article 65A.

⁷ *Op. cit.*, vol. I, 747th meeting, paras. 60-62.

⁸ Paras. 42-48.

seemed to have accepted. He hoped that the Drafting Committee and the Commission itself would agree to put stress on the essentially temporary character of suspension in general. In that way, the concern of a number of governments including that of the United States would be allayed. He therefore agreed with the Special Rapporteur's suggestion for the revision of paragraph 2 of article 64 and with his conclusions in paragraphs 5 and 6 of his observations.

47. He did not agree with paragraph 7 of those observations and saw little reason to single out for special treatment treaty obligations concerning the peaceful settlement of disputes. Admittedly, in the *Corfu Channel* case⁹ and the *Case concerning the Temple of Preah Vihear*¹⁰ the States concerned had not been in diplomatic relations with each other, but that fact had not prevented the International Court from exercising jurisdiction after the preliminary objections had been carefully examined. In neither case could its decision be regarded as an enunciation of any general principle. On that point he agreed with the Special Rapporteur, that much would depend on the circumstances.¹¹ To frame a general rule on the effect of severance of diplomatic relations on treaty obligations of that special category would be inadvisable and untimely. He even doubted whether it pertained to the law of treaties at all.

48. He had no objection to amplifying article 64 so as to cover the interesting but difficult point made by the Hungarian Government, but should that be done, the provision would need to be very strictly worded. If the Drafting Committee failed to find suitable phraseology, the point could be covered in the commentary.

49. Although the question of the proper place for the article could be left aside for the time being, he would just indicate that it ought to appear in part II, before the articles on the effects of suspension, as a kind of reservation, and if necessary it could be brought within the scope of application of articles 49, 50 and possibly 51. That kind of arrangement would obviate the concern felt by some governments that in certain circumstances suspension resulting from the severance of diplomatic relations might lead to a disguised form of termination. At the fifteenth session, when the matter had first been discussed in connexion with the Special Rapporteur's second report,¹² the Commission had agreed that, if it were to be covered at all, the proper context would be in the articles on the application of treaties.¹³ Now that all the articles were before the Commission as well as the comments of governments and delegations, that view could be reconsidered.

50. Mr. VERDROSS said that he was in general agreement with the Special Rapporteur and, in particular, endorsed his suggestion that the wording of paragraph 2 should be made more stringent and that the place of the article should be changed.

⁹ *I.C.J. Reports*, 1949, p. 4.

¹⁰ *I.C.J. Reports*, 1962, p. 6.

¹¹ *Yearbook of the International Law Commission*, 1964, vol. I, 747th meeting, para. 54.

¹² *Yearbook of the International Law Commission*, 1963, vol. II, document A/CN.4/156.

¹³ *Op. cit.*, vol. I, 697th meeting, para. 56.

51. It seemed to him, however, that there was some inconsistency, first, between the title and paragraph 1 and, secondly, between paragraphs 1 and 2. The title referred to the effect of severance "on the application of treaties", whereas paragraph 1 stated that it did not affect "legal relations" in general; even though the text referred specifically to "the legal relations between them established by the treaty", it was going a little beyond the scope of the law of treaties, since there might be legal relations based on regional or local customs.

52. Further, while paragraph 1 stated that severance did not affect the legal relations between the parties, paragraph 2 admitted that the severance of diplomatic relations might have some effect, since the parties could invoke it as a ground for suspension. It would, therefore, be preferable for paragraph 1 to state, not that severance had no effect on relations between the parties, but that it did not alter the legal relations arising out of the treaties.

53. Mr. CASTRÉN said he agreed with the Special Rapporteur that the comments of governments all pointed to the fact that article 64 needed extensive redrafting. That was particularly true of paragraph 2 which, in its existing form, might give rise to serious abuses and nullify the fundamental principles stated in paragraph 1. He could accept the revised wording for paragraph 2 suggested by the Special Rapporteur, as well as his suggested amendment to article 43, as revised at the last session.

54. Paragraph 3 could be dropped, as the Netherlands Government and the Special Rapporteur had suggested, for the reasons given by the Special Rapporteur in paragraph 5 of his observations.

55. He saw no need for the proposals by various governments and the Special Rapporteur for the insertion of new paragraphs in article 64 and for the further amplification of article 43, since it seemed quite clear that the severance of diplomatic relations between parties to a treaty could not be considered as resulting in an impossibility of performing any obligation undertaken by them in the treaty with respect to the peaceful settlement of disputes. On the other hand, if, for safety's sake, the Commission did decide to adopt a provision of that kind, the text proposed by the Special Rapporteur would have to be amended by replacing the words "any obligation" by something less categorical such as the word "obligations", since the obligations in question might also include the obligation to enter into diplomatic negotiations, which were, of course, excluded from the situation referred to in article 64.

56. The addition of the words "while the impossibility exists" to the second sentence of article 43 was also unnecessary. That proviso was self-evident, since it followed from the temporary nature of the impossibility in the case concerned.

57. The Hungarian Government's proposal that the severance of consular relations should also be covered in the draft should be rejected, for the reasons given by the Special Rapporteur in his observations.

58. Mr. AGO said that, generally speaking, he was not in favour of making too many changes in article 64,

which had been reasonably well drafted at the first reading.

59. The rule the Commission was stating was, admittedly, rather categorical. Some treaties—such as treaties of alliance—might, in fact, be affected by the severance of diplomatic relations. On the other hand, it might be dangerous to make any exception, as that might encourage States looking for an unlawful means of extricating themselves from such a treaty to resort to the severance of diplomatic relations for that purpose. As governments had made no comments on the rule, it would be better to leave paragraph 1 as it was.

60. He was not in favour of including a cross-reference to article 43 in paragraph 2, since that article related to an entirely different possibility, that of the destruction of an object indispensable for the execution of the treaty. Ideas which might have the effect of obscuring the purpose of article 43 should not be introduced into the draft articles.

61. A problem was presented by a number of treaties relating to the peaceful settlement of disputes, which contained frequent references to the diplomatic channel. Treaties concerning conciliation, arbitration or peaceful settlement usually stipulated that the first duty of States was to attempt to settle disputes through the normal diplomatic channel. But such a provision obviously involved a considerable risk. On the one hand, there might be an objective difficulty, but on the other hand, it was necessary to prevent a State faced by the necessity of exhausting the possibilities of diplomatic negotiation or of appointing a conciliation commission or a court of arbitration from frustrating the purposes of the treaty by invoking the severance of diplomatic relations. Consequently, it might perhaps be advisable to insert in the text a safeguard of the type suggested by the Special Rapporteur, although the wording could be improved. Whatever solution was adopted, the question merited attention, since severance might result in material difficulty in performing certain provisions of certain treaties.

62. He was not at all in favour of dropping paragraph 3. In fact, to revert to the types of treaties he had just mentioned, he wondered if it was not essential to say that they would continue to exist even though one of their provisions could no longer be applied.

63. On the whole, he thought that the existing text should be retained, subject to any redrafting which might appear necessary.

64. Mr. BRIGGS said that the provisions of article 64 could be limited to the contents of paragraph 1, which appeared to have the unanimous support of governments, as indicated by the Special Rapporteur in his observations. Strictly speaking, paragraph 1 stated all that was necessary in the matter.

65. If paragraph 2 were retained, he was not in favour of including a cross-reference to article 43. It would be sufficient to deal with the time-factor in article 43 by amending the text of that article in the manner indicated at the end of paragraph 8 of the Special Rapporteur's observations on article 64 (A/CN.4/186).

66. Though he supported the principle, to which attention had been drawn by the United Kingdom Govern-

ment, that severance of diplomatic relations should have no effect on clauses relating to the peaceful settlement of disputes, he saw no necessity to include an additional paragraph on the point in article 64.

67. The question of the effect on the application of treaties of the severance of consular relations should be dealt with in the commentary.

68. Mr. REUTER said that he was impressed by the Special Rapporteur's lucid arguments. From the logical standpoint, article 64 was not absolutely indispensable; there remained the question whether it was of any value, but he would have no objection to its being retained.

69. On the other hand Mr. Ago had just raised a rather important point and, if his argument were accepted, the whole of article 43 would have to be reconsidered. In his own view, the title of article 43 had a much broader meaning than that just attributed to it by Mr. Ago, since it related to "supervening impossibility of performance". Further, the actual text of article 43 referred to the permanent destruction, not of "the object", but of "an object", in other words, to a condition indispensable for the execution of the treaty. The Commission should decide exactly what it had intended to say in article 43. If it was referring to a particular object, it should say so and leave it at that. If, on the other hand, what it had in mind was any situation resulting in impossibility of performance, it should reach agreement on that point and thereby confirm the observations of the Special Rapporteur.

70. Mr. TUNKIN said that it would be dangerous to introduce into article 64 a cross-reference to article 43. Under the general title of "Supervening impossibility of performance", that article laid down the limits within which such impossibility could be invoked and he for one would oppose any proposal to amend article 43 so as to broaden its provisions. The question of the effect of the severance of diplomatic relations on the application of treaties should be treated as a separate subject in the draft articles.

71. Article 64 was not essential but he could agree to its retention in the form adopted in 1964, with drafting improvements.

72. The CHAIRMAN, speaking as a member of the Commission, said that in 1964¹⁴ he had put forward the view that some treaties were undeniably affected by the severance of diplomatic relations; for instance, treaties of alliance, whose execution was incompatible with severance. Since, however, that question had not been raised by governments in their comments, and in view of the difficulty of drafting an exception based on the nature of treaties, he would have no objection to that possibility being omitted from the text. He was still convinced however, that certain treaties, by their very nature, were suspended by the severance of diplomatic relations.

73. On the question of a cross-reference to article 43, he agreed with the views expressed by Mr. Ago and Mr. Tunkin. It was clear that the title of article 43 did not correspond to its text, which was the more important. A party could not invoke any impossibility whatsoever,

¹⁴ *Yearbook of the International Law Commission, 1964*, vol. I, 748th meeting, paras. 2-5.

it could only invoke an impossibility resulting from the permanent destruction of an object indispensable for the execution of the treaty. Article 43 did not therefore refer to all impossibilities but only to one particular impossibility. Paragraph 2 of article 64 referred to the impossibility resulting from the permanent disappearance of an object indispensable to the execution of the treaty; and it would therefore be preferable not to include a cross-reference to article 43 but to retain the existing text of article 64, subject to drafting changes.

74. With regard to the United Kingdom Government's comment, he did not agree that an exception should be made to cover certain treaties which were affected by the severance of diplomatic relations, since it would be difficult to formulate an exhaustive definition. It would be equally difficult to separate particular categories of treaties, such as those relating to the peaceful settlement of disputes between States. The severance of diplomatic relations might affect some provisions of such treaties but not the treaty as a whole. For instance, although it would not be possible to use methods of peaceful settlement which called for the existence of diplomatic missions, the treaties might provide for other methods which would not be affected by the severance of diplomatic relations.

75. On the whole, he was in favour of retaining the article. It might not be indispensable but it could have some value, particularly if the Commission endorsed the Special Rapporteur's ingenious warning against the belief that, because treaties were a product of diplomacy, they could be considered as having lapsed with the severance of diplomatic relations.

76. Mr. BARTOŠ said that a clear distinction must be drawn between substantive rules and means or methods of execution. In many cases, diplomatic relations were unquestionably the regular means of executing treaties, and the Commission had rightly taken the view, as stated in paragraph 1 of article 64, that the severance of diplomatic relations between parties to a treaty did not affect the legal relations between them established by the treaty. The grounds for severance might preclude some relations between the States concerned, but that was an entirely exceptional situation, and it was incorrect to maintain even in that situation that contractual relations between States terminated with the severance of diplomatic relations. Paragraph 1 should therefore be retained as it was.

77. On the question whether the disappearance of the necessary means might be invoked as a ground of suspension, it should be remembered that, even if the treaty itself provided that it should be executed by "diplomatic means", that term did not necessarily denote the direct diplomatic channel. In the event of the severance of diplomatic relations, the States concerned requested other States to undertake the protection of their interests, and it was not unusual for highly important notes to be exchanged through the embassies of protecting States. As diplomatic protocol was irrelevant, the result was precisely the same, so far as the application of treaties was concerned, as if such communications had been transmitted through the direct diplomatic channel. He therefore placed a very restrictive interpretation on the expression "disappearance of the means necessary"

in paragraph 2; all possible means must be used, even indirect means.

78. The case of Yugoslavia and Spain provided a telling example; those two States had not resumed diplomatic relations after the war, and had not even designated protecting States. That had not prevented them from regulating administrative and political matters relating, for instance, to customs tariffs and the most-favoured-nation clause, or even from applying trade and navigation treaties dating from before the war.

79. The severance of consular relations, a situation to which the Hungarian Government had referred, created a situation almost identical with that created by the severance of diplomatic relations, so far as the application of treaties was concerned. For reasons that were sometimes inexplicable, it happened that some States severed their consular relations while maintaining their diplomatic relations.

80. Thought should also be given to the precise meaning of the term "severance of diplomatic relations". Some States used it to mean the mere withdrawal of diplomatic missions, whereas others considered that the missions could be recalled without the severance of diplomatic relations. The severance of diplomatic relations was a form of sanction in relations between States; it was a negative attitude taken by one government towards another. The expression "disappearance of the necessary means", interpreted in the sense he had indicated, accordingly seemed to him preferable to the expression "severance of diplomatic relations".

81. He favoured the solution contemplated even by the Special Rapporteur whereby the suspension of a treaty would be limited to the period of time during which the impossibility of performance existed. Moreover, no termination or suspension of contractual relations could be admitted on the ground of severance of diplomatic relations unless that step had the extreme gravity that it had possessed in the past, when it had been a prelude to war. In that case, the severance of diplomatic relations with a State was tantamount to denying the duty to apply the treaties with that State, except for treaties whose character required their continued application, such as humanitarian treaties or treaties regulating the transport of State papers, repatriation or other similar matters.

82. Article 64 dealt with a serious question, and it was incumbent upon the Commission to ensure that international treaties remained in force so far as possible.

83. Mr. TUNKIN said he agreed with Mr. Bartoš that it was undesirable to broaden the scope of article 64; indeed, its provisions should be made more rigid.

84. The commentary should stress the very exceptional character of the instances mentioned in paragraph 2, and the fact that the severance of diplomatic relations did not mean the disappearance of all official relations between the two States concerned. The situation had changed considerably since the nineteenth century: it was now quite common for direct official communications to take place between States which did not maintain diplomatic relations, and even where one of the two States did not recognize the other. A frequent practice was for States to use their permanent missions to the United Nations in New York for that purpose.

85. Mr. JIMÉNEZ de ARÉCHAGA said that the provisions of article 64 should be kept stringent so as to prevent abuse, and that could be done by either of two methods. One was that suggested by the Special Rapporteur, namely to insert in paragraph 2 of article 64 a cross-reference to article 43. That method, as indicated by Mr. Tunkin, was dangerous in that it would involve widening the scope of article 43, an article which was even more open to abuse than article 64 itself. Article 43 covered *force majeure*, which normally could not be invoked by a party when that party had brought about the alleged *force majeure* by its own act. The introduction into article 64 of a cross-reference to article 43 would have the effect of creating a broad exception to that principle.

86. He therefore preferred the second method, which was to amend paragraph 2 of article 64 so as to specify that severance of diplomatic relations could be invoked as a ground for suspending the operation of the treaty only if it had become impossible to perform the treaty while diplomatic relations were interrupted. The use of the terminology employed in article 43, namely "impossibility of performance" would achieve the desired restrictive effect.

87. Mr. TSURUOKA said it was regrettable that the decision to sever diplomatic relations too often seemed to be taken lightly. Severance undoubtedly vitiated relations between the two States concerned, but it could also have a detrimental effect on practical international life as a whole. He had, therefore, thought of suggesting a radical change—the drafting of a very stringent article, which would result in the almost complete isolation of any State that took the initiative of severance. On thinking it over, however, he had decided to adhere to the main trend of opinion in the Commission.

88. The rule set out in article 64 corresponded to existing practice and was conducive to the security and stability of legal relations among States. It deserved to be respected, like many of the rules of international law which were based on the collective wisdom of mankind.

89. As Mr. Bartoš and Mr. Tunkin had observed, instances of a material impossibility of performing the obligations of a treaty because of the severance of diplomatic relations were very rare. If possible, he would like to see article 64 formulated in terms which would make it quite clear that any State which severed its diplomatic relations with another State would not thereby get itself out of difficulties, but on the contrary would impair international relations in general and incur a moral responsibility.

90. Mr. EL-ERIAN said that article 64 was not indispensable since it enunciated a principle covering a situation which had given rise to no problems or controversies in international practice.

91. The fears expressed by certain governments in their comments were perhaps exaggerated. To the United Kingdom Government's comment on clauses for the peaceful settlement of disputes, the Special Rapporteur had replied very lucidly in his report that it was "unthinkable that the obligations in regard to the peaceful settlement of disputes, which are set out in Article 2,

paragraph 3 and in Article 33 of the Charter of the United Nations, should be capable of being suspended by the severance of diplomatic relations" (A/CN.4/186).

92. Actually, even the outbreak of armed conflict did not have the effect of putting an end to all treaty relations. The traditional concept of the absolute effect of war on treaties had long been abandoned and the accepted modern theory drew a distinction between different categories of treaties. Certain treaties were *ipso facto* terminated by the outbreak of hostilities; others, like those which regulated the conduct of hostilities, actually came into operation with the outbreak of war; and there were still other treaties the operation of which was merely suspended by war.

93. The question of the effect of the severance of diplomatic relations on the application of treaties could only be decided by reference to each specific case; it could certainly have the effect of suspending temporarily the operation of certain types of treaties.

94. Article 43 as adopted at the second part of the seventeenth session referred to the "permanent disappearance or destruction of an object indispensable for the execution of the treaty". The provision thus covered cases of absolute impossibility of execution. The suspension of the application of a treaty as a result of a severance of diplomatic relations, however, covered a wider range of cases. The causes of such severance could vary considerably, as could the status of the relations between the two States concerned after the severance. It would therefore be inadvisable to make the terms of the article too rigid.

95. The possibility of abuse had been exaggerated. Severance of diplomatic relations was an extremely serious step and one which a country did not take lightly; it was hard to believe that any State would use severance merely as a manoeuvre in order to avoid having to execute the provisions of a treaty.

96. In conformity with his position that the cases envisaged in article 64 were different from those contemplated in article 43, he suggested that the words "if it results in the disappearance of the means necessary for the application of the treaty" be replaced by a less rigid formula, reading: "if it frustrates the means necessary for the application of the treaty or makes the continued implementation of the treaty incompatible with the severance of diplomatic relations". The purpose of the concluding words was to emphasize the fact that, in certain cases, the means necessary for the application of the treaty might be present, but the very nature of the treaty was such that its continued application could not be reconciled with the break in diplomatic relations. Certain treaties, by their very character, presupposed normal relations between the States parties to them. It was for that reason that the emphasis in article 64 should be on the question of incompatibility, whereas in article 43 the emphasis was on the disappearance of an object indispensable for the performance of the treaty.

97. Mr. AGO said the discussion had shown that there was fairly broad agreement on the need to make article 64 as strict as possible. The idea that a State might resort to the severance of diplomatic relations to evade

the obligation of observing a treaty was unfortunately not as far-fetched as Mr. El-Erian would like to think. At all events, whatever the grounds for severance, the important point was to avoid giving States any loophole and to ensure that treaties continued to be applied.

98. The expression "means necessary" in paragraph 2 should undoubtedly be altered, as it was dangerous. As Mr. Tunkin had observed, there were now all sorts of means by which States could negotiate, even if they did not maintain normal diplomatic relations. Great care must therefore be taken to avoid giving the impression that the severance of diplomatic relations might lead to the disappearance of the means necessary for the performance of treaties.

99. Careful reflection led to the inescapable conclusion that there were virtually no examples of the situations covered by paragraphs 2 and 3, and it was questionable whether those paragraphs were necessary. If the Commission decided to retain them, it would have to draft them very precisely so as to make it clear that the reference was to an absolute, objective, material impossibility of performing a treaty; and, as Mr. Tunkin had suggested, it would also have to include in the commentary all the necessary material to ensure that its thinking was fully understood.

100. Mr. AMADO said he whole-heartedly supported Mr. Ago's remarks; he would be glad to see article 64 reduced to paragraph 1. No one was required to do the impossible, but, as Mr. Tunkin had emphasized, it was necessary to be sure that the impossibility was genuine.

101. He would never concede the possibility of a link between article 64 and article 43; on that point he agreed with Mr. El-Erian.

102. He welcomed Mr. Tunkin's suggestion that the severance of diplomatic relations should cease to be regarded as having the disastrous significance it had had in the past.

103. Although he did not share Mr. Tsuruoka's confidence in the wisdom of mankind, he hoped that the article, which was of minor importance, would not be unnecessarily magnified.

104. Mr. BARTOŠ, referring to Mr. Tunkin's remarks on the part played by permanent missions to the United Nations, said that, in the course of his study of the functions of permanent representatives to the United Nations in New York, he had found more than thirty cases in which a State wishing to invite other States with which it did not have diplomatic relations to an international meeting had issued that invitation in the form of a note addressed by its permanent representative to their permanent missions; usually such notes included a reminder of the contractual rules and the decisions of the International Court of Justice on the conditions on which delegations attended meetings of that sort. That was a practice, indeed almost a custom. At the time of the severance of diplomatic relations between Chile and Yugoslavia, the permanent representatives of those two States had entered into contact with a view to re-establishing those relations. Again, although there were no diplomatic relations between the Philippines and Yugoslavia, those two States were applying a treaty on navigation, and all communications relating to the

application of that treaty were channelled through the permanent missions in New York. It was, therefore, a fact that all States Members of the United Nations had an appropriate means for applying treaties, apart from the normal diplomatic channel.

105. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that there was fairly general agreement that the rule in article 64 should be strictly stated. He himself was certain that paragraph 2, as adopted in 1964, was much too loose in its provisions and that governments were therefore justified in their objections. In fact, paragraph 1 might well be all that was necessary; it stated that in principle the severance of diplomatic relations did not affect treaty relations.

106. Any attempt to investigate individual cases of severance of diplomatic relations would lead to an inquiry into the special circumstances which had led to that severance. In some cases, the severance of diplomatic relations could be a form of sanction against an illegal act; in other cases, it might be a gesture of protest against some act which was considered unfriendly.

107. If a thorough examination were made of the underlying circumstances, it would be difficult to see whether there could exist any true case of impossibility of performance as a result of a severance of diplomatic relations. In 1964 the Commission had been much impressed by the possibility that severance of diplomatic relations might result in the disappearance of all formal channels of communication and the emphasis had been placed on that possibility in the commentary. It had been rightly pointed out in the present discussion, however, that when the need for communication arose, other channels were soon found.

108. In paragraph (3) of the 1964 commentary, it was pointed out that "a State does not appear to be under any obligation to accept the good offices of another State, or to recognize the nomination of a protecting State in the event of a severance of diplomatic relations; and articles 45 and 46 of the Vienna Convention on Diplomatic Relations of 1961 expressly require the consent of the receiving State in either case".¹⁵ As a result of the present discussion, that commentary would have to be altered. Personally, he had felt uneasy at the suggestion that severance of diplomatic relations could put an end to the possibility of channels of communication between the States concerned. The question largely depended on the will of those States; where the will to establish communications existed, a channel was always found.

109. The Drafting Committee would have to consider carefully whether it was necessary to retain paragraph 2. In the event of its retention, the paragraph would have to be reworded so as to limit it explicitly to cases of absolute impossibility of performance on the lines indicated in paragraph 4 of his observations (A/CN.4/186).

110. He suggested that article 64 be referred to the Drafting Committee for consideration in the light of the discussion.

¹⁵ *Yearbook of the International Law Commission, 1964*, vol. II, p. 192.

111. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 64 to the Drafting Committee as suggested by the Special Rapporteur.

*It was so agreed.*¹⁶

The meeting rose at 12.55 p.m.

¹⁶ For resumption of discussion, see 875th meeting, paras. 9-28.

859th MEETING

Thursday, 26 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 65 (Procedure for amending treaties) [35]

Article 65

Procedure for amending treaties

A treaty may be amended by agreement between the parties. If it is in writing, the rules laid down in part I apply to such agreement except in so far as the treaty or the established rules of an international organization may otherwise provide.

1. The CHAIRMAN invited the Commission to consider article 65, for which the Special Rapporteur had proposed the following rewording:

“ A treaty may be amended by agreement between the parties. The rules laid down in part I apply to such agreement except in so far as the treaty may otherwise provide. ”

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, of the four articles forming section II, on the modification of treaties, article 68, on the modification of a treaty by a subsequent treaty, by subsequent practice or by customary law, dealt with a somewhat different aspect of modification. The remaining three articles formed a group and, in discussing article 65, it was useful to bear in mind also the provisions of articles 66¹ and 67².

¹ For the text of article 66, see below, preceding para. 51.

² See 860th meeting, preceding para. 33.

3. Article 65 was in the nature of an introductory article and set forth the two general rules on the procedure for modification. The first rule, that a treaty could be amended by agreement between the parties, had been couched in general terms because the Commission had not wished to lay down too rigid a rule as to the conditions under which an amending agreement might be binding.

4. The second sentence of article 65, which made provision for the application to the amending agreement of the rules laid down in part I, had been criticized by some governments, the main objection being to the opening words “ If it is in writing ”, which the Commission had introduced in order not to exclude the possibility of amending a treaty by tacit agreement. He was quite agreeable to dropping those words, since the legal force of international agreements not in written form was safeguarded by the provisions of article 2(b), already adopted by the Commission, and article 65 made explicit reference to part I, in which article 2 was placed. For the actual wording, he had adopted the Netherlands Government’s proposal in preference to that put forward by the Israel Government.

5. A number of governments had also criticized the concluding proviso relating to “ the established rules of an international organization ”. That criticism applied also to article 66, and the United States Government had pointed out that it affected certain other articles as well. As he had indicated in paragraph 2 of his own observations (A/CN.4/186), the Commission had anticipated that point. The Commission had never contemplated giving overriding effect to the established rules of an international organization, thereby creating a kind of concept of a law-making competence in international organizations which would automatically impinge on the law of treaties; it had merely wished to reserve the special procedures of certain organizations, such as that for the amendment of international labour conventions which was governed by the rules of the ILO. In any case, the point had already been disposed of by the Commission’s adoption at the first part of its seventeenth session of article 3 (*bis*) (A/CN.4/L.115) which would automatically require the deletion from article 65 of the reference to the “ established rules of an international organization ”. It only remained for the Drafting Committee to examine article 3 (*bis*) carefully in the light of the government comments on article 65 in order to ensure that the reservation in article 3 (*bis*) had been expressed in sufficiently narrow terms to confine it to constituent instruments of international organizations and to treaties drawn up as part of the actual functions of an organization.

6. Mr. CASTRÉN said that he could accept the new wording suggested by the Special Rapporteur; it seemed likely to allay most of the misgivings of governments and was an improvement on the text adopted in 1964. It would certainly be better not to specify that the article referred only to agreements in writing, since article 2(b) already contained a general reservation, which was applicable to all the articles and which left the problems connected with oral agreements open.

7. Similarly, since article 3 (*bis*) contained a general reservation concerning treaties which were constituent

instruments of an international organization or had been drawn up within an international organization, the reference to the rules of an international organization might be deleted from article 65, but article 3 (*bis*) might with advantage be re-examined in the light of the comments of the Government of Israel, as the Special Rapporteur had proposed.

8. He agreed with the Special Rapporteur on the point raised by the Government of the United States; that was a special problem and no attempt should be made to solve it in that article.

9. Mr. VERDROSS said he agreed with Mr. Castrén that the Commission could take account of the comments of governments in the way proposed by the Special Rapporteur. He wondered, however, whether the abridged version of article 65 was still needed. Apart from the reservations in the second sentence, the proposed new text said practically the same as sub-paragraph (a) of article 68; the two articles might perhaps be combined.

10. Mr. ROSENNE said it was correct in principle to delete the reference to "the established rules of an international organization", and since the Special Rapporteur had spoken of that deletion as an automatic consequence of the adoption of article 3 (*bis*), the Drafting Committee would have to examine whether the same reference should not also be eliminated from articles 6, 7, 12, 18 and 29.

11. He agreed with the Special Rapporteur that the text of article 3 (*bis*) required careful examination in the light of government comments on other articles.

12. He could accept article 65 as proposed by the Special Rapporteur and, unlike Mr. Verdross, considered it an essential provision. It could of course be combined with article 68 but, in that case, it was the provisions of article 68 which should be moved back to article 65, not the reverse.

13. Mr. EL-ERIAN said that he fully agreed with Mr. Castrén and that he accepted the Special Rapporteur's redraft.

14. The question of the reference to the established rules of an international organization had been greatly facilitated by the Commission's adoption of article 3 (*bis*). However, he did not believe that it would be possible to make article 3 (*bis*) any more restrictive. The reference to treaties "drawn up within an international organization" was sufficient in that respect and he had been impressed by the Special Rapporteur's remarks in paragraph 5 of his observations, in particular by his reference to Chapters IX and X of the Charter.

15. Mr. de LUNA said that he supported the Special Rapporteur's proposal for the deletion of two phrases in the article, but was less happy over the retention of the remaining provision. The only rule left in article 65 after the deletions would be the statement that a treaty could be amended by a subsequent agreement, which would itself constitute a treaty and as such be governed by part I. The main preoccupation of governments concerned the possibility of a tacit agreement being invoked to amend a treaty. In that respect, the reference in the original text to the amending agreement being in writing served some purpose, although he was prepared

to see it deleted for the reasons given by the Special Rapporteur.

16. He was inclined to agree with Mr. Rosenne that articles 65 and 68 might be combined in a single article which would begin by stating the general principle that a treaty could be amended by a subsequent agreement and would then go on to say that modification could result from a subsequent treaty, subsequent practice or the subsequent emergence of a new rule of customary law, as set forth in sub-paragraphs (a), (b) and (c) of article 68.

17. Mr. JIMÉNEZ de ARÉCHAGA said he supported the Special Rapporteur's rewording of article 65.

18. Article 65 had a definite function in the system of the Commission's draft articles and did not duplicate article 68. It referred to a treaty in which the parties deliberately set out to amend the earlier treaty; in paragraph (a) of article 68, the reference was to a new treaty which had the unintended consequence of modifying the application of the earlier treaty. The two ideas were completely different.

19. He could not agree with Mr. de Luna with regard to the content of the Special Rapporteur's proposal. The article stated two important substantive rules. The first was that the modifying agreement constituted a new treaty and was governed by the provisions of part I. The second was contained in the concluding proviso "except in so far as the treaty may otherwise provide". The purpose of that proviso was to legitimate the practice of including in the treaty itself provisions for special amending procedures, such as amendment by majority vote or by the decision of some organ.

20. Mr. VERDROSS said he feared there was a slight misunderstanding between Mr. Rosenne and himself. What he had intended to propose was not that article 65 should be deleted, but merely that it should be combined with sub-paragraph (a) of article 68; the same result might be achieved by retaining the proposed rule in article 65 and then amending sub-paragraph (a) of article 68.

21. The CHAIRMAN, speaking as a member of the Commission, said he first wished to point out that the title of the article was not quite correct; it was concerned not with procedure, but with a substantive rule.

22. He agreed with those governments, in particular that of the Netherlands, which thought it undesirable to underline in article 65 the possibility of treaties being amended by tacit or oral agreement. At the second part of the seventeenth session, he had questioned the wisdom of a rule under which a treaty might be terminated by oral agreement.³ Such agreements were possible, admittedly, but their use should not be given too much prominence; that was even more true of the amendment of treaties, which might involve more serious problems than termination.

23. As several governments had suggested, it would be desirable to delete the reference to international organizations. The Commission had already discussed on several occasions whether the articles of the draft

³ *Yearbook of the International Law Commission, 1966*, vol. I, part I, 829th meeting, para. 68.

applied to treaties concluded under the auspices of or within international organizations, by States acting in their capacity as members of those organizations. In any case, with the inclusion of article 3 (*bis*) in the draft, there was no longer any need to retain that exception in article 65.

24. When amended as proposed by the Special Rapporteur, article 65 seemed at first sight to state a self-evident truth, but as Mr. Jiménez de Aréchaga had just pointed out, it also specified, first, that an agreement amending an earlier agreement was governed by the rules in part I of the draft and, secondly, that reference must be made to the treaty itself, which might contain special provisions relating to its amendment. The latter point was particularly valuable; if, for instance, the parties had agreed that a treaty might be amended by a certain majority, it must clearly be recognized that that rule applied to the treaty in question. Article 65 therefore served a useful purpose.

25. Mr. EL-ERIAN said that article 65 was useful in that it laid down the general principle that a treaty might be amended by a subsequent agreement, to which the provisions of part I applied. The final proviso opened the way for laying down special amending procedures in the treaty itself.

26. The title should be amended by replacing the reference to the "procedure" for amending treaties by a reference to the general principle on the amendment of treaties.

27. Mr. BRIGGS said he could accept the two amendments proposed by the Special Rapporteur. Nothing was lost by dropping the words "If it is in writing", since the rules in part I referred to treaties, which were defined in article 1 (*a*) as international agreements "in written form".

28. He also agreed with the Special Rapporteur's reasons for deleting the reference to "the established rules of an international organization". As Chairman of the Drafting Committee, he was grateful to Mr. Rosenne for drawing attention to a number of other articles which contained those words; the Drafting Committee would examine whether that reference should be deleted in those articles as well.

29. On the retention of article 65, he fully agreed with the remarks of Mr. Jiménez de Aréchaga and the Chairman. It was essential to retain article 65 as a separate article in its present position, for it was the only article which covered both bilateral and multilateral treaties. The provisions of the following two articles were confined to multilateral treaties, and article 68 did not deal with the question of the formal amendment of treaties but with the operation of a treaty in the light of a subsequent treaty, a subsequent practice, or the subsequent emergence of a new rule of customary law in the circumstances set forth in sub-paragraphs (*a*), (*b*) and (*c*) of article 68.

30. Mr. BARTOŠ said that he was opposed to the amendment of treaties by oral agreement. However, under the rules governing the registration of treaties, agreements concluded orally but recorded in writing were not to be regarded as oral agreements. In such cases, although the intention of the parties had been expressed

orally, there was written evidence of the existence and content of the agreement; the "arrangements" of Anglo-American practice came into that category. Such agreements produced the same effect as treaties in writing.

31. Mr. de LUNA said that he had not proposed the deletion of article 65, but had merely suggested, like Mr. Verdross, that it might conveniently be combined with article 68. The only difference between the provisions of article 65 and those of sub-paragraph (*a*) of article 68 was that, in the case covered by the latter provision, the second treaty had not been concluded by the parties for the sole purpose of amending the earlier treaty.

32. The rule laid down in sub-paragraph (*a*) of article 68 was in fact a repetition of that contained in article 63, on the subject of the application of conflicting provisions of two successive treaties.

33. Mr. AMADO said that he was in general agreement with the Special Rapporteur and those speakers who had supported his new text. He agreed, however, with the Chairman that the term "procedure" in the title of the article should be changed, as it was incorrect. It should be noted that article 65 stated a general rule concerning the amendment of treaties, whereas article 68 dealt with questions relating to their operation.

34. Sir Humphrey WALDOCK, Special Rapporteur, after thanking Mr. Jiménez de Aréchaga and the Chairman for answering the point which had been raised with regard to the respective functions of articles 65 and 68, said he would urge the Commission not to engage at present in a discussion of article 68, a difficult article which dealt with a special matter and on which he would submit his own observations and proposals in due course. Article 68 had its genesis in an article in the section on interpretation, and the Commission had experienced great difficulty in placing it.

35. He fully endorsed Mr. Jiménez de Aréchaga's observation that article 68 was completely different from articles 65 and 66, which dealt with an agreement in which the parties set out deliberately to amend the earlier treaty. At the sixteenth session, members of the Commission had attached great importance to the distinction between the amendment of the treaty itself, for which provision was made in articles 65 and 66, and the case covered by article 67, of *inter se* agreements. In article 67, the Commission had been careful not to speak of "amendment", because the original treaty was not amended as a text; some of its parties merely entered into a modified *inter se* agreement. Article 68 dealt with some entirely different matters, involving the accidental modification of the operation of the treaty by subsequent events; in two cases covered by that article, there was no intention to amend the text of the treaty.

36. Mr. CASTRÉN said he agreed with Mr. de Luna that it would be possible to combine articles 65 and 68, but he shared the misgivings of the Special Rapporteur and other members of the Commission that the resulting article might be too long and too complex, and give rise to confusion. It would be better, therefore, to keep them separate.

37. He supported the proposal by the Chairman and Mr. El-Erian that a change should be made in the title

of article 65; it should probably be amended along the lines suggested by Mr. El-Erian.

38. Mr. REUTER said that, in view of the importance attached to the principle of sovereignty in the draft, the Commission would seem to intend that article 65 should state the so-called principle of the *acte contraire*, the principle that a treaty which had been concluded in a certain way could always be amended in the same way. If that was the intention of article 65, it was an important and useful rule, bearing as it did on a problem which was not purely theoretical.

39. For example, if the parties had provided in a treaty that it could not be amended until a certain number of years had elapsed, was any amendment of the treaty prohibited before that period had elapsed or could the parties to the treaty amend that provision of the treaty so that they could revise the treaty before the date laid down? The point might seem rather academic in the case of bilateral treaties, but it did nevertheless arise. It was more serious in the case of treaties concerning international organizations, especially when the parties had agreed in the treaty that its amendment should be more difficult than its conclusion. For example, if it was considered that the establishment of an international organization resulted in the creation of a legal entity and if it was provided that the treaty could not be revised except with the participation of one of the organization's organs, it was possible that governments might wish to amend that rule among themselves. Could they do so or was that no longer within their power?

40. The Commission should certainly make its intention in that respect absolutely clear.

41. Mr. BARTOŠ said that the question raised by Mr. Reuter had been discussed at length by international jurists. The point was whether the rule which existed in comparative municipal law, that the parties had the capacity to decide the form of their contracts, also applied to treaties, or whether each expression of sovereign will was complete in itself. It sometimes occurred in practice that the basic provisions of a treaty which had been concluded in the most formal manner, with a preamble, final clauses and a ratification procedure, and to which the parties had given wide publicity, were subsequently amended by an agreement in simplified form or even by a mere exchange of notes. It was possible that the treaty had been concluded in a particular political atmosphere and that, following a change in that atmosphere, the two States had agreed to reduce its importance or even to let it virtually lapse as discreetly as possible.

42. In his view, the rule which appeared in all civil codes and in customary law, including the common law, whereby the parties committed themselves in advance to use a certain form of contract, did not apply to international treaties; States were free at all times to choose the form of agreement which suited them. An expression of the will had been given; it could also be changed, but the form in which it was changed could differ from that in which it had been given; the parties were not tied to any given form.

43. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission had never intended to endorse the theory

of the *acte contraire*. In fact, the Commission had agreed that a formal treaty could be repealed or amended by a less formal agreement, or even by subsequent custom.

44. With regard to the other point raised by Mr. Reuter, the concluding proviso, "except in so far as the treaty may otherwise provide", ensured that it would be possible to establish in the treaty amendment procedures which could be either easier or more difficult than the procedures employed for adopting the treaty itself. It was impossible to accept the theory, which had been put forward by one delegation in the United Nations, that the Charter could be amended by a two-thirds majority—the majority by which it had been adopted originally—in disregard of the express provisions of Articles 108 and 109 of the Charter.

45. Mr. AGO said that the article laid down an important rule. He agreed with the Special Rapporteur and with those members of the Commission who believed that the important point was to state that the rules laid down for the conclusion of a treaty should apply to its amendment, except where the treaty itself provided for different rules, which might make amendment easier or harder than conclusion. The Commission intended to give the parties both possibilities.

46. In view of the content of article 3 (*bis*) there was no longer any need to refer in article 65 to the established rules of an international organization.

47. He was in favour of the text proposed by the Special Rapporteur, except that the article should preferably be headed "Rule applicable to the amendment of treaties". He also agreed with the Special Rapporteur that article 68 was far from satisfactory and would have to be revised.

48. Sir Humphrey WALDOCK, Special Rapporteur, said he endorsed Mr. Jiménez de Aréchaga's remarks on the rejection by the Commission of the theory of the *acte contraire*. Article 65 gave full liberty to the parties to agree on their own procedures for amendment. In doing so, they would naturally take into account their constitutional positions, but that was a matter which concerned the parties exclusively.

49. He proposed that article 65 should be referred to the Drafting Committee with instructions to amend its title and consider its wording in the light of the discussion.

50. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 65 to the Drafting Committee, as proposed by the Special Rapporteur.

*It was so agreed.*⁴

ARTICLE 66 (Amendment of multilateral treaties) [36]

Article 66

Amendment of multilateral treaties

1. Whenever it is proposed that a multilateral treaty should be amended as between all the parties, every party has the right to have the proposal communicated to it,

⁴ For resumption of discussion, see 875th meeting, paras. 29-41.

and, subject to the provisions of the treaty or the established rules of an international organization:

(a) To take part in the decision as to the action, if any, to be taken in regard to it;

(b) To take part in the conclusion of any agreement for the amendment of the treaty.

2. Unless otherwise provided by the treaty or by the established rules of an international organization:

(a) An agreement amending a treaty does not bind any party to the treaty which does not become a party to such agreement;

(b) The effect of the amending agreement is governed by article 63.

3. The application of an amending agreement as between the States which become parties thereto may not be invoked by any other party to the treaty as a breach of the treaty if such party signed the text of the amending agreement or has otherwise clearly indicated that it did not oppose the amendment.

51. The CHAIRMAN invited the Commission to consider article 66, for which the Special Rapporteur had proposed a revised text reading:

" 1. Unless the treaty otherwise provides, any proposal to amend a multilateral treaty as between all the parties must be notified to every other party which shall have the right to take part in:

(a) The decision as to the action, if any, to be taken in regard to such proposal;

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

" 2. Unless the treaty otherwise provides:

(a) An agreement amending a treaty does not bind any party to the treaty which does not become a party to such agreement;

(b) The effect of the amending agreement is governed by article 63.

" 3. If the proposal relates to a multilateral treaty which has not yet entered into force, it must be notified to every State which by its signature or otherwise shall have adopted or endorsed the text. *Mutatis mutandis*, paragraphs 1 and 2 shall then apply with respect to each such State.

" 4. A party to the treaty, which by its signature or otherwise has adopted or endorsed the text of the amending agreement but without becoming a party thereto, may not object to the application of that agreement as between any States which have become parties to it."

52. Sir Humphrey WALDOCK, Special Rapporteur, said that, in his revised text, the reference in paragraphs 1 and 2 to the established rules of an international organization had been deleted for the reasons already given by him in connexion with article 65.⁵

53. In response to a comment by the Government of Israel, he had amended the opening sentence of paragraph 1 so as to make notification subject to the proviso "Unless the treaty otherwise provides"; since the substantive rights set forth in sub-paragraphs (a) and (b)

were subject to the provisions of the treaty, it was logical that the same should be true of the notification. The whole of paragraph 1 would thus be couched in the form of a residuary rule, as had already been the case in the 1964 text with regard to sub-paragraphs (a) and (b).

54. In paragraph 3 of his observations (A/CN.4/186), he examined the possibility that the Israel Government's suggestion might perhaps have been intended to cover also the right of a party to put forward a proposal for amending a multilateral treaty. In 1964, the Commission had discussed the practice of including in certain multilateral treaties clauses designed to restrict the making of proposals for amendment in some manner, for example, until after the lapse of a specified period of time.⁶ The Commission, however, had arrived at the conclusion that it could not lay down, as a rule of law, that the parties to a treaty were not at liberty to make any proposals for amendment at all. On the political and diplomatic plane, the question of the amendment of a treaty could always be raised. Accordingly, he had not proposed in his revised text that the opening proviso of paragraph 1 should govern also the right of a party to put forward a proposal for amending a multilateral treaty.

55. Paragraph 5 of his observations dealt with a point raised by the Government of Israel in regard to the notification of proposals of amendment. The point applied to article 67 as well and related to the "intermediate" case in which the notice of amendment was made at a time when the parties proposing the amendment did not yet know whether the ultimate result would be an amendment of the treaty as such for all the parties, or merely an *inter se* agreement. Cases of that type did arise in practice but it was difficult to provide for them; any attempt to lay down rules in the matter might hinder the progress of political negotiations on desirable proposals for the amendment of a treaty. Moreover, it was hard to draw a dividing line between preliminary discussions and mature proposals for amendment. His own suggested solution to the problem was that paragraph 2 of article 67 should be strengthened. When the Commission came to consider article 67, it would have before it his analysis of government comments, from which it would note the concern expressed by a number of governments at the looseness of the provisions on notification contained in that article.

56. In paragraph 6 of his observations, he discussed the question of the rights or interests of States that had taken part in drawing up the treaty, and whether those States, even if they were not yet parties, should not be notified of proposals for the amendment of the text. The question had engaged the attention of the Commission in connexion with other articles as well. He had himself originally proposed provisions safeguarding the interests of all those States, but the Commission had arrived at the conclusion that such safeguards would lead to too much complication and would grant too great a benefit to States which had shown little real interest in the text of the treaty.

57. In paragraph 7 of his observations, he discussed the case, mentioned by the Government of Israel, of

⁵ See paragraph 5 above.

⁶ See *Yearbook of the International Law Commission, 1964*, vol. I, 744th-747th meetings.

the possible amendment of the text before the treaty came into force. Sometimes States would fail to ratify a treaty precisely because of some defect in the text, whereas if the text were amended, the necessary number of ratifications for entry into force might well be obtained. In order to take that point into account, he had drafted a new paragraph 3 for the consideration of the Commission.

58. The point raised by the Hungarian Government and referred to in paragraph 8 of his observations had been discussed by the Commission in connexion with article 8 on participation in a treaty, the decision on which had been postponed.

59. The Government of Israel had suggested that, in paragraph 2(b), reference should be made not only to article 63, but also to articles 59-61. As indicated in paragraph 9 of his observations, he considered that it was sufficient to refer to article 63, which already gave effect to the essential rule of article 59 which protected the rights of third States and prevented any obligations from being imposed upon them, so that they could not be deprived of their rights under an earlier treaty without their consent.

60. Three Governments had criticized paragraph 3 of article 66 and he had discussed their criticisms in paragraphs 10-13 of his observations; he had proposed a rewording of the paragraph, which would now become paragraph 4. The Commission would have to consider whether that concluding paragraph was necessary and, if so, what its terms should be. His view was that the provision should be restricted to the narrow point of estoppel arising from the adoption or endorsement of the amending agreement.

61. Mr. AGO said the Special Rapporteur should remove the uncertainty created by the opening sentence of paragraph 1 of his revised text; it could be taken to mean that the proposal to amend must be notified only to the parties which had the right to take part in the acts in question, which would make the whole article unintelligible.

62. Sir Humphrey WALDOCK, Special Rapporteur, said that the opening sentence of paragraph 1 was intended to mean that the proposal must be notified to all the parties and that those parties would have the right to take part in the decision mentioned in sub-paragraph (a) and in the conclusion of any amending agreement, as mentioned in sub-paragraph (b). The language was somewhat ambiguous and the Drafting Committee should consider its improvement. There was, of course, no intention to go back on the Commission's 1964 decision that every party had the right to be notified.

63. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the Special Rapporteur that paragraph 1 called for some drafting changes. Perhaps all that was necessary in the revised text was to put a full stop after the word "party" and substitute the words "The party thus notified" for the word "which". The rest of the text need not be broken up into sub-paragraphs.

64. Paragraph 2, with the insertion of the word "amended" after the words "Unless the", was acceptable.

65. Paragraphs 3 and 4 should be deleted. He was not convinced that a provision was needed concerning the amendment of a treaty not yet in force or that signatory States were entitled to be notified and to participate in the amending process on an equal footing with States that were actually parties to the treaty. Surely such a provision had no place in the general system of the Commission's draft articles which elsewhere were concerned with treaties that were in force. The signatories to a treaty not yet in force possessed complete freedom to adopt a new text by means of an independent agreement. Moreover, paragraph 3 presented practical difficulties in connexion with notification and termination, as the Special Rapporteur had pointed out.

66. Paragraph 3 of the 1964 text had served some purpose, inasmuch as it covered the case of breach and provided for estoppel. He mentioned that point in the hope that the Special Rapporteur might be disposed to modify the somewhat rigid standpoint he had adopted in regard to article 63. His new paragraph 4 for article 66 should be brought into line with article 67 because it was evident that a State, whether or not it had signed the text, was not entitled to contest the application of the amended agreement as between other States, unless its rights were affected and it could only object to such an *inter se* agreement if the conditions specified in article 67 were not fulfilled.

67. Mr. TUNKIN said that the discussion of articles 66 and 67 during the sixteenth session had revealed a certain difference of opinion. He agreed on the whole with the Special Rapporteur's analysis of the observations received from governments and delegations on the former article.

68. He had some sympathy with the Hungarian Government's comment on paragraph 1 because, as the international community expanded with the appearance of new States, what could be regarded as general multilateral treaties might not at any given moment include all States among the parties; but that was a problem of participation and more relevant to article 8. The Special Rapporteur's suggestion to drop the reference to the "established rules of an international organization" in paragraph 1 was acceptable as well as his other suggested changes in that paragraph.

69. To a large extent he shared the doubts expressed by Mr. Jiménez de Aréchaga about the revised text of paragraph 3, which might result in instability and confusion by allowing any State to propose amendments to a text already adopted, even before the treaty had entered into force. That might require a second conference to consider the amendment, and not all the States that had participated in drawing up the text might attend. Such action should certainly not be encouraged, and the contingency was in any case covered in the opening proviso of paragraph 1. Paragraph 3 should be dropped.

70. Doubts had been expressed about the utility of the revised paragraph 4 on the ground that the point was already covered in article 67: that was a matter that could be examined by the Drafting Committee. His own view was that the paragraph could be left out, mainly for the reasons given by Mr. Jiménez de Aréchaga. If it were retained, some drafting changes would have

to be made to remove any misunderstanding about the meaning of the words "or otherwise has adopted or endorsed . . .".

71. Mr. ROSENNE said that the Special Rapporteur's new text for paragraphs 1 and 2, with the drafting changes proposed by Mr. Jiménez de Aréchaga, was acceptable.

72. The arguments for and against retaining paragraph 3 were fairly evenly balanced. Perhaps a provision on those lines was needed because, if his interpretation was right, it might constitute an exception to the provisions of article 17. It would be helpful to hear the Special Rapporteur's views on the relationship between those two provisions.

73. He reserved his position in regard to the new paragraph 4.

74. Sir Humphrey WALDOCK, Special Rapporteur, said that he had not yet given a great deal of thought to the relationship between the revised paragraph 3 and article 17. Although the obligation to refrain from acts calculated to frustrate the object of a proposed treaty, laid down in article 17, might be held to preclude proposals to amend a text before its entry into force, it might be going too far to make a cross-reference in paragraph 3 to that obligation.

75. He had been more preoccupied with the question whether a provision of the kind embodied in paragraph 3 was necessary at all. He had no strong views on the matter but had put forward a text for the Commission to consider. There was considerable force in Mr. Tunkin's argument that it would be undesirable to encourage States, before the entry into force of the treaty, to tamper with a text already approved or adopted. Perhaps the problem could be left aside for decision by States, particularly in view of the political aspects.

76. The purpose of paragraph 3, which was not a particularly radical provision, was to enable any State that had taken part in the formulation of the text to be consulted on a proposal to amend it before the treaty had entered into force and before, strictly speaking, any parties existed. He had no particular liking for the drafting of paragraph 3; there was a very real difficulty in finding a suitable form of words to designate the States which had taken part in the formulation of the text. They could not be described as the signatories nor as those which had adopted the text; in the latter case the records of the final voting might not necessarily suffice to identify them. The difficulty had been discussed at length by the Commission in the past, but no satisfactory solution had yet been found. He noted that Mr. Tunkin had not offered any alternative version for paragraph 3 either.

77. Mr. CASTRÉN said that the amendments which the Special Rapporteur had proposed to the 1964 text in the light of the comments made by governments seemed on the whole to be justified. The special reservations in regard to the "established rules of an international organization" should be deleted from paragraphs 1 and 2, as they had been from article 65, for the reasons given by the Special Rapporteur in his observations. His other amendments to paragraph 1 were also of a formal nature and, as they improved the text, they were acceptable.

78. Paragraph 2 had been left as it was, except for the deletion of the reservation to which he had already referred, and the Special Rapporteur had been right in rejecting the other proposed amendments.

79. The new paragraph 4, former paragraph 3, was more precise and less categorical on a number of points. It no longer provided that a breach of the treaty had taken place if certain States parties to the treaty started to apply, in their mutual relations and without the consent of the other parties, an agreement amending the treaty. According to the new text, the parties could give their assent by adopting or endorsing the text of the amending agreement by signature or otherwise. In that particular respect, however, he had the impression that the 1964 text, which was clearer and more precise, would be preferable. The expression "adopting the text of the treaty" had been severely criticized in 1964. Perhaps, even, as Mr. Jiménez de Aréchaga had said, the article was not necessary at all.

80. He doubted the wisdom of including the new provision contained in paragraph 3, for although cases might arise in which some of the States which had concluded a treaty wished to amend it before it had come into force, such cases were fairly rare, and that special and complicated issue should not be raised in draft articles devoted to general rules.

81. Mr. de LUNA said that he whole-heartedly approved the new form which the Special Rapporteur had given to paragraphs 1 and 2. In the light of the new text of article 3 (*bis*), the reference to the established rules of an international organization could be deleted.

82. He shared the doubts which had been expressed as to the advisability of including paragraph 3 in the article. Admittedly, it quite often happened that, when a specific number of ratifications was required for the entry into force of a multilateral treaty, ten years or so elapsed before the necessary number of ratifications were obtained. During that interval, the parties might reconsider the treaty or circumstances might change, thus creating an obstacle to the ratification of the treaty which the parties could overcome by amending the treaty. In that case, a problem of interpretation arose. According to article 17, States were obliged to refrain "from acts calculated to frustrate the object" of a treaty. Consequently, if the amendment did not frustrate the object of the treaty, there was no need for the paragraph 3 suggested by the Special Rapporteur: States were quite free to propose an amendment even to a treaty that had not yet come into force. On the other hand, if the amendment was such that it frustrated the object of the treaty, the Commission should make some specific observation on the subject, if only in the commentary to article 17.

83. He agreed with Mr. Jiménez de Aréchaga on paragraph 4. The principle *nemo potest venire contra factum proprium* was self-evident, but should be reaffirmed. The only question was whether the *sedes materiae* was article 66 or article 67. In fact, article 67 dealt with the modification of multilateral treaties between certain of the parties, and the new paragraph 4 of article 66 was also concerned with the application of the agreement in relations between certain parties.

84. Paragraph 4 was based on comments made by governments which left him completely unconvinced. The principle *nemo potest venire contra factum proprium* was a general principle of international law which the new text expressed in a very weak form. That being so, whether the paragraph was left in article 66 or transferred to article 67, he would prefer that it should convey, in unambiguous terms, the Special Rapporteur's idea that a State could not object to anything which it had endorsed by its own previous conduct.

85. Mr. AGO said that he did not believe that there was any real link between article 66 and article 17. The Commission's concern in article 17 was to ensure that States refrained from acts which might frustrate the object of a treaty; but such acts certainly did not include a straightforward proposal to amend the treaty. The question dealt with in article 66, on the other hand, was the rather exceptional case in which one party proposed an amendment to the treaty before it had come into force. Cases of that kind were, in fact, less rare than was generally supposed. It might happen that special difficulties arose in connexion with the entry into force of the treaty, and that one party took the initiative in proposing an amendment to the treaty for the specific purpose of overcoming those difficulties and facilitating the entry into force of the treaty. The Special Rapporteur had asked which States had to be notified by the State proposing to amend the treaty since, as the treaty was not in force, there were not as yet any parties to it, and in any case those States which had ratified it were not the only ones which had to be notified of the proposal. It was then that a slightly arbitrary choice had to be made, and the Special Rapporteur's choice, that States which had in any way expressed approval of the first treaty be notified of the proposal to amend the treaty, was still the least arbitrary.

86. Mr. VERDROSS said that the Special Rapporteur had improved the article considerably. He approved the omission of the reference to the established rules of an international organization, and paragraphs 1 and 2 called for no further comment.

87. With regard to paragraph 3, though he realized that no rule of the kind it stated existed as yet in international law, in his opinion international courtesy required that a State should be invited to take part in the amendment of a treaty which it had signed or approved. The question now was whether that rule of courtesy should be converted into a rule of law. He had no definite views on the matter and would abide by the opinion of the majority.

88. Paragraph 4 in fact stated the existing law and met all the objections which one government had raised to the earlier text.

89. Mr. BRIGGS said that, subject to drafting changes, paragraphs 1 and 2 in the Special Rapporteur's revised text were acceptable. He particularly welcomed the disappearance of the reference to the established rules of an international organization.

90. There was no need for paragraph 3. The formation of any such rule, for which he doubted whether there was any foundation in practice, should not be encouraged.

91. He also questioned the need for paragraph 4, although the drafting was certainly an improvement on the 1964 version. The purpose was to make provision for amendment of a text of interest to all the States concerned and not to deal with *inter se* agreements, a matter covered in the following article. As had been indicated by the Special Rapporteur in paragraph 11 of his observations, an amending agreement signed by the great majority of the parties to the treaty did not usually come into force for all of them, owing to the failure of some to ratify it. Under the terms of article 66, all the parties had the right to be notified of a proposal to amend, unless the treaty provided otherwise, and to participate in the decision on the action to be taken, if any; under paragraph 2 (a) they had the right not to accept the amending agreement and paragraph 2 (b) indicated what the legal situation would be in that event. Paragraph 4 was therefore quite unnecessary since the Commission was trying to deal not with situations in which responsibility was incurred but with amendments intended to be applicable to all the parties.

92. Mr. ROSENNE, referring to the possible connexion between paragraph 3 and article 17, said that the question he had raised could not be completely dismissed, although it might be covered in the commentary on article 17. Incidentally, his impression was that the French version of the phrase used in the first sentence of article 17, "to refrain from acts calculated to frustrate the object", "*s'abstenir d'actes de nature à réduire à néant l'objet*", seemed stronger and might be the more correct. If paragraph 3 of article 66 were retained, its object would be defeated if the provision were limited to States which had adopted or approved the text. Clearly its application ought to extend to all States that had participated in drawing up the original treaty. On balance, it would be preferable to drop the paragraph altogether.

93. Mr. TSURUOKA said he thought Mr. Rosenne was right. Actual experience of international life showed that when consideration was given to amending a treaty in order to overcome difficulties connected with its entry into force, it was because there were not enough ratifications, and because ratification presented problems for a number of States. When States believed that, rather than try to insist on the original text, it would be advisable to make some slight amendments to it in order to enable the treaty to come into force, the States most directly interested in its amendment were those which had not signed or ratified the treaty. In such a case, the normal practice would be to invite all States which were interested in the subject-matter of the treaty. He therefore thought that paragraph 3, as drafted by the Special Rapporteur, was too narrow and somewhat out of keeping with the requirements of present-day practice.

94. Mr. AGO said that, everything considered, he agreed with Mr. Rosenne and Mr. Tsuruoka. There was no reason to limit the invitation merely to States which had approved the first treaty. In all probability, the States which had neither approved nor signed nor in any way indicated their assent to the treaty would include some States which would be quite prepared to accept the amended treaty. It would be better, therefore, that in such a case the invitation should be extended at least to all States which had participated in the conference

at which the original text had been drafted. That was, of course, the minimum number of States which should be invited; if any new States had come into being in the meantime to which the subject-matter of the treaty was perhaps of interest, they could also be invited. But such an obligation should not in any way be interpreted as restrictive.

95. Mr. REUTER said that the text as a whole was very satisfactory. As Mr. Jiménez de Aréchaga had suggested, paragraph 1 might be simplified, and subparagraphs (a) and (b) combined.

96. Paragraphs 3 and 4 might not be absolutely indispensable. He had some doubts about retaining a paragraph which was merely designed to restate the principle of estoppel. Paragraph 3 was, perhaps, useful in the light of a dual phenomenon of which there were some notable examples in history—on the one hand, the effect of parliamentary procedure and, on the other hand, the undoubtedly predominant role which certain States had played in the adoption of certain treaties. He was thinking of very important countries where the senate had distinguished itself by refusing to approve treaties. It would certainly be helpful to establish a more or less continuous procedure to counter the disastrous effects on important international treaties of the attitude adopted by the parliamentary bodies of great Powers. He was, therefore, in favour of retaining the paragraph, and strongly supported the Special Rapporteur's views on the matter.

97. Mr. TUNKIN said that no member advocating the deletion of paragraph 3 would contend that States were debarred from taking action to amend a treaty which had not secured enough ratifications to enter into force. The only point at issue was whether the Commission ought to include a provision of a kind that could be interpreted as treating on the same footing an amendment to a treaty in force and one to a treaty not in force.

98. The reference to paragraph 1 in paragraph 3 was misleading because it was not clear whether the scope of the proviso "unless the treaty otherwise provides" was intended to comprise the temporal element. If not, paragraph 1 did not cover the possibility of a treaty containing clauses governing the submission of proposals for amendments to the text before the treaty came into force. Under paragraph 3, any State was entitled to propose an amendment before the treaty had entered into force. If his reading of paragraphs 1 and 3 was correct, his objection to maintaining the latter was even stronger than when he had first commented on the article.

99. Mr. BARTOŠ said that the utmost importance should be attached to a treaty that had been concluded, even if it had not come into force. If a supervening change of circumstances prevented the will of the parties which had participated in the drafting of the treaty from producing its effect, some remedy had to be found.

100. It might be, for instance, that a historical event of minor importance supervening between the time when the treaty was drafted and the expiry of the time-limit for the deposit of ratifications would suffice to make it impossible for certain governments to subscribe to the obligations which they had intended to assume at the

time of authentication. What was the best procedure to follow? Was it better to abandon the treaty altogether or—regardless of whether the treaty contained rules relating to revision or not—to initiate negotiations with a view to saving what could still be saved? In general, rules relating to revision were applicable after ratification and after entry into force; but what the Commission had to find was a remedy which could be applied before the entry into force of the treaty, for the specific purpose of facilitating its entry into force. The Commission had not dealt with that point in its draft articles, and the Drafting Committee should give it some thought.

The meeting rose at 1 p.m.

860th MEETING

Friday, 27 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 66 (Amendment of multilateral treaties)
(continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 66.
2. Mr. JIMÉNEZ de ARÉCHAGA, amplifying the objections he had put forward at the previous meeting² to paragraph 3 in the Special Rapporteur's revised text,³ said that it ought to be examined from the threefold standpoint of whether it embodied a rule of international law requiring codification, whether it contributed to the development of international law and whether it fitted into the structure of the draft. The answer to the first question was in the negative. At its sixteenth session, the Commission had proposed in paragraph 1 a rule granting to all parties the right to be notified and to participate in the amendment of a treaty, while recognizing that such a procedure was not normally followed in practice. The reaction of governments and delegations to that proposal had been favourable, but that was no reason for extending the rule to an entirely different situation.
3. In paragraph (11) of the commentary on the 1964 text, after setting out the practice against such a rule,

¹ See 859th meeting, preceding para. 51.

² *Ibid.*, para. 65.

³ *Ibid.*, para. 51.

the Commission had stated that it nevertheless considered that "... the very nature of the legal relation established by a treaty requires that every party should be consulted in regard to any amendment or revision of the treaty. The fact that this has not always happened in the past is not a sufficient reason for setting aside a principle which seems to flow directly from the obligation assumed by the parties to perform the treaty in good faith."⁴ The justification for the Commission's proposal in paragraph 1 was the existence of a treaty relationship between the parties, but that could not hold for a rule intended to apply in cases where no treaty relationship yet existed.

4. Paragraph 3 of the Special Rapporteur's revised text, far from contributing to the development of international law, might have the contrary result. For example, all Member States of the United Nations and parties to the Statute of the International Court of Justice had been invited to the second Geneva Conference on the Law of the Sea, and not just those States which had taken part in the adoption of the conventions drawn up at the first Conference. Even if, as suggested by Mr. Ago, the rule in paragraph 3 were framed in wider terms, the practical difficulty mentioned by the Special Rapporteur of determining which States should be invited would still remain. That proved that the Commission was moving beyond the realm of treaty law into that of rules governing the convening of international conferences. If paragraph 3 were included in its revised form, the Commission would have formulated a rule regarding the convocation of second conferences without having established a rule concerning the first conference. In 1964 it had decided not to include in its draft a rule on convening the first conference on the ground that that matter fell outside the law of treaties.

5. An even more important objection to attempting to codify rules as to which States ought to be invited to take part in the negotiation of general multilateral treaties was the danger of trying to legislate for the future. As Mr. Tsuruoka had pointed out at the previous meeting, that question had to be decided according to the circumstances in each case and according to the nature of the treaty, either by the international organization concerned or by the States convening the conference. One of the factors that had to be taken into account was the possible emergence of new States during the interval between the two conferences.

6. The CHAIRMAN, speaking as a member of the Commission, said that before a rule such as that stated in paragraph 3 was included in the text, a detailed study was needed of the many problems which it was likely to raise. It might be better not to complicate matters by including a provision of that kind.

7. Mr. de LUNA said he still thought that the difficulties could be solved by inserting, in the commentary on article 17, a sentence stating that that article could in no way be interpreted as applying to a proposal for amending a treaty which was not yet in force.

8. The point was of some practical importance as could be shown by the recent case of an agreement on

appellations of origin, particularly for wines and cheeses, to which France and Italy were parties. As the other countries, including Spain, had not ratified the agreement, France and Italy had proposed an amendment which had been approved at a second conference held at Lisbon. It had thus been the countries which had ratified the agreement which had taken the initiative in proposing the amendment, in order to induce the other countries to ratify it.

9. Mr. AGO said he agreed that the inclusion in article 66 of a provision such as that contained in paragraph 3 might complicate the article, and that it would be better to restrict the provisions of the article to proposals for amending a treaty already in force.

10. He supported Mr. de Luna's suggestion that the matter should be mentioned in the commentary, but preferably in the commentary on article 66. To include it in the commentary on article 17 would result in a complete misunderstanding of the meaning of article 17, which dealt with acts frustrating the object of the treaty, and that had nothing to do with a proposal to amend the treaty.

11. In the commentary, the Commission might say that it had considered the question of a proposal to amend a treaty which had not yet come into force but had preferred not to lay down a specific rule on the subject, in order to avoid giving the impression of encouraging a practice which, in normal circumstances, seemed reprehensible; it did, however, think that, if such a case did arise, at least all States which had participated in the drafting of the first treaty should normally be invited to participate in the negotiations on the proposed amendment. A sentence on those or similar lines would express the idea contained in the paragraph, while the text of the article itself would be shortened.

12. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that only small drafting changes had been proposed in paragraphs 1 and 2, and they could be left to the Drafting Committee.

13. There seemed to be some hesitation about maintaining paragraph 3 of his revised text and the weight of opinion might even be against it, but that need not be particularly disturbing because, should the situation which paragraph 3 was intended to cover arise, States could always remedy the matter by diplomatic action.

14. Most of the arguments adduced against the inclusion of paragraph 3 had not been very convincing, because in paragraph 1 the Commission had laid down a strict rule the effect of which would be that from the moment a general multilateral treaty came into force, any consideration of its amendment would become a matter for the parties alone. The Commission had limited the scope of paragraph 1 in a way that would exclude from the amending process, once the treaty had come into force, the States which had attended the conference, signed the text, and might be considering ratification, so that the rule was probably stricter than existing international practice. So far as amendment of major multilateral treaties was concerned, it was more usual for the States that had taken part in the drawing up of the text and which had certain expectations under the final clauses of being able to proceed to rati-

⁴ *Yearbook of the International Law Commission, 1964*, vol. II, p. 196

fication to be consulted. The course which the Commission had decided to adopt on that point at the sixteenth session might penalize a State failing to ratify the text at an early date, should a question of amending the text arise.

15. The main reason for maintaining paragraph 3 was that there could be instances where the original text had proved unsatisfactory and some action was needed to put it right before States would be willing to become parties. The Secretariat had reminded him of the interesting example of the 1956 International Agreement on Olive Oil,⁵ the final clauses of which had given trouble and had had to be amended before the States taking part in the 1963 Conference had been willing to proceed with the 1963 Agreement. The danger lay not in States resorting too lightly to the amendment of a text, but in their doing nothing about a defective one: inertia was the great enemy of the development of treaty relations. The political hazards which some members saw in the revised paragraph 3 did not exist. Obviously an unfounded amendment put forward shortly after the text had been drawn up would not be entertained by the other States.

16. Some members might feel it was unnecessary to deal with the issue, but if it were not left aside he was among those who considered that the category of States which could take part in the consideration of an amendment should be fairly wide. He had tried various alternatives in different contexts in other articles to overcome the difficulty, such as the States that were "entitled to become parties" or "the States which participated in the adoption of the text"; but all had met with objection.

17. He was unable to agree with Mr. Jiménez de Aréchaga: surely when a text had been drawn up, and adopted with the final clauses that enabled States to become parties by one procedure or another, whatever the legal status of the text before it came into force as a treaty, participation in the process of drawing it up created certain rights. On that point the Commission was agreed. A State that had signed, adopted, or otherwise endorsed the text, had more than an interest in it and amendment became a serious matter because it could alter the basis on which that State might have expected to ratify, adhere or accede. To confer the right contemplated in the revised paragraph 3 on that category of States would constitute a parallel provision to paragraph 1.

18. If paragraph 3 were dropped altogether, the point could be covered in the commentary, but paragraph 3 would undoubtedly mitigate the stringent tenor of article 66.

19. Some members had suggested that paragraph 4 was redundant because article 67 covered the problem of *inter se* agreements. Certainly there was a relationship between the two situations that those provisions were intended to cover, but they were by no means the same. In article 67 the right of certain parties only to agree between themselves to modify a treaty—the agreement

to be operative only between them—was admitted, but under strict conditions limiting the possibility to instances when that would not adversely affect the rights and obligations of the other States.

20. Article 66, paragraph 4, was designed to cover the case of a proposal for an amendment intended to apply between all the parties; that might give rise to something analogous to an *inter se* agreement through the failure of some States to ratify the amending agreement. In the cases envisaged, a conference would be called to draw up a text containing the amendments which the States that had participated in drawing up the "master" treaty would be entitled to sign, ratify and so on. The conditions laid down in article 67 might not have been satisfied; for the nature of the proposed amendments would be immaterial, provided they commended themselves to the great majority of States that had participated in the original conference.

21. The purpose of paragraph 4 was to indicate plainly that, once the participants had agreed to draw up and adopt an amending agreement, the States which afterwards ratified the agreement and put it into force as between themselves were not doing anything illegitimate. If paragraph 4 were dropped, that point would be open to argument, particularly if the Commission maintained the provision that the amending agreement was not binding on States which had not become parties to it. Those States would be able to claim that the treaty was being violated by the mere action of the other States in putting into effect the amending agreement as between themselves. In fact paragraph 4 dealt with estoppel. The issue might not be of great practical significance and he had never come across an example of a signatory to the original text challenging the right of States which had ratified an amending agreement to put it into force between themselves, but it must clearly be understood that paragraph 4 and article 67 covered *inter se* agreements arising in entirely different circumstances and that the legal situation was not identical.

22. Paragraph 3 in the 1964 text of article 66 had been justifiably criticized by the United States Government. His revised paragraph 4 sought to attenuate the rigour of that rule and would fill a gap in the draft that ought to be filled. The problem could be examined by the Drafting Committee.

23. Mr. ROSENNE said that the Special Rapporteur's emphasis on the strictness of the rule laid down in paragraph 1 had injected a new element into the discussion. He appeared to construe paragraph 1 as excluding from the process of amending a multilateral treaty States that were not parties. His (Mr. Rosenne's) reading of the purport of that paragraph was quite different, namely, that it was strict in the sense that it definitely conferred rights on the parties but that it did not deprive other States of the right to take part in the amending process, if that were appropriate in a particular situation.

24. The discussions that had taken place in the General Assembly in 1962, 1963 and 1965, and at the Commission's fifteenth session, on the problem of opening to accession what were known as the League of Nations "closed" treaties, had focused attention on the problem of the relationship between the rights of States parties to those treaties and the more general problem of the

⁵ The text of the 1956 Agreement will be found in United Nations Conference on Olive Oil, 1955, *Summary of Proceedings* (United Nations publication, Sales No.: 1956. II D. 1), p. 20.

rights of other States Members of the United Nations. In the General Assembly resolutions adopted on the subject, a sharp distinction had been drawn between those two categories of States, but although States parties certainly possessed rights of the kind set out in article 66, paragraph 1, it had never been understood that such rights were confined exclusively to those States. If the Special Rapporteur's reading of paragraph 1 was a different one, then the wording would have to be changed.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne had misunderstood. His argument had been that the real danger that article 66 might present was that the rule set forth in paragraph 1, if included in a codification convention that eventually came into force, might be acted upon by depositaries or other States. He himself had never thought that the rule laid down in paragraph 1 should preclude certain States from being consulted in regard to the amendment of multilateral treaties. In the case of most multilateral treaties of a general character, States were invited to take part in the process of drawing up the text because their participation was thought to be desirable, and the same held good for an amending agreement.

26. The rule in paragraph 1 was strict in the sense that it only admitted that the parties had a right, as distinct from an interest, in taking part in the discussion of an amending agreement. To illustrate what he had in mind, he would take the case of a multilateral treaty that required twelve ratifications in order to enter into force; so long as only eleven had been received by the depositary, all the States that had participated in drawing up the text would have the right to be consulted over a proposal for amendment, but the moment the twelfth ratification was received and the treaty came into force, the right to participate would become limited to the actual States parties. Thus, on the plane of right, the legal situation might change from one day to another. Of course, as far as political factors were concerned, nothing laid down in the draft could prevent the parties from providing otherwise in the treaty itself.

27. Mr. TUNKIN said he fully endorsed the Special Rapporteur's view that, as far as general multilateral treaties were concerned, article 66 was too restrictive. The Drafting Committee might have to consider enlarging its scope.

28. In the case of ordinary multilateral treaties, presumably not many States other than the parties would be interested in amending the text soon after it had come into force. However, a problem could arise over treaties that might originally have been of interest to only a few States and which in course of time came to be of interest to more States; the interest of the latter could certainly not be ignored.

29. If the problem covered in the revised paragraph 3 were to be dealt with in the commentary, the wording would have to be thoroughly revised because as it stood it was incorrect. If an international conference were convened to amend an old treaty adopted by a two-thirds majority, why should the States that had voted against the text of the original treaty be prevented from taking part in that second conference?

30. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with what Mr. Tunkin had said, but the reason why he had put forward a more restrictive formula in his revised text of article 66 was that members had objected to the obscurity of such phrases as "the States that had participated in the adoption of the text". He himself had never been convinced that it would be right to exclude States that had voted against the adoption of the text, but, as Special Rapporteur, he had tried to take account of the view of certain members that such States were not entitled to take part in the amending process.

31. Mr. BARTOŠ said that the arguments of those who had voted against the adoption of the text of the treaty might have been supported by the facts. It would therefore perhaps not be wise or in keeping with constructive jurisprudence to exclude on principle all countries which had formerly opposed the treaty from the procedure for amending it. All those who had participated in the first conference, or had been entitled to do so, should be invited to the second conference at which a generally acceptable solution would be sought. If the text of the treaty were amended, the majority view might change.

32. The CHAIRMAN suggested that the Commission adopt the special Rapporteur's proposal and refer article 66 to the Drafting Committee.

It was so agreed.⁶

ARTICLE 67 (Agreements to modify multilateral treaties between certain of the parties only) [37]

[37]

Article 67

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may enter into an agreement to modify the treaty as between themselves alone if:

(a) The possibility of such agreements is provided for by the treaty; or

(b) The modification in question:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole; and

(iii) Is not prohibited by the treaty.

2. Except in a case falling under paragraph 1(a), the conclusion of any such agreement shall be notified to the other parties to the treaty.

33. The CHAIRMAN invited the Commission to consider article 67. The Special Rapporteur had suggested adopting the Israel Government's amendment to paragraph 1(a) whereby the words "such an agreement" would be substituted for the words "such agreements". He had also suggested a revised text for paragraph 2, reading:

"Except in a case falling under paragraph 1(a), the parties concerned shall notify the other parties

⁶ For resumption of discussion, see 875th meeting, paras. 42-78.

of their intention to conclude any such agreement and of the nature of its provisions”.

34. Sir Humphrey WALDOCK, Special Rapporteur, said that article 67 dealt not with the amendment of a treaty as such, but with a process that the Commission had chosen to describe as the modification of a treaty between certain parties only by means of a subsequent agreement between themselves. In the context, the use of the words “modify” or “modification” was appropriate, because the article was intended to deal with special arrangements by some of the parties that would have the effect of modifying the operation of the treaty only as between themselves.

35. The article, which had been discussed at considerable length during the sixteenth session,⁷ had not attracted much comment from governments or delegations. The Finnish Government had suggested deleting the third condition in paragraph 1(b), on the ground that the point was covered in the second condition. In paragraph 1 of his observations and proposals he had explained his reasons for rejecting that suggestion. Even though there might be some overlapping, the two provisions were not identical. The Commission's aim had been to formulate strict conditions for *inter se* agreements and he agreed with that view. If it were decided that some overlapping did exist, it was the second condition that should be dropped rather than the third.

36. The drafting change suggested by the Israel Government in paragraph 1(a) was an improvement and should be adopted.

37. The main point of substance raised by three governments—those of Finland, Israel and the Netherlands—related to the question of notification dealt with in paragraph 2. The Israel Government, in its comments on article 66, had drawn attention to the intermediate case where a proposal for amendment might be discussed between a small group of States that had not yet decided whether it should apply *inter se*, or whether it would be a proposal for the amendment of the treaty as a whole. He had suggested that the problem might be dealt with by laying down more stringent requirements concerning notification in article 67; the criticism by the three governments that the conditions about notification in article 67 were too loosely formulated was well-founded. There was a real need for the other State or States to be protected against encroachments upon their rights in cases when an *inter se* agreement was no longer a mere political assertion and had reached the stage of a proposal. In such cases a requirement to notify other parties was needed.

38. The point made by the Finnish Government about cases where the treaty itself contemplated, or even provided for, the possibility for a special agreement between the parties to the treaty was in itself valid; practice provided some well-known examples. At its sixteenth session the Commission had considered the matter and had decided not to lay down the requirement suggested by the Finnish Government because it would seem to go too far, desirable though it was for every party to be aware of any developments connected with the treaty.

When the parties themselves had provided for the possibility of *inter se* agreements but had inserted no requirements in the treaty itself about notification, it might almost amount to altering the provisions of the treaty if the Commission were to lay down a rule requiring notification.

39. Mr. CASTRÉN said that certain governments, including that of Finland, had made proposals for amending article 67. Their criticisms had been mainly directed against paragraph 2 which, they considered, did not deal satisfactorily with the important question of notification, since it did not take sufficient account of the interests of States parties to the treaty which were not included in so-called *inter se* agreements.

40. He noted with satisfaction that the Special Rapporteur had taken account of the concern expressed by those governments and had proposed a new text which was a real improvement on that of 1964. He was therefore prepared to accept that text subject to certain drafting amendments, and would be able to vote for the article as a whole, because the other disputed points were of minor importance.

41. Mr. TSURUOKA said that, like the 1964 text, the new text of paragraph 2 proposed by the Special Rapporteur began with the words “Except in a case falling under paragraph 1(a)”. It seemed to him, however, that paragraph 2 dealt only with notification, whereas it was not certain that paragraph 1(a) also referred to notification. It was thus not clear how the proviso applied, and he would prefer a wording such as: “Unless the treaty otherwise provides”.

42. Further, in his opinion, where an additional agreement on the modification *inter se* of the main treaty did not fulfil the conditions laid down in paragraph 1, the question which arose was one of a violation of the treaty and, as such, was governed by the articles on breach.

43. Mr. BARTOŠ said that three possible situations might arise in connexion with the conclusion of *inter se* treaties. First, if the main treaty explicitly prohibited the parties from concluding an *inter se* agreement, such an agreement would be impossible without a flagrant violation of the main treaty.

44. Secondly, the main treaty might impose restrictions on the conclusion of *inter se* treaties. The Convention on Consular Relations, for instance, authorized the parties to conclude additional agreements, provided they did not go beyond the scope of the general Convention. In that case, States which availed themselves of the possibility of concluding an *inter se* agreement had an obligation towards the other States, since they had assumed a commitment towards them, within the general association of States, to remain within the scope of the main treaty. That being so, the form in which notification was made was immaterial. All States which were not parties to the *inter se* treaty were entitled to consider that the main treaty had been violated if the *inter se* treaty went beyond certain limits defined in the general convention. The Commission should not let itself be led into granting the facilities claimed by certain governments for concluding *inter se* agreements without any requirement to notify them to the other parties.

⁷ See *Yearbook of the International Law Commission, 1964*, vol. I, 745th, 746th, 747th, 754th and 764th meetings.

45. Thirdly, the main treaty might contain no provisions on the matter. That did not mean that States parties were free to do whatever they liked and to conclude *inter se* treaties; in view of the general reciprocity rule implicit in the law of treaties, all States parties were interested in knowing what derogations were made from the main treaty. The parties to a general treaty could not enjoy all the advantages arising from that association and at the same time enter into a separate association offering special advantages, which it was not open to certain of the parties to join and from which they were excluded.

46. The proper solution lay in a general system of law. If States applied the principle of good faith, they had no need to conceal any *inter se* agreements they concluded. He was therefore opposed to dispensing with the requirement of notification.

47. Mr. JIMÉNEZ de ARÉCHAGA said he supported article 67 as revised by the Special Rapporteur. There remained, however, the question of the possible application of the procedure laid down in article 67 to cases of suspension. It was his understanding that the Commission would deal with that point when it considered paragraph 3 of article 40, an article which, at the second part of its seventeenth session, the Commission had decided to defer until the present session. It would then be possible to decide whether article 40 should refer back to the provisions of article 67.⁸

48. With regard to the difference between articles 67 and 66, it should be noted that the cases envisaged in them were different in the initial stages, but the subsequent effects might be the same. If a State which had participated in the procedure of amendment under article 66 later failed to ratify the amending agreement, the resulting situation would be similar to that contemplated in article 67; there would be an *inter se* agreement between those parties which had ratified the amending agreement.

49. The Commission should consider how the provisions of paragraph 4 of article 66 would affect article 67. Under article 67, a State which was not a party to the *inter se* agreement could not object to its application as between the parties to it if its own rights were not affected. The provisions of the proposed paragraph 4 of article 66, however, could give the contrary impression, in that they appeared to give to a party which had not signed the amending agreement the right to object to its application as between the parties to it. The Special Rapporteur and the Drafting Committee should therefore examine carefully the problem of the co-ordination of the provisions of article 67 with those of paragraph 4 of article 66.

50. Mr. AGO said that he would make his comments on the form of the article in the Drafting Committee.

51. In general, he approved the text, but he was not convinced that paragraph 2 should be amended in the manner suggested by the Special Rapporteur, who thought that notification should be made not only of the conclusion of an *inter se* agreement, but even of the intention to conclude such an agreement. Too much

suspicion was being displayed of *inter se* agreements, though he would have thought that they should, in general, be viewed with favour. If fifty States had succeeded in concluding a treaty which went up to a certain point only—for instance, a treaty on consular questions—and ten States were able to go further and grant each other more extensive advantages, why should they not do so? Was there any reason for opposing that practice, which was perfectly normal?

52. The situation envisaged in paragraph 1(b) (ii) was really an extreme case. If States had agreed to sign a treaty, it was difficult to believe that some of them would later wish to conclude an agreement designed to frustrate the object of the treaty.

53. It would normally be enough for the conclusion of the treaty to be notified. If it were decided that notification should be made earlier, it would be necessary to decide at what point. When could it be said that States were intending to include an *inter se* agreement, and when did they have to give notice of their intention? It was after all possible to have an intention and not to carry it into effect. Further, how would it be possible to describe the provisions of the agreement concerned before they were in their final form? In short, a large number of diplomatic difficulties might be created for no good reason. If there was a strong feeling that the parties should be notified of the treaty before it was definitive, the obligation to notify would have to relate to the period after the *inter se* treaty had already been concluded and was in final form, but before it had come into force. In that case, the right course would be to include a provision to the effect that notification of any agreement of that kind to the other parties to the multilateral treaty had to be made before the entry into force of the agreement concerned.

54. Mr. REUTER said that the Drafting Committee would have to try to bring the French and Spanish versions more into line with the English. The latter version, in which the word “between” was used both in the title and in the text was perfectly clear and correct, whereas the expressions “*dans les relations entre*” and “*en sus relaciones mutuas*” were a little ambiguous. On the whole however, the text of the article was satisfactory.

55. As Mr. Jiménez de Aréchaga had pointed out, application of the procedure laid down in article 66 might lead to the result contemplated in article 67. It might, therefore, be asked whether, conversely, the application of article 67 might not bring into play the procedure laid down in article 66. The text of paragraph 2 adopted at first reading did not specify by whom the notification should be made. According to the new text, it was “the parties concerned” which had to do so. The purpose of that notification was to enable the other parties to indicate their opposition if they considered that the conditions set forth in paragraph 1 were not fulfilled. What would happen if the other parties, instead of objecting, stated that they were interested in the proposed modification, wished to participate in it and requested the convening of a general conference for that purpose? In his view, the other parties would be acting within their rights in calling for such a conference, but did the Commission share his view?

⁸ For discussion of article 40, see 861st meeting.

56. If the Commission's intention was to give the other States the right to initiate the procedure laid down in article 66, the wording proposed by the Special Rapporteur was preferable, despite the use of the vague term "intention". But it would also be possible to adopt an intermediate solution between that wording and the one proposed by Mr. Ago, for example by requiring the parties concerned to notify the other parties of their intention "before initiating the procedure for the conclusion of a separate agreement". A wording of that kind would enable the other States wishing to participate in the *inter se* agreement to request the convening of a conference for the purpose.
57. Mr. VERDROSS said that, for the reasons stated by the Special Rapporteur, he favoured the retention of paragraph 1, as adopted by the Commission at first reading.
58. With regard to paragraph 2, which had already been discussed at length in 1964, he sympathized with Mr. Ago's view. It was, however, impossible to disregard the fact that the States parties to a multilateral treaty had an interest in being informed when a group of States wished to conclude an *inter se* agreement modifying that treaty. Even if the rights of the other States were not affected by such an agreement, their interests might be. Article 67 should include some reference to that point, perhaps on the lines suggested by Mr. Reuter.
59. Mr. CASTRÉN said he agreed with Mr. Ago that, in general, *inter se* agreements served the interests of the States which had recourse to that procedure. At the same time, however, they might be detrimental to the interests of other States. As had been pointed out by Mr. Verdross and Mr. Bartoš, there was a certain solidarity between the States parties to a multilateral treaty. It was therefore not sufficient to require notification after the event: the other States must be informed of the intention of certain States to conclude an *inter se* agreement.
60. The wording proposed by Mr. Ago did not specify how long before the entry into force of the agreement the notification should be made; the notification might thus come too late. He himself would be inclined to accept the wording suggested by Mr. Reuter.
61. Mr. de LUNA said that he supported the retention of paragraph 1, for the reasons given by the Special Rapporteur.
62. With regard to paragraph 2, given the fact that *inter se* agreements were perfectly admissible in international practice, it was necessary to bear in mind that many multilateral treaties, which were often not of a general character—peace treaties, for example—contained clauses which could be described as "local", such as those relating to frontiers and affecting only two States. Accordingly, if the purpose of an *inter se* agreement was not to modify a "local" clause but to go further and make changes in the general treaty though without frustrating its object, all the States parties to the general treaty had an interest in the matter, because the *inter se* agreement might gradually erode some of the principles on which the general treaty was based.
63. That being so, Mr. Ago had been right to ask how it was possible to notify a mere intention in the absence of a definitive text. Mr. Reuter had also made a valid point, since it was natural that a party which had participated in the main treaty should wish to take part, if only as an observer, in the negotiations prior to the conclusion of an *inter se* agreement, in order to prevent its interests from being prejudiced, or to ensure the strict observance of the rules on the conclusion of *inter se* agreements, laid down by the Commission or contained in the main treaty itself.
64. In his view, the Commission should consider the desirability of making it possible for all the States parties to the multilateral treaty to be informed when a group of such States was about to open negotiations with a view to the conclusion of an *inter se* agreement, so that they could take part in the negotiations if they saw fit or at least be represented by observers who could put forward their comments and, if necessary, their objections.
65. Mr. TUNKIN said that the problem dealt with in article 67 was very close to that in article 63: it concerned the conclusion of a later agreement which did not include all the parties to the earlier one.
66. The difficulties which had arisen in connexion with paragraph 2 were not connected with drafting; they arose from the situations which the rule embodied in that paragraph was meant to cover. The conclusion of *inter se* agreements was primarily possible in the case of those multilateral treaties which operated in fact on a bilateral basis. It was therefore undesirable to introduce any further complications by requiring the notification of a mere intention to negotiate an *inter se* agreement. Even after its signature, an *inter se* agreement might not be ratified and it would be excessive to require its notification before it actually came into effect. The problem of participation did not arise, because the *inter se* agreement envisaged in article 67 related to a multilateral treaty which operated on a bilateral basis. The parties to the *inter se* agreement could negotiate it without asking other parties to participate.
67. Notification of *inter se* agreements was necessary in order to enable the other parties to the original agreement to ascertain whether the conditions specified in paragraphs 1(a) and 1(b) were fulfilled. Paragraph 2 thus supplemented the safeguards provided in paragraph 1 and he was in favour of its retention in the form in which it had been adopted in 1964.
68. Mr. BRIGGS said that article 67 contained a highly desirable provision, which was in accordance with State practice and satisfied a real need in international relations.
69. The safeguards provided in paragraph 1 were sufficient; those in sections (i), (ii) and (iii) of paragraph 1(b) should be taken together. Although they overlapped to some extent, they supplemented each other and it was essential to retain them all.
70. With regard to paragraph 2, he shared Mr. Tunkin's doubts about the proposed redraft, although he had at first been attracted by Mr. Ago's suggestion that notification should be required before the *inter se* agreement entered into force.
71. The provisions of article 67 left two questions open. The first was that of the legal effect of a violation of the

provisions of paragraph 1. That matter was covered by other articles of the draft; if, for example, the violation of the rule embodied in paragraph 1(b) of article 67 amounted to a material breach of the original treaty, the provisions of article 42 would apply.

72. The other question was that of the legal effect of an objection made after receiving notice under paragraph 2. If, following that notification, a State party to the original treaty objected, the question arose whether the objecting States would then have a right to participate in the negotiation of the second agreement. Would such a State always have a right to participate? Would it also have the right to prevent the application of an *inter se* agreement concluded despite its protest? In his opinion, those questions should be left open.

73. His view generally was that notification should be required only after the conclusion of an *inter se* agreement; the introduction of any other complicating factor might hamper the operation of the procedure laid down in article 67, which States had found useful in their relations.

74. Mr. BARTOŠ said he wished to make it clear that he was in no way opposed to *inter se* agreements as such. The conclusion of *inter se* agreements was in a sense authorized by the United Nations Charter itself, in the articles relating to regional arrangements. Furthermore, as Mr. Tunkin had pointed out, there were multilateral treaties under which certain States parties were invited to conclude regional or bilateral agreements among themselves. The Convention on International Civil Aviation,⁹ signed at Chicago, made express provision for the conclusion of bilateral agreements between States parties to the Convention, subject to the obligation to notify ICAO, which made such agreements public. *Inter se* agreements were not only permissible under international law; they were useful and sometimes even necessary.

75. It was also his view that, in all cases, the States parties to the main treaty had an interest in being informed in one way or another of the existence and contents of *inter se* agreements modifying the treaty. As pointed out by Mr. Tunkin, the other States might wish to participate in the *inter se* agreement; in any event, they should at least be warned so that they could protect their rights and ascertain their position with regard to the existing obligations under the main treaty.

76. The notification of *inter se* agreements was also necessary in order to safeguard the principle of non-discrimination. If the main treaty authorized special régimes and certain parties established such a régime among themselves, the other parties must be informed so that they could instruct their representatives not to lodge a complaint on discovering that different treatment was being accorded to other States by virtue of an *inter se* agreement.

77. The general rule of notification was consistent with the principle of open diplomacy, which called for the publication and registration of treaties; notification was in a sense an anticipation of that formality. The rule that *inter se* agreements must be notified was in conformity

with general public international law; it did not place a limitation upon the right of States to conclude treaties but was rather a condition of good relations among States. In that respect, he adhered to the views which he had expressed in 1964.¹⁰

78. It should be left to the Drafting Committee to settle the question whether notification should relate to the conclusion of the *inter se* agreement or to an intention to conclude such an agreement which had not yet been put into effect.

79. The CHAIRMAN, speaking as a member of the Commission, said that article 67 related to treaties which regulated on a multilateral basis relations that were essentially bilateral. In the case of those treaties, there were neither practical nor theoretical objections to the conclusion of *inter se* agreements. It was permissible for two States or a group of States, because they were bound together by closer ties, to conclude an *inter se* agreement for the purpose of more extensive co-operation between themselves than that established by the multilateral treaty. But the existence of a multilateral treaty necessarily had certain consequences. All the parties to that treaty might have an interest in the protection of certain principles. Although it was possible to conclude *inter se* agreements, freedom in that respect was not absolute; it was subject to rules which it was the purpose of article 67 to define. It was therefore useful and indeed necessary to require the notification of *inter se* agreements, except perhaps where such agreements were authorized by the treaty itself; as a general rule, however, notification was very desirable, mainly in order to safeguard the interests of the other parties.

80. If the notification was to serve a useful purpose, it must be made before the *inter se* agreement was concluded. From that point of view, the new formula proposed by the Special Rapporteur represented a genuine improvement. Notification of the intention to conclude an *inter se* agreement might lead to the opening of discussions, or to the submission by the other parties of observations, that might have a favourable influence on the States wishing to conclude the agreement. Prevention was always better than cure.

81. Sub-paragraph (iii) was useful and did not overlap with sub-paragraph (ii); the difference between them was the difference between implied and express prohibition.

82. Mr. ROSENNE said he could accept paragraph 1 subject to minor drafting changes.

83. With regard to paragraph 2, he agreed with the Chairman that, for notification to have any real value, it should come as early as was consistent with practical exigencies. Admittedly, it might seem rather vague to refer to the "intention" to conclude an *inter se* agreement, but a formula of that type was much to be preferred to one which would call for notification only after the conclusion of the *inter se* agreement. It would not even be sufficient to require notification of the signing of the *inter se* agreement, because it was expressly provided in some agreements that they entered into force upon signature. The Drafting Committee would have to consider the best formulation for paragraph 2.

⁹ United Nations, *Treaty Series*, vol. 15, p. 296.

¹⁰ *Yearbook of the International Law Commission, 1964*, vol. I, 754th meeting, paras. 84 and 86, and 764th meeting, para. 85.

84. Mr. JIMÉNEZ de ARÉCHAGA said that he also favoured the requirement of early notification. It might not be essential in the case of *inter se* agreements of the type mentioned by Mr. Bartoš, such as regional agreements and agreements for closer relations such as those authorized in the 1961 Vienna Convention. In those cases the possibility of such *inter se* agreements was normally provided for in the main treaty and the matter was thus covered by the opening proviso of paragraph 2, "Except in a case falling under paragraph 1(a)".

85. Early notification was, on the other hand, very necessary in the other type of *inter se* agreement, for bringing up to date an earlier treaty, when it had not been possible to include in the negotiations all the parties to the earlier treaty. In cases of that type, it was possible that the *inter se* agreement might affect, if not the rights, at least the interests, of another State party to the original agreement. Early notification to that State would enable it to take some action in the matter. It could protest if it considered that its rights were affected, it could ask to participate in the negotiations for the new agreement, it could ask to be allowed to accede to the new agreement, or it could initiate the procedure for general amendment laid down in article 66, paragraph 1.

86. Mr. CASTRÉN said that the Special Rapporteur's redraft of paragraph 2 laid down a very modest requirement, which did not prevent or hinder the conclusion of *inter se* agreements. The Commission could leave all the other problems open, in particular those relating to the possible right of objection or of participation in the procedure. The paragraph simply provided that the other States had the right to give their views on the desirability or the lawfulness of the *inter se* agreements; as pointed out by Mr. Jiménez de Aréchaga and the Chairman, they could also propose negotiations, a proposal which might or might not lead to the convening of a conference with the participation of a larger number of States than those which had originally contemplated the conclusion of the agreement.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that there appeared to be general agreement to retain the contents of paragraph 1, subject to drafting suggestions for the consideration of the Drafting Committee.

88. With regard to paragraph 2, he did not believe that it involved a major question. However, the Commission attached importance to article 67 and by specifying fairly strict conditions in paragraph 1, had recognized that *inter se* agreements could represent a potential threat to the interests of the other parties to the original agreement. The purpose of the provision on notification was precisely to protect those interests and in its 1964 discussions, the Commission had recognized that the States concerned would be confronted with a *fait accompli* if, in order to be informed, they had to wait for the *inter se* agreement to be registered with the United Nations Secretariat and published by it in accordance with Article 102 of the Charter. It generally took a very long time for a treaty to be published in pursuance of that Charter provision.

89. The parties should therefore be notified before the treaty came into force, so that they could take steps to invoke any possible responsibility which might arise

from a violation of their rights, or endeavour to change the situation before it was too late. The provisions of paragraph 2 should be kept flexible so that the parties notified of the intention to conclude an *inter se* agreement could endeavour to secure a change in the terms of the agreement under discussion.

90. With regard to the wording of paragraph 2, he could not support Mr. Ago's suggestion that the text of the *inter se* agreement should be notified before the initiation of the process necessary to make it into a treaty. The wording which he himself proposed was not as vague as had been suggested. The reference to the "intention" to conclude an *inter se* agreement was supplemented by the requirement that the other parties should be notified not only of that intention but also of the nature of the provisions of the *inter se* agreement. Clearly, therefore, the notification would take place at a time when the negotiations and drafting of the *inter se* agreement had reached a fairly advanced stage. His redraft of paragraph 2 would thus not require the notification of political discussions of a preliminary kind.

91. He had the impression that there was a slight majority in the Commission in favour of making paragraph 2 somewhat stricter than in 1964.

92. He proposed that article 67 be referred to the Drafting Committee for consideration in the light of the discussion.

93. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 67 to the Drafting Committee as proposed by the Special Rapporteur.

*It was so agreed.*¹¹

Second Seminar on International Law

(resumed from the 847th meeting)

94. Mr. RATON, Legal Adviser to the United Nations Office at Geneva, said that as the Second Seminar on International Law would be ending that day, he wished, on behalf of the Director-General of the United Nations Office at Geneva, to thank the Commission for the assistance it had given in the work of the Seminar. He also wished to convey the gratitude of the participants to those members of the Commission who had consented to give lectures as well as to all those who had generously contributed to the success of the Seminar in other ways. The Director-General would be organizing a third Seminar next year, and hoped he could again count on the co-operation and public spirit of the members of the Commission.

95. The CHAIRMAN, speaking on behalf of the Commission, expressed appreciation of the initiative taken by the United Nations Office at Geneva and said he hoped that all the participants in the Seminar had benefited from their stay in Geneva and would help to strengthen the ties between the Commission and the world of international law as a whole at both the theoretical and the practical level.

The meeting rose at 12.50 p.m.

¹¹ For resumption of discussion, see 875th meeting, paras. 79-101. and 876th meeting, paras. 1-10.

861st MEETING

Wednesday, 1 June 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

(A/CN.4/183/Add.2; A/CN.4/L.107, L.115)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 40 (Termination or suspension of the operation of treaties by agreement) [51, 54]

[51, 54]

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.

1. The CHAIRMAN invited the Commission to consider article 40. The Drafting Committee's text, which had been submitted at the second part of the seventeenth session but consideration of which had been deferred, 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."¹

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, for the benefit of members who had not been present at the second part of the seventeenth session during the discussion of article 40 at the 829th and

841st meetings, he would explain that in his fifth report (A/CN.4/183/Add.2) he had proposed a new text to take into account the observation by the Israel Government that the version formulated by the Commission in 1963² seemed to exclude the possibility of tacit agreement to terminate a treaty. He had also suggested dropping the reference in paragraph 1 to the form of the instrument or act by means of which termination could take place.

3. Members who had attended the discussions during the second part of the seventeenth session seemed to have favoured the latter suggestion and had shown little inclination to follow the theory of the *acte contraire*. Mr. Ago had contended that suspension of the operation of a multilateral treaty might not necessarily require the agreement of all the parties and might result from something in the nature of an *inter se* agreement.³ That argument had prompted him to wonder whether the text had been adequate. After some discussion it had been referred to the Drafting Committee at a relatively late stage in that session.

4. He had submitted a new text to the Drafting Committee that distinguished between the position in regard to bilateral treaties and the position in regard to multilateral treaties, introducing the idea of *inter se* suspension for the latter category. If such a provision were needed at all, it should be made subject to conditions of the kind laid down in article 67, because there was some analogy, though not complete identity, between the situations which the two articles were designed to cover. For lack of time the Drafting Committee had not gone into the matter very deeply and had provisionally approved the text reproduced in footnote 2 to document A/CN.4/L.115.⁴ Members would have noted that the Drafting Committee's revised text for paragraph 3 contained a cross-reference to article 67.

5. Mr. Jiménez de Aréchaga had expressed doubts about the wisdom of introducing a provision that would enable the parties to a multilateral treaty to suspend its operation *inter se*, and that view had been shared by Mr. Bartoš. His own opinion was that, as long as the conditions set out in article 67 were specified, they would provide the necessary safeguards. Certain other members had expressed the view that the somewhat difficult point raised by Mr. Ago would need further reflection and accordingly, at the 841st meeting, the decision had been postponed.

6. The main question to be decided was whether or not to include in article 40 a provision on *inter se* suspension in the case of multilateral treaties and, if so, on what conditions the provision would apply.

7. Mr. JIMÉNEZ de ARÉCHAGA said he was opposed to paragraph 3 of the new draft. Under paragraph 1, termination was permitted only by agreement of all the parties, so that the Commission had upheld the classical principle of unanimity. But paragraph 3 would be the first and the only provision in the draft under which suspension was permitted in certain circumstances in which termination would not be permitted. It meant

² Yearbook of the International Law Commission, 1963, vol. II, document A/5509, p. 202.

³ Yearbook of the International Law Commission, 1966, vol. I, part I, 829th meeting, para. 84.

⁴ See also paragraph 1 above.

¹ Yearbook of the International Law Commission, 1966, vol. I, part I, 841st meeting, para. 57.

divorcing the two institutions of termination and suspension and abandoning the legal foundation for suspension, which was the principle *in plus stat minus*; if a party had a right to terminate, then *a fortiori* it had a right to suspend the operation of the treaty. What then would be the independent legal foundation for suspension in the hypothesis of paragraph 3? It would appear to be the provisions laid down in article 67 concerning modification, but he doubted whether such an extension by analogy of the scope of article 67 was permissible or would constitute a progressive development.

8. The practice on which the rule in article 67 had been based was twofold. It consisted in the first place of regional or other agreements, by means of which two or more parties to a multilateral treaty concluded between themselves an agreement which went further than the multilateral treaty. Normally, such an agreement was expressly authorized in the original instrument. In the second place, it consisted of *inter se* agreements revising general multilateral treaties which had become obsolete. During the past thirty years an exception to the traditional principle of unanimity in regard to termination, suspension or modification established by the Declaration of London of 1871,⁵ had come into existence, based on the need for progressive development.

9. The reason for that exceptional practice was that the unanimity principle would confer upon a single State or a minority of States a power of veto that would prevent the majority from adapting an international instrument to fit new circumstances. The traditional principle of unanimity could not confer such power to maintain the *status quo* against the will of all the other parties.

10. In the case of suspension such *ratio legis* did not exist. The Commission should not attach as much weight to the right of several or even a majority of States wishing to suspend a valid multilateral treaty in force as to the right of a majority wishing to modify a treaty by means of *inter se* revision, because such modification might be for the purpose of maintaining the treaty in operation by eliminating obsolete provisions, whereas *inter se* suspension might be a concealed device for undermining the treaty régime. As Mr. Scelle had remarked, "there is a great difference between the axe of termination and the orthopaedics of revision".

11. The safeguards laid down in article 67 were not sufficient for *inter se* suspension because, in contrast to the case of modifying a treaty in force, not only the rights of the other States but also their interest in the normal continuance of a perfectly valid multilateral treaty binding on all parties had to be protected. For example, a treaty establishing a free trade area could be ruined by an *inter se* agreement to dispense with the rules laid down in the reciprocal relations between the States concerned. To take a more striking example, in the case of a multilateral agreement on the peaceful settlement of disputes, such as the Pact of Bogota which provided for negotiation, consultation, inquiry and arbitration, and in the last resort for compulsory judicial settlement, could it be argued that a few parties were entitled to agree between themselves to suspend the provisions concerning compulsory jurisdiction? Such *inter se* suspension would

seriously affect the interests of all the other parties, since they could no longer have confidence in the continued operation of a treaty of that nature if a number of parties had agreed among themselves to dispense with the execution of certain basic provisions. Moreover, the other parties would find it much more difficult to assert and exercise rights which in theory would remain intact. The Commission was entitled to confirm an exception to the principle of unanimity where that exception had been established by a large body of State practice on *inter se* revision or modification. But it should not be led, merely on the basis of logical argument or analogy, to provide for the second exception, when there was not a single instance in international practice of *inter se* suspension.

12. Furthermore, the argument based on logic proved too much. If *inter se* suspension was permitted on the ground that the rights of the remaining parties remained unaffected, then why should not *inter se* termination be allowed whenever those rights remained untouched? On a basis of pure logic, the Commission would thereby abolish the principle of the London Declaration, that termination required unanimity. As Justice Holmes had said, "the life of the law is not logic, but experience".

13. Mr. ROSENNE said that at the beginning he had been ready to accept the Drafting Committee's revised text for paragraph 3 but he had been impressed by the force of Mr. Jiménez de Aréchaga's argument at the last session⁶ and even more by his repetition of that argument.

14. Paragraphs 1 and 2 presented no difficulties and they might be combined, as Mr. Castrén had suggested at the 841st meeting. The suggestion that the scope of the provision on suspension might be extended by agreement between the parties needed careful thought. The development of the concept of suspension was one of the innovations introduced in the draft articles; the Commission should be cautious and not carry it too far. The revised paragraph 3 was the only provision in the draft articles covering a case of suspension which was not an alternative to termination, and he wondered whether it would be appropriate to transfer into that context the conditions laid down in article 67 concerning *inter se* modification which did fill a practical need.

15. Article 67 seemed likely to be kept substantially in the form approved at the sixteenth session. If the applicability to suspension of the conditions set out in that article were considered in turn, to take the first of them, it was unlikely that the treaty itself would provide for suspension. If it did, there was no problem but it was doubtful whether a rule to that effect should be included in a codification convention as that might encourage a practice which, if it occurred at all, was certainly rare.

16. The effect of the second condition, that the modification should not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations, might be more serious for suspension because the suspension of the operation of a treaty between a group of parties for an indeterminate period might completely upset the general situation the treaty

⁵ *British and Foreign State Papers*, vol. 61, p. 1198.

⁶ *Yearbook of the International Law Commission, 1966*, vol. I, part I, 841st meeting, paras. 62-68.

was meant to establish. The practical result of introducing such a condition into article 40 might be to create problems of the kind which had induced the Commission to insert in article 42 a provision—paragraph 2 (c)—dealing with the special situation, in cases of breach, that lead to a radical change in the position of one of the parties.

17. The condition that the modification should not relate to a provision derogation from which was incompatible with the effective execution of the objects and purposes of the treaty as a whole was also inappropriate to the case of *inter se* suspension, the effects of which were bound to be different from *inter se* modification and to be incompatible with effective execution.

18. As for the fourth condition, he doubted whether it would foster the progressive development of the law to encourage the inclusion in international instruments of clauses concerning *inter se* suspension or the prohibition of such clauses. In fact the objection was much the same as for the first condition.

19. The problem of what action the other parties were entitled to take on receiving notice of an *inter se* modification had been left open in article 67—and he was not questioning the Commission's decision on that point—but as far as *inter se* suspension was concerned, the matter must be elucidated. He therefore agreed with Mr. Jiménez de Aréchaga that paragraph 3 of article 40 ought to be deleted. Nevertheless, he thought that there was one omission from the article, unless the point was covered by implication, namely, the possibility of agreement by all the parties to permit withdrawal from the treaty or the temporary suspension of its operation by one party. That could be a matter of considerable practical importance.

20. Such a provision might be useful in cases of temporary impossibility of performance or temporary change of circumstances, as an alternative to the formal procedure laid down in article 51. It might be worth inserting an explicit provision on the matter in article 40, it being understood that the agreement of all the parties in such cases could be expressed informally or even tacitly.

21. Mr. BRIGGS said that he had no difficulty in accepting the Drafting Committee's text of paragraphs 1 and 2, but was opposed to paragraph 3 which raised problems of correlation between articles 40 and 67 and possibly others. Article 67 permitted *inter se* modification of treaties and although article 40, paragraph 3, did not forbid *inter se* suspension, the conditions laid down in article 46, paragraph 3 might be applicable. However, the latter differed from those in article 67, or at least had been expressed in different language. The conditions laid down in article 67 were perhaps not adapted to *inter se* suspension.

22. It was important to remember that article 67 had not been drafted with suspension in mind, and if a third paragraph were needed at all in article 40, it should not merely incorporate article 67 by reference but ought to deal with cases when *inter se* suspension of the operation of a treaty by fewer than all the parties was permissible. Under article 42, paragraph 1, a material breach of a bilateral treaty provided a ground for the injured party to suspend its operation unilaterally. Under para-

graph 2 (b), a party to a multilateral treaty specially affected by a breach could also invoke that as a ground for suspending the operation of the treaty in whole or in part. Under paragraph 2 (c), any other party could suspend operation of the treaty with respect to itself if the breach was of such a character that it radically changed the position of every other party with respect to further performance of the obligations. Temporary impossibility of performance as a ground for unilateral suspension was provided for in article 43.

23. The Commission would have to consider whether there were any other instances when suspension might be permissible without the agreement of all the parties, as now required by article 40, paragraph 2. Personally he doubted whether any need existed for *inter se* suspension, but he was open to persuasion. However, a general rule was clearly needed to prevent *inter se* suspension from being used as a means of frustrating performance of the treaty.

24. Mr. de LUNA said that he shared the Special Rapporteur's views on paragraph 3. He had in mind cases—which were not hypothetical but were found in international practice—of so-called “local” clauses which concerned a few of the parties to a multilateral treaty. The complete suspension of a treaty was very difficult except under the conditions which the Commission had laid down in article 67, but there could be a partial suspension of those “local” clauses, which were usually of a territorial nature or concerned reciprocal services between two or more parties. In that case, the same general principle applied as in the case of modification. Since the Commission had admitted the possibility of a treaty being amended by *inter se* agreements—derogation from the general obligation imposed by multilateral treaties—there could not be the slightest objection to the suspension of clauses which did not affect the object of the multilateral treaty and were not detrimental to the interests of the other parties.

25. He had no strong views on the method to be followed, provided that the text of the draft remained elegant. Was it necessary to restate principles that were very similar to those of article 67 or would it be sufficient to include a cross-reference to that article? It appeared from paragraph 3, as worded by the Drafting Committee, that the operation of a multilateral treaty in part only would no longer be possible except in the case of a clause of limited scope not affecting the parties which had not agreed to the suspension *inter se*. By making a slight change in the paragraph, a cross-reference to article 67 might be all that was needed.

26. Mr. VERDROSS said that he had no difficulty in accepting paragraphs 1 and 2. In paragraph 3, a cross-reference to article 67 was not enough and it would perhaps be better to drop the paragraph altogether.

27. Mr. AMADO said that he had difficulty in deciding between the two schools of thought. Unless other speakers dispelled his doubts, he would support Mr. de Luna.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not have particularly strong views about paragraph 3 but if Mr. Ago's line of reasoning, which had some logical force, were followed, the necessary safe-

guards must be included in the provision and they should be close to the kind of conditions laid down in article 67.

29. The attempts to refute the argument that there was a close parallel between paragraph 3 and article 67 had been quite unpersuasive: article 40, paragraph 3 dealt with the suspension of the operation of a multilateral treaty between some of the parties only and they could not in any circumstances suspend the treaty as a whole for all the parties. Should some of the parties find themselves in difficulties over operating the treaty, they would be able to modify it provided the conditions laid down in article 67 were complied with. A suspension of operation, if applied in good faith under article 40, would be a temporary expedient that could not involve a risk of an *inter se* arrangement radically changing the position vis-à-vis all the other parties. By putting an end to an *inter se* suspension, the parties to it would bring themselves back into line with the other States. The analogy between the two situations was quite close.

30. Of course it could be argued that article 40, paragraph 3, was unnecessary because the parties themselves could agree on such an arrangement in accordance with the conditions laid down in article 67 by first modifying the treaty and then cancelling the modification.

31. It was mistaken to ascribe serious dangers to paragraph 3. If they existed at all they would arise also under article 67, but the conditions there laid down were already very stringent and, if applied in good faith, afforded enough protection.

32. It might be true that the suspension of operation of a whole treaty was not very often envisaged in a multilateral instrument but the inclusion of treaty provisions allowing for the suspension of quite large portions of a treaty, in certain circumstances, was very common.

33. The CHAIRMAN, speaking as a member of the Commission, said that, at the second part of the seventeenth session, he had suggested the postponement of the consideration of the article in the interests of a more thorough study of the question of suspension, which had been introduced at short notice.

34. One point had been established beyond all doubt: there was no connexion between termination and suspension. Suspension was by its very nature temporary; if it were final, it would constitute termination, and, as such, would be subject to separate rules. Suspension was not identical to modification, but resembled it closely, the difference between the two being perhaps one of degree. Those reasons led him, in the first place, to question the position of the paragraph. He doubted whether suspension should be mentioned in the same context as the case in which a treaty could be terminated. Moreover, in view of the connexion between the two cases, it would be appropriate to treat suspension in the same way as modification. It seemed to him, therefore, that a cross-reference to the article stipulating certain conditions for modification might be sufficient to safeguard the interests of the international community in the case of the suspension of a treaty.

35. The provisions of paragraphs 1 (a) and (b) of article 67 could be adapted to the case of suspension by stating that two or more parties could conclude an agreement for the purpose of suspending the treaty as

between themselves if the suspension did not interfere either with the enjoyment by the other parties of the rights they possessed under the treaty or with the performance of their obligations, if it was not prejudicial to the objects and purposes of the treaty as a whole in relation to the international community, and if it was not prohibited by the treaty. Those conditions would safeguard the interests both of the parties and of the international community. Subject to that change, he would have no difficulty in accepting the Drafting Committee's text.

36. Mr. TUNKIN said that, during the second part of the previous session, he had had some hesitation regarding paragraph 3 and had therefore supported the proposal by Mr. Yasseen to postpone the consideration of article 40 until the present session.

37. He agreed with the Special Rapporteur, the Chairman and Mr. de Luna that instances of the *inter se* suspension of the operation of multilateral treaties were not rare in practice, although perhaps not much publicized. In the circumstances, the question arose whether a special provision should be included on the question in article 40, or whether the matter should be considered to be covered for all practical purposes by the provisions of article 67. He himself had no strong feelings on the question but was inclined to accept the Drafting Committee's proposal to include a paragraph 3 in article 40.

38. That being so, he agreed with those members who held that the reference to article 67 provided sufficient safeguards to prevent the *inter se* suspension of the operation of the treaty from being used to injure the rights and interests of the other parties.

39. Mr. AGO said he was a little surprised that a problem which was essentially of minor importance should give rise to such animated discussion. Theoretical analogies between certain cases should not be pushed too far, but if it were decided to take them into account, it must be recognized that suspension had more affinity to modification than to termination. It might become necessary to suspend the operation of a treaty during the actual process of its modification. International affairs produced so many unexpected situations that it might prove necessary temporarily to suspend the operation of a treaty between a group of States. Moreover, it would be pointless for the Commission to try to oppose a practice which already existed. For that reason, he was in favour of retaining the article, in the form in which it had been submitted by the Special Rapporteur.

40. The only amendment he would like to propose would be the insertion at the beginning of the article of the usual reservation relating to cases in which the treaty provided otherwise. That reservation also applied to the termination of treaties; for example, it could be specified in the treaty that if it was terminated by a certain number of parties, it would come to an end. There were no reasons for excluding the possibility that the treaty itself might establish a rule on that point which was less strict than or different from that stated in article 40.

41. Mr. CASTRÉN said that he, too, considered paragraphs 1 and 2 acceptable.

42. He had been no more convinced than had the Special Rapporteur by the arguments of the critics of

paragraph 3. He did not see what dangers could arise from the inclusion of such a provision in the draft. On the contrary, that provision could usefully supplement the provisions of article 67 concerning *inter se* agreements. As had already been pointed out, a State practice in the matter was in existence. There were also treaties, such as the Barcelona Conventions of 1921⁷ and the Chicago Convention on International Civil Aviation of 1944,⁸ which authorized the parties to suspend their application for certain exceptional periods, for instance in the event of war.

43. It would be premature to delete paragraph 3 before the Drafting Committee had had an opportunity to reconsider it. The wording could undoubtedly be improved, as the Chairman had said, but the guarantees at present envisaged were reasonably satisfactory.

44. Mr. EL-ERIAN said he supported article 40 as proposed by the Drafting Committee. He had been impressed, but not convinced, by the arguments put forward by Mr. Jiménez de Aréchaga. Treaty relations were so varied, complex and intricate that it was inadvisable to introduce very strict rules in the matter. That was why he favoured a flexible formula; sufficient safeguards were provided by the reference to article 67 in the proposed paragraph 3.

45. Mr. ROSENNE said that article 40, paragraphs 1 and 2, stated the elementary proposition that a treaty could be terminated or suspended at any time by the agreement of all the parties. It would go against the whole hypothesis of the article to introduce a proviso making a reservation for the case in which the treaty provided otherwise.

46. Clearly, if the treaty contained any clause on the subject of the suspension of its own operation, that clause would prevail. But the question before the Commission was a different one; the Commission was called upon to decide whether, quite apart from any treaty provisions on the subject, it was going to introduce the dangerous innovation represented by the provisions of paragraph 3. He had great misgivings on that point and thought that any cases that might arise in practice were already covered by other articles of the draft, or could be covered by other articles, subject to minor modifications.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the majority of the Commission seemed inclined to maintain paragraph 3, at any rate until the final text of the article was formulated.

48. There was no identity between termination and suspension in the present connexion. As for the dangers which had been mentioned, the position would be better protected if paragraph 3 were included in article 40. The question would then not be ignored and express provision would be made for the application of the rather strict safeguards set forth in article 67.

49. With regard to the drafting, he would endeavour to take Mr. Ago's suggestion into account, although it was difficult to reconcile it with the present formulation of paragraphs 1 and 2 which stated that a treaty " may at

any time " be terminated or suspended by agreement of all the parties.

50. Mr. JIMÉNEZ de ARÉCHAGA said that he had not been at all convinced by the discussion and regretted that such a dangerous innovation was being introduced.

51. As adopted in 1963, article 40 laid down in its paragraph 2 the rule that the operation of a treaty could only be suspended by the unanimous agreement of the parties. It was significant that in its comments no government had opposed that text. Nevertheless, at the second part of the seventeenth session, the new idea of an *inter se* suspension without the unanimous consent of the parties to the treaty had been introduced. The other States had an interest in the continuity of the treaty and that interest should be protected. Provision for *inter se* suspension would create and encourage a new practice liable to undermine, through continued suspension, the regime established by a multilateral treaty.

52. Mr. BRIGGS said he wished to repeat his suggestion that paragraph 3 should be so drafted as to state fully the safeguards in the matter. A mere reference to article 67 was not satisfactory because that article had not been drafted with suspension in mind. As it now stood, paragraph 3 would not cover all the cases of suspension, such as those to which he had referred in his earlier remarks.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 3 was intended to deal with cases of suspension by agreement rather than with the other cases of suspension arising from special grounds, such as breach, mentioned by Mr. Briggs. Such other grounds could, of course, constitute the motive behind the agreement of the parties to suspend the operation of the treaty, but any attempt to introduce that idea would complicate unduly the provisions of the various articles.

54. Paragraph 3 should be confined to the case in which the parties for their own reasons and regardless of the existence of any possible other grounds of suspension, decided to suspend the operation of the treaty as between themselves. The obligation to comply with the conditions set forth in article 67 would ensure that the rights of the other parties were not prejudiced in any way.

55. He proposed that article 40 be referred back to the Drafting Committee in the light of the discussion.

56. The CHAIRMAN, speaking as a member of the Commission, said that the Drafting Committee might nevertheless consider the possibility of adapting the wording of the provisions concerning modification to cover suspension, giving particular attention to the case of the suspension of the treaty as a whole. Paragraph 1 (b) (ii) of article 67 referred only to the case in which it was proposed to amend a single provision of a treaty. The condition should be stated that the suspension of the operation of the treaty as a whole must not be prejudicial to certain interests of the international community. That was a point which the Drafting Committee ought to consider.

57. Speaking as Chairman, he suggested that the Commission now refer article 40 back to the Drafting Com-

⁷ League of Nations, *Treaty Series*, vol. VII, p. 29, art. 6 and p. 61, art. 19.

⁸ United Nations, *Treaty Series*, vol. 15, p. 356, art. 89.

mittee, as the Special Rapporteur had already proposed, for reconsideration in the light of the discussion.

*It was so agreed.*⁹

The meeting rose at 5.5. p.m.

⁹ For resumption of discussion, see 876th meeting, paras. 90-94 and 103-119.

862nd MEETING

Thursday, 2 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

(A/CN.4/183, A/CN.4/186 and Addenda; A/CN.4/L.107, L.115)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the texts of articles submitted by the Drafting Committee.

ARTICLE 29 (*bis*) (Notifications and communications) [73]

2. Mr. BRIGGS, Chairman of the Drafting Committee, after drawing the Commission's attention to the text of article 29 (*bis*) as provisionally adopted at the first part of the seventeenth session,¹ said the Special Rapporteur would explain the reasons for the changes now being proposed by the Drafting Committee. The changes would be seen from a comparison of the two texts, which read:

Article 29 (bis)

Text provisionally adopted at the first part of the seventeenth session

Communications and notifications to contracting States

Whenever it is provided by the present articles that a communication or notification shall be made to contracting States, such communication or notification shall be made:

(a) In cases where there is no depositary, directly to each of the States in question;

(b) In cases where there is a depositary, to the depositary for communication to the States in question.

¹ *Yearbook of the International Law Commission, 1965*, vol. I, 815th meeting, paras. 61 and 62.

Drafting Committee's text

Notifications and communications

Unless the treaty otherwise provides, any notification or communication required to be made to any State under the terms of the treaty or of the present articles shall:

(a) be transmitted to the depositary or, in the absence of a depositary, directly to the State in question;

(b) be considered as having been made to a State upon its receipt by the depositary or, in the absence of a depositary, upon its receipt by that State.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's text had been prepared during the examination of article 50 and the whole problem of the manner in which notifications and communications become effective. The Drafting Committee's view was that a satisfactory presentation of the various related provisions had not yet been achieved. There were three stages to consider: the transmission of notifications or communications: their receipt, and finally the time in law at which they were to be regarded as having been made. The problem was a familiar one in private contract law. As treaties often laid down time-limits for notifications or their expiry, it was clearly important to establish at what moment they could be considered as having been made. The Drafting Committee had reviewed the text provisionally adopted at the previous session and had introduced a new element to cover that last point.

4. Much thought had been given to the problems arising when the parties to a multilateral treaty provided for a depositary to act as their agent. The Drafting Committee had considered whether allowance should be made for the time required for the administrative processes of transmitting the notice or communication from the depositary to the State concerned. The kind of difficulties that could arise when a period was specified had been brought to light during the preliminary objections to the Court's jurisdiction in the *Case concerning Right of Passage over Indian Territory*.²

5. The Committee had concluded that it was undesirable to frame a provision as to when the notice or communication took effect since that would depend on the provisions of the treaty or of the instrument being communicated itself.

6. Mr. VERDROSS, referring to paragraph (b), asked what the Drafting Committee thought the legal position would be if the depositary or the State to which the notification was addressed refused to accept it. It seemed to him that the crucial moment was not when the notification or communication was made, but when it was delivered to the depositary or the State which received it directly.

7. Sir Humphrey WALDOCK, Special Rapporteur, said that if a State refused to receive a notification or communication, that would be a new element to be taken into account in establishing the facts of a case, but the possibility had no relevance to article 29 (*bis*). If the

² *I.C.J. Reports, 1957*, p. 125.

procedure specified there had been complied with and the notification or communication had been received by the depositary or State concerned, there could be no doubt that the notice had been given. Whether or not a rejection was legitimate was another matter that should not be examined at that juncture.

8. The CHAIRMAN, speaking as a member of the Commission, said that it was not possible to provide for every eventuality in a text; the question should be left to international practice and enlightened jurisprudence.

9. Mr. BARTOŠ said he was not very satisfied with paragraph (b), as he wondered whether or not the presumption it contained was rebuttable. The purpose of notification was to ensure that the State concerned was made acquainted with a certain fact. But, under existing practice, if a State wished its notification to be transmitted rapidly to another State, it had to make several representations to the United Nations Secretariat—in cases where the Secretariat was the depositary—to ensure that the notification was brought to the cognizance of governments by a *note verbale* or signed note from United Nations, and it often happened that six months elapsed between the notification and its transmission to States parties. What was the position in the interval between the date of receipt by the depositary and the date when the depositary transmitted the notification? Was there, or was there not, a presumption that States had had cognizance of the notification? Depositary States sometimes filed the notification in their archives without transmitting it to the other parties.

10. He would be prepared to accept paragraph (b) if the presumption was rebuttable since it must always be assumed that the depositary's obligation to transmit the notification to the other parties would be discharged in good faith and immediately. But if it were proved that the notification had not been made, it would be very difficult to be bound by a presumption which was not rebuttable. The phrase "shall be considered as" could be interpreted in two ways: either the notification would be considered as having been made, or it would be so considered until there was proof to the contrary. It was not clear from the proposed text exactly what the Drafting Committee had in mind.

11. Mr. AGO said he understood Mr. Bartoš' concern, but thought that in the present instance the Commission was not concerned with the objective problem—as it might be described—of the time when the notification reached the State or States to which it had to be made, but with defining the obligations of the notifying State. That State was under a duty to transmit the notification either to the depositary, if there was one, or directly to the States in question. In either case, the intention was to say that the notifying State's obligation could not be held to have been carried out and completed until the moment of receipt, which was the moment when the notification was received by the depositary or the recipient State. But at that point every obligation ceased for the State which had transmitted the notification. The question which would then arise was what were the obligations of the depositary, and not what was the duty of the State which had transmitted the notification.

12. The Commission should take Mr. Bartoš' misgiving into account when it came to deal with the obligations

of the depositary, but not when it was dealing with the obligations of the notifying State, because once that State transmitted its notification and the latter had reached the depositary, it could do no more. What the article was concerned with was the obligations of the notifying State, not what would happen after the receipt of the notification by the depositary.

13. Mr. BARTOŠ said that, from the moment of notification, the treaty, or the acts linked to its effects, were applicable as against the other parties. The question in the present case, therefore, was whether an act was applicable as against the other parties even if it had not been brought to their cognizance.

14. It would therefore be as well if the Special Rapporteur were to incorporate in the commentary the idea, so clearly expressed by Mr. Ago, that the purpose of the text was simply to determine the duty of the State which was required to make the notification or communication; that that State's obligation was discharged as soon as it had transmitted the notification or communication to the depositary, or in the absence of a depositary, directly to the other State in question; and that the text did not settle the question of the effects of notification on the States concerned.

15. Mr. TUNKIN said that he was inclined to agree with Mr. Bartoš. The Drafting Committee's text dealt not only with the transmission of notifications or communications but also with the moment from which they might be regarded as having been received. Clearly the new sub-paragraph (b) would have legal consequences. The other State might not be aware of the notification for some time, yet under sub-paragraph (b) it would already have become bound by certain obligations.

16. He consequently had serious doubts about the new text and considered it would be more consistent to delete the phrase "... upon its receipt by the depositary or, in the absence of a depositary ..."

17. Sir Humphrey WALDOCK, Special Rapporteur, said that if the course proposed by Mr. Bartoš were followed, the rule proposed by the Drafting Committee would be completely reversed. The Commission must decide what it was aiming to achieve: obviously there was an inherent difficulty in the problem because the interests of two sides were involved.

18. The Drafting Committee's standpoint had been that, when the parties to a multilateral treaty provided in the treaty for a depositary as a channel of communication, all notifications would have to be transmitted through it. The notifications might be of different kinds, for example instruments of ratification that would initiate a legal relationship, or communications about reservations or other matters provided for in the treaty. The problem was to fix the moment at which a legal nexus was established.

19. There could be no question that, according to existing practice, in cases when there was a depositary the instrument, whatever it might be, became operative from the moment of its receipt by the depositary. That had been the view taken by the International Court of Justice in the *Case concerning Right of Passage over Indian Territory*.³ He himself, as agent for the Republic

³ *I.C.J. Reports*, 1957, p. 146.

of India in that case, had put forward the contrary view, but it had been rejected.

20. The alternative approach was to consider the problem from the standpoint of the other States and the obligations resulting for them. It could be argued that until they had received the notification themselves, and not merely what in English legal parlance was known as constructive notice, in other words, the receipt of the notification by an agent of the parties, those States would not be bound in any way by an act of another State which had done precisely what it was required to do under the provisions of the Commission's draft relating to the functions of a depositary. As he understood it, Mr. Bartoš was not suggesting that the fundamental proposition in sub-paragraph (b) should be radically altered, but that the presumption should be rendered rebuttable. The difficulty of following that course was that it would immediately throw doubt on the firmness of the legal nexus and at what exact moment it was established.

21. The choice lay between a somewhat arbitrary system, but one that offered some certainty in application, and a more flexible one that could result in doubts about the moment when the instrument became effective. He had understood the Drafting Committee to have chosen the former alternative.

22. Mr. TUNKIN said that a distinction should be drawn between the legal effect of different notifications. Sub-paragraph (b) should be so worded as to make it clear that a notification or communication would be considered as having been made to a depositary upon its receipt by the depositary, and would be considered to have been made to a State upon its receipt by that State. Thus, if a State notified to the depositary its withdrawal from a treaty, the other State party would have to conform with that new situation only after having received from the depositary notification of the withdrawal of the first State.

23. Mr. de LUNA said that what the Commission was in fact dealing with was the functions of the depositary. In theory—a theory which practice had disproved—the depositary had first been regarded as a kind of letter-box. Later, in practice, as the number of States and the number of multilateral treaties had increased, the depositary had become an organ in the full sense of the term.

24. He fully understood the anxiety expressed by Mr. Bartoš and Mr. Tunkin. What was meant by the words "receipt by that State"? Did they imply receipt by the ambassador of the State concerned, considered as an organ of the State equally with the depositary, or did they imply receipt by the central government? In either case there would be delay, because some time always elapsed between the receipt of the notification by the ambassador and its transmission by him to his government.

25. He saw no reason why a distinction should not be made, provided that no essential changes were introduced in the functions of the depositary as defined in article 29, paragraph 1 (e)—"informing the contracting States of acts, communications and notifications relating to the treaty".

26. He agreed with the Special Rapporteur's view that, at the present time, the depositary was an agent of the contracting State no less than if he were its ambassador. But it was important to neglect neither the functions of the depositary as the agent of all the States which had appointed him as depositary in the treaty, nor the security which the international community must have with regard to the date of notification. Without that security, everything would depend on the speed of transmission of communications and notifications made on the same day to all States, and which might produce their effects at different dates, whereas the function of the depositary was precisely to ensure uniformity and certainty. So long as those two principles were safeguarded, he had no objection to the Commission's accepting the suggestions made by Mr. Bartoš and Mr. Tunkin.

27. The CHAIRMAN, speaking as a member of the Commission, said that paragraph (b) raised a very delicate problem which affected the legal status of the depositary. If he had understood the draft article correctly, the depositary's status was not that of a representative. The depositary was an organ entrusted with certain functions; but it would be going too far to say that he represented all the States which had appointed him, and to draw from that the inevitable conclusion that notification to the depositary was deemed to be notification to the parties. He did not believe that the draft had established the concept of the depositary-representative in that sense.

28. It was necessary to be realistic, particularly in cases which raised practical problems, as when the purpose of notification was to bring to the cognizance of certain States information which might call for some action or decision on their part.

29. It was difficult to accept the absolute presumption in paragraph (b). It was in his view quite impossible to relate the presumption contained in the phrase "shall be considered as having been made to a State upon its receipt by the depositary" to the facts. Communication of the notification by the depositary required time. Even as a presumption, it was to be rejected because it was completely unrealistic.

30. In cases which raised delicate problems, the Commission should not be led astray by fictions, presumptions or theoretical interpretations, but should construct, on the basis of reality, a rule which would be of service to the real interests of States.

31. Mr. BRIGGS said that the purpose of sub-paragraph (b) was to set forth the circumstances in which a notification was to be considered as having been made, not as having been received. It laid down that, where a State had an obligation to make a notification, it would be considered as having discharged that obligation when the notification was received by the depositary, or in the absence of a depositary, by the other State concerned. That rule was fully consistent with State practice and with the ruling of the International Court of Justice in the *Right of Passage* case. It would be flying in the face of existing State practice to modify that rule so as to state that notification would be considered as having been made only upon its actual receipt by the other State, either directly or through the depositary.

32. As he saw it, the Commission had no other choice than to adopt either the rule proposed by the Drafting Committee, or a formulation which would deprive the institution of the depositary of much of its usefulness.
33. Sir Humphrey WALDOCK, Special Rapporteur, said that a simple illustration was provided by the provisions of article 77, paragraph 1, of the 1963 Vienna Convention on Consular Relations, which read: "The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations." That provision established in an absolute manner the date on which the Convention would enter into force for all the parties.
34. Article 78 of the same Convention dealt with notifications by the Secretary-General and its sub-paragraph (b) called on the Secretary-General to notify all the States concerned of the date "on which the present Convention will enter into force, in accordance with article 77". The Convention thus recognized that all the States entitled to become parties to the Convention had a right to know of its entry into force. However, the Convention entered into force for all the parties on one and the same date, namely, that determined in absolute terms by the provisions of article 77, paragraph 1.
35. In the discussion, there had been some confusion between two questions which were to some extent connected but were nonetheless separate. The first was that of the legal effectiveness of an act; the second was a question of State responsibility in the case of a State which was unaware of the entry into force of a treaty.
36. Article 29 (*bis*), as proposed by the Drafting Committee, reflected an established practice and if the Commission were to change the rule embodied in that article, it would in effect be modifying the final clauses of a large number of treaties.
37. Mr. BARTOŠ said that although the provisions of the Vienna Convention on Consular Relations, to which the Special Rapporteur had referred, were perhaps badly drafted, it had by no means been the intention of the Conference that notification of the last instrument of ratification should be sufficient for the Convention to enter into force. The notification made by the State to the Secretary-General when depositing the instrument should not be confused with the notification in which the Secretary-General stated that the necessary conditions for the Convention's entry into force had been fulfilled. In his opinion, it was the latter notification which determined the date on which the Convention entered into force.
38. Mr. ROSENNE said that article 29 (*bis*) expressed a residuary rule, since it was qualified by the opening proviso: "Unless the treaty otherwise provides." In fact, an increasing number of treaties made provision for the eventuality under discussion. At the same time, it was essential to retain in the draft articles a residuary rule which gave a clear indication of the date on which the notification was considered as having been made, even if there might be an element of arbitrariness in the choice of that date.
39. He had always sympathized with those who had hesitated to accept the automatic and immediate effect for the parties of a notification made to the depositary. At the seventeenth session, he had made a proposal⁴ which would have allowed an arbitrary period of ninety days to elapse before a notification actually became operative. The purpose of that proposal had been to allow time for the completion of administrative procedures and to try and avoid the recurrence of a situation such as that which had arisen in the *Right of Passage* case. There, however, the Court's decision had been based on a strict reading of the relevant provisions of the Statute of the Court and was therefore covered by the initial proviso of article 29 (*bis*), "Unless the treaty otherwise provides".
40. In the light of the discussion, he thought that article 29 (*bis*) should be accepted as proposed by the Drafting Committee but that careful consideration should be given to the wording of the substantive articles on the subject of entry into force and termination, to see whether the date that would result from the provisions of article 29 (*bis*) was appropriate for purposes of entry into force and termination respectively. In the case of the articles on reservations,⁵ the Commission, at its seventeenth session, had already adopted a system different from that provided for in article 29 (*bis*).
41. In particular, the Drafting Committee should consider the wording of article 29 (Functions of depositaries). In paragraph 1 (*f*) of that article as adopted at the seventeenth session, the adverb "promptly" which had appeared in the text adopted at the fourteenth session in the corresponding paragraph 7 (*a*)⁶, had been omitted before the words "Informing the contracting States when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty had been received or deposited". It might be desirable to restore that qualification, in order to lay greater emphasis on the duties of the depositary.
42. Mr. AGO said he was still convinced that the Commission would run into difficulties if it sought to deal in article 29 (*bis*) with any question other than that of the obligation of the State which was required to make the notification.
43. It might be better to delete the words "to any State" in the main paragraph, since it was those words that caused many of the difficulties to which attention had been drawn. Moreover, in some cases, notification was required to be made, not to a State, but, for example, to an organ of an international organization.
44. Mr. LACHS said that, with regard to the effects of notification, a very real problem could arise: in the event of the entry into force of a treaty as a result of a notification to the depositary of which State X was unaware, that State might find itself unknowingly acting in disregard of the treaty. Would such a State be held responsible for thus departing from the provisions of a treaty of whose entry into force it had no knowledge? The opening proviso of article 29 (*bis*) "Unless the treaty otherwise provides" was of no assistance in cases

⁴ See *Yearbook of the International Law Commission, 1965* vol. II, document A/CN.4/L.108.

⁵ Articles 18-22.

⁶ *Yearbook of the International Law Commission, 1962*, vol. II, p. 185.

of that type. The discussion had revealed a loophole in the draft, which the Commission ought to fill, at least in the commentary.

45. Mr. TSURUOKA said he agreed with Mr. Lachs and several other speakers that there were two aspects to the question of notification. Practically speaking, the problems raised were not so difficult, but it would probably be necessary to change the wording of the article in order to arrive at a satisfactory draft from the theoretical standpoint.

46. He would like to make one suggestion, though it might seem a little paradoxical in relation to the general arrangement of the draft, with regard to the functions of the depositary. The Commission might lay down the rule that, even when there was a depositary, a State which had to make a notification concerning a treaty must also notify the other States concerned that it had made its notification to the depositary. If that rule were added, the rest of the article could remain as it stood, and there would no longer be too great a discrepancy between the rule and the reality. The obligation would not impose a very heavy burden on States: it would become a routine duty of embassies.

47. Mr. TUNKIN said that the situation being discussed resulted in large measure from the deletion by the Drafting Committee of the reference originally contained in a number of other articles to the moment when a notification became operative for the State receiving it. So far as the State making the notification was concerned, the provisions of sub-paragraph (b) of article 29 (*bis*) were satisfactory, but those provisions would undoubtedly be construed as dealing with the separate problem of the moment from which notification became operative for the State receiving it. The Drafting Committee should consider inserting in the article an additional paragraph to the effect that a communication or notification became operative for a State from the moment when it had been received by that State.

48. Mr. AMADO said that the important thing was that the State in question should receive the notification, either directly or through the depositary. An addition to the article to make that quite clear would avoid difficulties of the kind to which attention had been drawn by Mr. Lachs, since it would be apparent that the notification was not valid unless it had actually been received by the State concerned.

49. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the operation of notification comprised two stages. He had no objection to article 29 (*bis*) if it related only to the first stage, at which a State was obliged to make a notification of something. The rule proposed was satisfactory in so far as, in the conditions stated, the State which was obliged to make a notification could be deemed to have made it.

50. The effect of notification with respect to the State to which it was addressed, however, constituted another stage concerning which the present wording of the article left some doubts, for it might be understood that, as soon as the depositary had received the notification, the operation of notification was deemed to have been carried out in its entirety. It was therefore essential that the Drafting Committee should revise the article so as

to distinguish clearly between the two stages of the operation.

51. The Vienna Convention on Consular Relations provided that the Convention should enter into force, not upon the deposit of the last instrument of ratification but on the thirtieth day after such deposit; the fact that a period had been laid down clearly showed that a problem existed, and that an attempt had been made to take a realistic view.

52. Sir Humphrey WALDOCK, Special Rapporteur, said that the text of article 29 (*bis*) as proposed by the Drafting Committee was perfectly clear: it was intended to state the rule that notification was legally made to a State upon its receipt by the depositary. The depositary might not be the agent of the parties but was nevertheless the channel of communication chosen by the States concerned and designated as such.

53. Reference had been made to the duty that a State might have to make a notification; in practice, it was still more common for a State to have the right to make a notification with certain legal effects. For example, when notice of termination was given, it would have its effects as from the making of the communication giving such notice.

54. The purpose of the thirty-day period laid down in article 77, paragraph 1, of the Vienna Convention on Consular Relations was to allow for the possibility of administrative delay in communicating the entry into force and also to enable the parties concerned to adjust themselves to the new situation arising from the entry into force of the treaty. Paragraph 2 of the same article specified that, for each State ratifying or acceding to the Convention after its entry into force, the Convention would be in force "on the thirtieth day after deposit by such State of its instrument of ratification or accession". Those provisions reflected a fairly common practice.

55. The Drafting Committee should, perhaps, consider the suggestion by Mr. Tunkin for the introduction of an additional paragraph to deal with the somewhat absurd situation of a State which might have obligations under a treaty while being unaware of the action on which those obligations were based. The provisions of such a paragraph should be drafted with the utmost care, so as to avoid creating a very delicate situation in the relations between the parties to a multilateral treaty.

56. In his communications to States, the Secretary-General of the United Nations followed the practice of the governments concerned; his communications to some were sent by air mail and those to others by different means. The choice of method of communication might thus affect the date on which the communication would become effective, if any change were made to article 29 (*bis*) on the lines proposed by some members.

57. With the exception of the *Right of Passage* case, he fortunately had heard of no example in practice which had given rise to the problem the Commission was now discussing.

58. Mr. AGO said that there was one point about which there was no doubt: the article clearly stated at what moment the notification could be considered to have been made by the State which had to make it. There was still some doubt, however, about the moment

at which the notification began to produce its effect, so far as the rights and obligations of the recipient States were concerned.

59. Mr. Rosenne had pointed out that the article stated a residual rule, because normally the treaty or the notification itself made appropriate provision. The Commission should decide whether, in the residual rule which it was stating, it was trying to establish one particular arbitrary system which had certain disadvantages, or another system, equally arbitrary, which had other disadvantages.

60. Mr. Lachs had raised a practical problem: what happened if, where the treaty itself provided that notification produced its effect at the moment it was received by the depositary, a State which had not been informed acted in a way which might then be considered a violation of the treaty? Such a case could actually occur, and the Commission's rule would do nothing to change it. If, for example, the treaty itself provided that it would enter into force at the moment when the twentieth instrument of ratification was deposited with the depositary, there was no doubt that the treaty would indeed enter into force at that moment and that the obligations for which it provided would come into effect. In the case envisaged by Mr. Lachs, the safeguard for the State which had not been informed was the theory of responsibility: ignorance of the ratification and of the resultant entry into force of the treaty was indubitably a circumstance which excluded any fault on the part of the State in question. The case envisaged by Mr. Lachs therefore fell into a different category.

61. The article should be referred back to the Drafting Committee so that it could try to find a formula which would be more acceptable to the Commission as a whole.

62. Mr. BRIGGS, said that there would be no difficulty in formulating the text of sub-paragraph (b) if the Commission took a decision as to what its contents should be. If some of the suggestions that had been made were accepted, the sub-paragraph would state that a notification would be considered as having been made upon its receipt by a State either directly or through the depositary. The adoption of such a formula would mean, however, the reversal of the rule originally adopted by the Commission.

63. Mr. AMADO said he could hardly agree to the Commission's laying down a rule concerning the effects of notification, because that would only too obviously mean creating a new rule of international law. The important thing was that the notification should reach the State for which it was intended; the practical difficulties involved, or the circuitousness of the route followed, were no concern of the Commission.

64. The CHAIRMAN, speaking as a member of the Commission, said that it could be made clear that the article dealt with notification considered from the point of view of the State which had to make it, and not the effect of such notification in relation to another State.

65. Sir Humphrey WALDOCK, Special Rapporteur, said that, if Mr. Amado's suggestion were adopted, a notification—concerning, for example, an instrument

of ratification—would have no effect in relation to a State until it had reached that State. That proposition would open the door to a State claiming, for example, that a notification from the depositary had never reached it because it had gone astray in the post.

66. If the rule contained in sub-paragraph (b) were dropped, there would be a conspicuous gap in the draft articles. The rule should be retained and the Drafting Committee should consider carefully the possibility of introducing into article 29 (*bis*) an additional paragraph to deal with the problem of a State which was unaware of its obligations under a treaty and, as a result, took some action which it would not otherwise have taken.

67. Mr. AGO said he agreed that an attempt should be made to find a formula which would dispel all misgivings, but there was certainly no cause for the slightest misgiving on that point. Either the treaty was in force or it was not; the position of a State which acted without knowing that the treaty was in force did not concern the law of treaties.

68. Sir Humphrey WALDOCK, Special Rapporteur, said that it was not possible to divorce the question of responsibility from that of the existence of rights and obligations under the treaty as a result of a notification. Responsibility arose because of the existence of such rights and obligations and the problem was how to make an exception for the case of a State which was unaware of its obligations.

69. Mr. TUNKIN proposed that article 29 (*bis*) be referred back to the Drafting Committee for reconsideration; all members would then have time for further reflection.

70. Mr. BARTOŠ said that he supported Mr. Tunkin's suggestion. The discussion would otherwise proceed to no purpose, because of the words "to any State", which might create the legal fiction that any notification to the depositary was a notification to the State, and therefore produced its effects. He could not approve or accept such a fiction.

71. The Drafting Committee should try to find a formula which would satisfy both those who favoured that fiction and those who, like the Chairman and himself, considered it necessary to separate the two aspects of the matter.

72. He personally thought that a notification to the depositary produced no immediate direct effect unless the treaty so provided.

73. Mr. TSURUOKA said that the difficulty was to decide when and how a notification produced its effects and what those effects were vis-à-vis the State for which it was intended. Since international custom was not clear on the point, the Commission ought not to hesitate to introduce a minor innovation to deal with it.

74. The CHAIRMAN suggested that the Commission refer article 29 (*bis*) to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*⁷

⁷ For resumption of discussion, see 885th meeting, paras. 2-54.

ARTICLE 30 (Validity and continuance in force of treaties) [39]

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.

75. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new text for paragraph 1 of article 30 which read :

“ 1. The validity of a treaty may be impeached only through the application of the present articles. A treaty the invalidity of which is established under the present articles is void. ”

Paragraph 2 remained as adopted at the second part of the seventeenth session.

76. Paragraph 1 had gone through three stages. The first had been the single paragraph of article 30, on the presumption as to the validity, continuance in force and operation of a treaty, adopted by the Commission at its fifteenth session in 1963.⁸ When the article was discussed at the second part of the seventeenth session, there had been some objection to its formulation in the form of a presumption and, as a result, the Commission had adopted article 30, on the validity and continuance in force of treaties, in two paragraphs.⁹

77. At the present session, during the discussion on article 52 at the 845th and 846th meetings, there had been difficulty in finding a formulation which would cover both the case in which a treaty was void and that in which it was voidable. The Drafting Committee had therefore, on the instructions of the Commission, redrafted paragraph 1. The reference to the establishment of the invalidity of a treaty had been replaced by a reference to the validity of a treaty being “ impeached ” and a second sentence had been added reading : “ A treaty the invalidity of which is established under the present articles is void ”.

78. Mr. BARTOŠ asked for a separate vote on paragraph 1.

79. The CHAIRMAN, speaking as a member of the Commission, said that he would abstain from voting on paragraph 1 for the reasons given by him at the second part of the seventeenth session.¹⁰ Speaking as Chairman, he would now put paragraph 1 to the vote.

Paragraph 1 was adopted by 17 votes to none, with 1 abstention.

80. The CHAIRMAN said that as the Commission had already adopted paragraph 2 at the second part of the seventeenth session, he would now put article 30 as a whole to the vote.

⁸ *Yearbook of the International Law Commission, 1963, vol. II, p. 189.*

⁹ *Yearbook of the International Law Commission, 1966, vol. I, part I, 841st meeting, paras. 21-41.*

¹⁰ *Ibid.*, 840th meeting, paras. 85-88, and 841st meeting, paras. 26 and 27.

*Article 30 as a whole was adopted by 18 votes to none.*¹¹

ARTICLE 35 (Coercion of a representative of the State) [48]

81. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee had proposed a new text for article 35 which read :

“ 1. 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.

“ 2. The same rule applies if the expression of a State’s consent to be bound has been procured through the corruption of its representative ”.

Paragraph 1 was the single paragraph adopted by the Commission at the second part of the seventeenth session as article 35.¹²

82. Paragraph 2 had been prepared by the Special Rapporteur and submitted to the Drafting Committee at the Commission’s request to cover the case of corruption of a representative. The Drafting Committee had been evenly divided on the desirability of including paragraph 2 and had decided to refer the matter to the Commission for decision.

83. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 2 did not represent his own proposal; he had prepared it on the Commission’s instructions. At the last session, some members had pointed out that corruption could be as material as fraud in the context of invalidity. Some members had felt that the matter was already covered by the notion of fraud but others had felt that cases of corruption came closer to those of coercion of a representative.

84. Mr. JIMÉNEZ de ARÉCHAGA said that if paragraph 2 were accepted, the Commission would be introducing on second reading, without any suggestion from a government or any other source, the entirely novel idea of a new defect of consent, that of corruption, which would thus be added to the three traditional defects of consent: fraud, error and coercion. Moreover, under paragraph 2, corruption would render the treaty void *ab initio* instead of making it merely voidable, as in the cases of fraud and error.

85. He had been unable to find any precedent at all in State practice which admitted the invalidity of a treaty on grounds of corruption. That absence of State practice was not due to any lack of examples of corruption. On the contrary, the biographies of many prominent nineteenth century statesman and diplomats proved conclusively that the practice was widespread. However, there had never been an instance of a treaty being regarded as void, or even voidable, on grounds of corruption. It was even more significant that not a single writer on the law of treaties had referred to that supposed additional defect of consent.

86. Attention had been drawn to certain precedents of nullity of arbitral awards on grounds of corruption, but

¹¹ For further discussion of article 30, see 888th meeting, paras. 28-61, and 889th meeting, paras. 1-37. See also 890th meeting, paras. 1-17.

¹² *Yearbook of the International Law Commission, 1966, vol. I, part I, 840th meeting, paras. 45-83.*

there was a wide difference between the situation of an umpire or third arbitrator and that of a state representative; an umpire was selected jointly by both States parties to the dispute, while a State representative was selected, appointed and instructed exclusively by his own government. If the representative allowed himself to be corrupted, there was always on the part of his own State a *culpa in eligendo* or a *culpa in vigilando*.

87. The proposed paragraph 2 was also very loose as to the content of the rule. Corruption would naturally cover bribery, but there were many other ways of obtaining the goodwill of a representative. How would the dividing line be drawn between corruption and admissible courtesy? It might be suggested, on the analogy of private law, that the deciding factor was whether there had been sufficiently strong inducement to procure consent to a treaty which would not otherwise have been given. But although the objective fact of inducement might be proved, it was very difficult to establish the subjective element of whether the inducement actually procured a consent which would not otherwise have been given. A party interested in getting rid of treaty obligations could allege that certain courtesies and favours extended to its representative were the factors which determined his consent and the representative might, out of patriotism or for other reasons, be prepared to support that allegation with his own testimony. It would endanger the stability and security of international relations to open the door to that type of allegation. If the statement of the representative himself was not to be regarded as decisive in the matter, how would a court or arbitrator determine whether the inducements received had been strong enough to procure consent? That point could not be decided by reference to the treaty itself, because to do so would introduce the concept of *lésion* as vitiating consent, a concept which the Commission had very properly set aside in 1964.

88. He failed to see the relationship between coercion and corruption that could justify covering the two in a single article. Coercion suppressed the freedom of consent, while corruption, like error and fraud, affected the basis of fact which determined a freely given consent.

89. Corruption itself naturally deserved condemnation but he was concerned at the damaging effect which paragraph 2 might have with respect to the draft articles, which had already been criticized as affecting to some extent the security and stability of international transactions because of the very detailed enumeration they contained of the grounds of invalidity and termination.

90. The most serious defect in the proposed paragraph 2, however, resulted from adding it to the article concerning coercion, instead of leaving the matter to be regulated by the provisions of article 33 on the subject of fraud. All legal systems considered that, while an agreement obtained by coercion was void regardless of the agent who had employed the coercion, an agreement obtained by fraud was voidable when, and only when, the other contracting party was responsible for the fraud. By linking corruption with coercion, the Commission would be departing from that time-honoured principle of law; under paragraph 2, the question of the agent of corruption was immaterial.

91. In fact, there was a very important reason for confining invalidity to those cases in which the agent responsible for the fraud or the corruption was the other contracting party. Whereas violence was a notorious and obvious fact, that was not true of fraud, or of corruption which was one form of fraud. Under the proposed paragraph 2, even if a contracting State was entirely innocent and in fact unaware of the corruption, the treaty into which it had entered might become void as soon as it was revealed that there had been some action by an independent source which was alleged to constitute a form of corruption; that source might be a private company interested in a particular provision of the treaty, or even a third State which might have an interest in the treaty becoming void.

92. The most serious forms of corruption, namely, those in which the other contracting State had itself been guilty of corrupting the representative, were already covered by article 33. Under that article, a State which had been induced to conclude a treaty by the fraudulent conduct of the other contracting State could invoke the fraud as invalidating its consent, and the corruption or bribery of a foreign representative undoubtedly constituted most serious fraudulent conduct. If the matter were left to be governed by article 33, the treaty would not be void *ab initio* but would be voidable at the option of the State which had been the victim of the fraudulent conduct on the part of the other contracting State, and not merely of some third party.

93. The term of article 46 on the separability of treaty provisions also made it advisable to deal with the problem of corruption through the article on fraud, and not by means of a new paragraph in article 35. Separability was admitted in cases of fraud but not in the case of coercion. If paragraph 2 were left in article 35, there would be no separability in cases of corruption, with the absurd result that a long and important treaty negotiated in good faith could become void *ab initio* and be deprived of all legal effect merely because one of the representatives of a State had been induced to accept a minor provision of the treaty by a gift received from a private company interested in that particular provision. It was easy to see all the dangers of abuse that such a possibility could create.

The meeting rose at 1.5 p.m.

863rd MEETING

Friday, 3 June 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock

Law of Treaties

(A/CN.4/183; A/CN.4/L.107, L.115)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 35 (Coercion of a representative of the State)
(continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 35.
2. Mr. CASTRÉN said that he had been one of those members of the Drafting Committee who had considered it desirable to deal in the draft with the problem of corruption. After hearing the statement by Mr. Jiménez de Aréchaga at the previous meeting, however, he was now hesitant. States had resorted to corruption during the negotiation and conclusion of treaties, but such cases were fortunately rare. They also differed greatly, and it might be extremely hard to determine whether there was corruption in the strict sense. It could also be argued that a State which had chosen its representatives badly and entrusted such important tasks as the negotiation and conclusion of treaties to dishonest persons had only itself to blame.
3. In any case, it ought to be made clear that the act of corruption must be imputed to the other State party to the treaty, never to a third State or to private individuals or associations. Even with that restriction, there was reason to fear abuses: a State might unwarrantedly withdraw from a treaty under the pretext of corruption.
4. Again, as Mr. Jiménez de Aréchaga had urged, the sanction provided for in article 35 was too severe for the case of corruption, which could more properly be assimilated to fraud or error than to coercion.
5. He was not prepared to take a final position on the main issue—whether or not paragraph 2 should be retained—until he had heard the views of the other members of the Commission, but regarded the provision as unacceptable without considerable revision along the lines he had indicated.
6. Mr. de LUNA said that, in his first report, Sir Gerald Fitzmaurice had taken as the title for article 4, the first of a series entitled “Certain fundamental principles of treaty law”,² the maxim *ex consensu advenit vinculum*. In his third report, he had placed that article, in its final version, at the beginning of the section on defective consent. Paragraph 1 of that final version, renumbered article 9 and entitled “Consent in general”, read: “The mutual consent of the parties, and reality of consent on the part of each party, is an essential condition of the validity of any treaty . . .”³ The will of the State, which was the basis of all treaties, must not be vitiated, since consent must be freely given.

¹ See 862nd meeting, preceding para. 75 and para. 75.² *Yearbook of the International Law Commission, 1956*, vol. II, p. 108.³ *Yearbook of the International Law Commission, 1958*, vol. II, p. 25.

If consent were procured by means of the corruption of a representative, that consent was just as void as consent obtained by fraud, coercion or error. That proposition was the only logical one in law; there was not in international law any rule to the effect that, even if the corruption of a representative were established, his expression of consent must necessarily be attributed to the State.

7. It had been said that, although there were examples in arbitration, there had been no instance in international practice of a treaty voided by corruption. But even Mr. Jiménez de Aréchaga, who had so strongly opposed the inclusion of paragraph 2, had recognized that cases of treaties obtained by corruption had occurred. In fact, there had been cases of that type much more recently than in the nineteenth century and the whole problem was of great importance in relation to the international obligations contracted by certain new States. At the fifteenth session, Mr. Tunkin had made some remarks on the subject of fraud which were equally relevant to the question of corruption. What he said was: “The history of international relations showed that fraud had been used by some States, especially as an instrument of colonial or other aggressive policy. Perhaps instances should not be sought in the literature on the subject, because the authorities might be disinclined to discuss shameful acts belonging to the past”.⁴ The absence of any reference to corruption in the literature could be explained in the same way. In the period of colonial imperialism, European writers considered that international law governed only the relations between those States which they described as “civilized nations”. Unequal treaties and treaties obtained by means of corruption were considered perfectly valid in the relations with States outside the club of “civilized nations”.

8. International law on the subject of defects of consent had gone through three stages. In the first stage, the earliest writers had applied to the law of treaties the Roman law concept of defects of consent. In the second stage, the appearance of the positivist school in the nineteenth century had led to the abandonment of that concept, on the ground that notions derived from private law should not be imported into international law. That view had been upheld even quite recently by the eminent contemporary writer Rousseau, but it ignored the fact that international law, being a body of law like any other, needed the concepts of consent and defective consent. In the third stage, coercion, fraud and error had been recognized as factors that vitiated consent and made a treaty null and void.

9. Corruption should be recognized as an additional defect of consent, in that its effects were the same as those of coercion, fraud and error. From the practical point of view, it was even more necessary to make provision in the draft articles for cases of corruption than for the other three cases; the problem of treaties obtained by means of corruption was much more likely to occur in the future than that of treaties obtained by coercion, fraud or error.

⁴ *Yearbook of the International Law Commission, 1963*, vol. I, 678th meeting, para. 41.

10. The various arguments which had been put forward against the inclusion of paragraph 2 applied equally well to articles 33, 34 and 36, as well as to paragraph 1 of article 35. For example, there was a subjective element in the determination of fraud, but that had not prevented the Commission from adopting article 33. It had been said that corruption was difficult to define, but it was even more difficult to define fraud. Again, the difficulty of proving corruption was no argument at all, since difficulties of that kind arose in connexion with all the draft articles.

11. He could not agree that corruption came close to fraud. Fraud consisted in inducing the other party into error; corruption consisted in offers or gifts made before consent was given. Fraud and corruption represented two different forms of international bad faith and it was essential to make separate provision for each of them in the draft articles.

12. He was in favour of retaining paragraph 2 and opposed to either its deletion or its amalgamation with article 33.

13. Mr. VERDROSS said he was in favour of retaining the rule stated in paragraph 2.

14. Two main arguments had been advanced against including a rule concerning corruption. One was that cases of corruption were rare; that was true, but the argument was not decisive. The other was that the rule might give rise to abuses; but that was the argument used by Professor Schwarzenberger against the rule proposed by the Commission concerning *jus cogens*. On the other hand, it was possible by analogy to argue, in favour of the rule, that an arbitral award was void if the arbitrator had been corrupted.

15. The proposed rule, however, could not be left in article 35, because corruption was not the same thing as coercion. Corruption should be the subject of a special article, for which a place would have to be found in the draft.

16. Mr. BARTOŠ said that the question of corruption deserved to be mentioned in the draft, but he had some observations to make concerning the inclusion of the proposed paragraph 2 in article 35.

17. First, there was a great difference between the crime of coercion and that of corruption, although both invalidated consent. Coercion could be unilateral; although the possibilities of resisting coercion should not be overlooked, it was the consequence of certain unilateral acts, whereas corruption always had two aspects, one active and the other passive, and it was an offence which was characterized by the fact that it could not be committed without complicity. It was therefore, as other speakers had already observed, impossible to deal with coercion and corruption under the same heading. Corruption should be included under defects of consent. Many treaties had been concluded by that evil means in the past, and there might be others in the future, although parliamentary control and the equality of States, once it had become a reality, would no doubt reduce their number.

18. In his study of the law of treaties, he had noted the existence of a fairly common practice of certain big capitalist States, that of combining a business contract,

which came within the province of private international law, with what was called a treaty of guarantee, which was in the province of public international law. The business contract was first concluded between a State, or an undertaking designated by the State, and a large corporation of international monopoly character; the performance of the contract was then guaranteed by a treaty between the debtor State and the State to which the capitalist corporation belonged. Corruption could sometimes play a part in the conclusion of the contract, but the treaty was not directly vitiated by any defect of that nature. The Commission's draft was restricted to the law of treaties, and could not trespass on the law of contracts, even where the contracts were covered by a treaty; in a case of the kind to which he had just referred, therefore, the proposed rule would be without effect. He had considered it his duty to draw the Commission's attention to that particular instance.

19. Nevertheless, he remained firmly in favour of including that rule in the draft, even though there were many degrees and forms of corruption. But the rule should not be included in the article on coercion, because coercion and corruption were different kinds of defect. Nor should corruption be assimilated to fraud. It would therefore be best to deal with the question of corruption in a separate article, which would be frankly entitled: "Corruption of representatives".

20. He had no objection to paragraph 1.

21. Mr. TSURUOKA said that he could not accept paragraph 2, with regard to which he supported the arguments of Mr. Jiménez de Aréchaga and shared the doubts of Mr. Castrén. From a practical point of view, it was one thing to condemn corruption and another to include a provision on corruption in the draft. If freedom of consent was invalidated by corruption, the validity of the treaty was impaired as a consequence. But that did not mean that corruption need be dealt with in the draft. That course would be justified if cases of corruption were numerous, if the notion of corruption were clear, and if there were a reliable procedure for establishing it; but such was not the case. Corruption took various forms—a gift of money, the promise of a lucrative position, and other tempting offers. In cases of corruption, it was hard to say whether the whole responsibility lay with the State whose representatives had resorted to corruption, or whether the representatives of the complainant State were also partly to blame.

22. It had been said that cases of corruption had been frequent, particularly during the colonialist era. But by the time the Commission's articles came into force, colonialism would probably be a thing of the past, and in any case, with the progress in communications, the situation today could not be compared with what it was once.

23. If the conclusion of the treaty had been procured by corruption, it was not only the representative of the State who was responsible; the government itself must have yielded to temptation or have been negligent. But it was scarcely conceivable that a government worthy of the name could be a victim of corruption. It would be dangerous to start from the presumption that governments and their representatives were not necessarily honest; that would suggest a low standard of inter-

national morality and be tantamount to encouraging States to start disputes by alleging, for the purpose of evading their obligations, that their representatives had been corrupted.

24. For the proposed rule to be effective, the two States would have to agree that corruption had taken place; if they did so, they could easily remedy the situation by some other means, such as amending the text of the treaty; and the rule was therefore unnecessary.

25. The proposed rule also had the defect that it did not state clearly who had the right to invoke the nullity of the treaty on the ground of corruption; did a State not a party to the treaty also have that right?

26. Finally, if a State was accused of having corrupted the representative of another State, it might deny having done so and argue that a particular favour it had granted had no connexion with the negotiation of the treaty or was merely a proper reward for services rendered.

27. The rule contained in paragraph 2 would therefore have more disadvantages than advantages for the security of treaty relations between States.

28. Mr. REUTER said he was in favour of retaining the article more or less as it stood. Corruption did take place and there were precedents: at the first Hague Conference, in 1899, the draft prepared by the Russian Government had provided for corruption as a ground for nullity of arbitral awards.⁵

29. The Commission's position with regard to the article on corruption was perhaps connected with a position taken on the procedure for concluding treaties, a matter on which it had been divided. The majority had been unwilling to lay down as a mandatory rule of general international law that all international treaties were subject to the obligation to ratify. It could now be maintained that the obligation to ratify should have been recognized, however burdensome the formalities required by each State, for it would have helped to prevent corruption. But in any case, the majority, of which he had been one, had been against that rule and quite rightly, it appeared, for the Commission must be optimistic and not complicate international relations unduly by fearing the worst. Since the Commission was proposing a rule which did not make ratification necessary, the mention of corruption constituted a useful warning.

30. From the theoretical point of view also, the provision in paragraph 2 was quite appropriate in article 35. The effect of corruption was to misrepresent the will of the State and the representative whose will was affected, whether by coercion, in paragraph 1, or by corruption, in paragraph 2, no longer represented the State. The title of the article might perhaps be amended to read "Action affecting the representative of a State."

31. It had been suggested that the provision might provide States with a pretext for not executing a treaty, but other pretexts were unfortunately not lacking.

32. The text of the article was very satisfactory; there must not only be corruption, but also a causal connexion between the corruption and the consent of the State.

There were many cases of corruption which did not come within the scope of paragraph 2. Talleyrand was known to have been corrupted by every Government with which France had negotiated and the Emperor had not been unaware of it, but no one could say that France's consent to the treaties it had signed had been obtained by corruption.

33. All the problems connected with international responsibility and diplomatic protection fell outside the scope of paragraph 2. Everyone knew of international disputes in which a Government had evidence that its officials had been corrupted by a private concern, but hesitated to use that fact in a court of law, in case it turned to its own disadvantage. That was a problem of responsibility with which the Commission was not concerned for the moment.

34. Mr. TUNKIN said he was in favour of retaining paragraph 2, which was a necessary provision for the protection of weak States against powerful States. The need to retain paragraph 2 was the same, regardless of the frequency or otherwise of instances of treaties procured by corruption. Corruption as a means of obtaining consent to unequal treaties had been a common practice in the colonialist era and was now a not uncommon feature of neo-colonialist activities.

35. Even those who opposed the retention of paragraph 2 had admitted that the corruption of the representative of a State invalidated the consent expressed by him. There was, therefore, every reason for making provision in the draft articles for the invalidity of treaties procured by corruption.

36. With regard to the suggestion that cases of corruption were already covered by the article on fraud, Mr. de Luna had convincingly demonstrated that corruption was completely different from fraud. It was therefore necessary to keep the provisions on corruption and fraud quite separate.

37. He was unimpressed by the argument that the rule stated in paragraph 2 was not completely clear. All rules of law were intended to be applied to a multitude of different cases. A general rule could never correspond on all points to any actual case. There would therefore always be an element of ambiguity in the statement of any rule of law and all that could be said was that perhaps that ambiguity was somewhat greater in the statement of the rule on corruption than in the rule on fraud. That, however, was not a convincing argument against the retention of paragraph 2.

38. Nor was he convinced by the remark of Mr. Tsuruoka that the inclusion of paragraph 2 might suggest a low standard of international morality. In municipal law, there were provisions in the penal code for dealing with a wide variety of offences but that did not indicate a low standard of morality in the country concerned.

39. With regard to the placing of the provision, he would be in favour of making paragraph 2 a separate article. Paragraph 1 of article 35 dealt with the very dangerous case of a treaty obtained by coercion, and from both the factual and the legal points of view, coercion and corruption were different. The Commission had therefore no option but to separate the two para-

⁵ *The Proceedings of The Hague Peace Conferences: the Conference of 1899* (New York, Oxford University Press, 1920), p. 804, art. 26.

graphs of article 35, even if that meant giving some unwanted prominence to the question of corruption.

40. Mr. BRIGGS said that the Commission had discharged a whole quiver of arrows at the stability of treaties, in the form of a series of provisions on defects of consent, and that on the basis of little or no State practice. It was now proposed, in paragraph 2 of article 35, to establish corruption as an independent legal ground of invalidity, although it was admitted that there was no case on record of any treaty having been invalidated on grounds of corruption of the representative who had expressed the consent of the State to be bound by the treaty.

41. Moreover, paragraph 2 did not provide that corruption was merely a ground for invalidity which could be invoked by a State; it proclaimed the unproved assumption that if a State's consent to be bound by a treaty had been procured by corruption, that treaty would be without any legal effect.

42. The problem arose as to what was covered by the term "corruption"; a bribe in money would certainly constitute corruption, but an offer of support, say, in an election to a United Nations organ might also be used as an inducement to procure consent to a treaty. It was hard to decide whether a case of that kind should be included in the term "corruption" as a ground for invalidating consent to a treaty.

43. In practice, if corruption were retained as an independent ground of invalidity, it would thus become possible to avoid treaty obligations by means of a mere unproved allegation that the treaty had been procured by corruption.

44. There was no necessity to include in the draft articles provisions to deal with every form of undue influence and to set up every one of them as a separate ground of invalidity.

45. Mr. TSURUOKA explained that, in saying it should not be assumed that the representative was of very low morality, he had been thinking of the usefulness of the proposed provisions, which depended on the frequency of the cases. The reason why he had tried to clarify the idea and the procedure was that it was the first time that an idea of that kind had been introduced as a ground of invalidity. Whenever the Commission wished to innovate, it must study the question more thoroughly and formulate the solution as fully as possible.

46. If the Commission wished to mention all the cases in which consent might be impaired, in addition to intellectual and moral causes, it would also have to include the permanent or temporary physical condition of the representative; that showed the danger of going into too much detail.

47. The CHAIRMAN, speaking as a member of the Commission, said that it was not a question of protecting everything that had the appearance of a treaty, but of protecting treaties worthy of the name, which were essentially deliberate acts based on the consent of the parties. A logical general rule inherent in the very nature of a treaty laid down that anything which had not been consented to could not form the basis of a treaty. Consequently, if it was proved that the will of a State

had not been expressed, there could be no question of a treaty.

48. The matters referred to by Mr. Tsuruoka were taken for granted in international law. When anyone spoke of the representative of a State expressing that State's consent, it was taken for granted that he meant a human being capable of expressing a will. Obviously if the representative of a State were certified as insane, no international court or arbitrator would uphold the contention that the instrument which he had helped to prepare on behalf of the State was a treaty.

49. Corruption invalidated consent and falsified the will of the State. Since the consent of the State had not been properly expressed, there was no treaty. Cases of corruption were no rarer than cases of fraud, but the Commission had included a provision on fraud, and in the present state of international law, in which the sovereign equality of States had to be safeguarded, it was very important to formulate a rule on corruption also. Moreover, as corruption was neither fraud nor coercion, it could not be covered by articles relating to fraud or coercion and should be dealt with in a separate article.

50. Mr. de LUNA said that it was always dangerous to formulate definitions in law but he would suggest as a definition of corruption: "Corruption is when the representative, before expressing consent on behalf of the State, has accepted an offer or promise, or gift as an inducement to express in a particular way the consent of the State he represents".

51. There were three elements in that definition: first, the idea that the offer, promise or gift was made prior to the expression of consent; secondly, the notion that the inducement could take a number of different forms, including that of an offer or promise of some gift or benefit to be given at a later stage; thirdly, the idea that the inducement should have the effect of swaying the decision of the State in a particular direction. On that last point, it was appropriate to remember the example of Talleyrand, who had received gifts from foreign powers but had nonetheless acted in accordance with the interests of France, so that despite the bribery he still validly represented, and defended, the interests of his State.

52. He could not agree with Mr. Briggs's interpretation of the provisions of paragraph 2. Neither that paragraph nor any other provision on defects of consent in the draft articles could possibly be construed as permitting a State unilaterally to repudiate its obligations under a treaty.

53. Questions of procedure were governed by the provisions of article 51. A State which claimed that a treaty was invalid was required under that article to notify the other party or parties of its claim. If the claim was disputed, the parties were required to seek a solution of the question through the means indicated in Article 33 of the Charter, such as arbitration or judicial settlement. If no means of settlement were found, the parties would remain in their respective positions. That situation, however, arose in connexion with all the substantive articles.

54. With regard to the placing of the provision on corruption, he favoured a separate article, since the ques-

tion was neither one of fraud nor one of coercion. If, however, it was felt undesirable for psychological reasons to give undue prominence to the question of corruption, paragraph 2 could be left in article 35, subject to the amendment of the title of the article as suggested by Mr. Reuter.

55. Mr. JIMÉNEZ de ARÉCHAGA said that he had been misunderstood. His main line of argument, which he had developed at the previous meeting,⁶ was not that the Drafting Committee's text was open to abuse, or that jurisprudence was lacking or that such a rule could not be applied by existing international tribunals. Nor had he argued that a treaty procured by corruption was valid. His argument had been that the treaty was voidable under the terms of article 33, which clearly covered the situation, although some additional explanation might be needed in the commentary. That was the best way to handle the problem, rather than in an independent provision or article framed as broadly as the text proposed by the Drafting Committee.

56. It was beyond dispute that the corruption or bribery by a State of the representative of another State engaged in negotiating a treaty constituted fraudulent conduct that entitled the injured party to invoke it as a ground for invalidating consent. That interpretation was fully confirmed by the text of article 33 (A/CN.4/L.115) and the last sentence in paragraph (4) of the commentary⁷ on the article.

57. Misrepresentation, concealment or non-disclosure of illicit benefit by any party to an act of corruption would vitiate an agreement secured by that means. Mr. de Luna, supported by the Chairman and Mr. Tunkin, had argued that there was a great difference between corruption and fraud and that the latter was a means of procuring consent by leading the other party into error, whereas in the case of corruption an agent had been suborned by bribery or some other benefit.

58. The means should not be confused with the results. Corruption was not an independent ground of defective consent, but a possible means of procuring consent through fraud or "*dol*". Rules of international law should not, any more than rules of municipal law, seek to cover expressly every means of obtaining consent by fraud. There was fraud or "*dol*" in the case of corruption because a State had been induced to consent to a treaty by an error brought about by the other party: the State's consent had been given in the belief that an agent representing that State had been defending its interests and not his own or the interests of the other party. That essentially was the situation contemplated in the concept of "*dol*" found in French law. The "*conduite frauduleuse*" consisted in there having been a secret understanding between an unfaithful agent and the other contracting party, a manoeuvre that had succeeded in inducing consent which would not otherwise have been given.

59. On the delicate question of law as to whether corruption was or was not comprised in the concept of fraud or "*dol*" and how it should be dealt with, the

Commission should be guided by the experience accumulated over the centuries in private contract law of municipal systems. To take an example from doctrine and case law, in France, the failure by an agent to disclose to his principal that he had received a bribe or a special benefit from the other party was regarded as a ground of nullity based on "*dol*" resulting from the manoeuvres of the other party with the complicity of the unfaithful agent. However, when the agent had been corrupted by a third party, the agreement was upheld so that the innocent party should not suffer from the consequences of such corruption; the rule followed in that case was that the principal should suffer the consequences of his choice of agent.

60. Paragraph (4) of the 1963 commentary on article 33 indicated the trend of opinion in the Commission and he continued to think that it would be preferable to formulate the article on fraud in as broad terms as possible, leaving its scope to be worked out in practice and by international tribunals. Nothing would be gained by attempting to enumerate the different methods whereby consent to a treaty could be secured through fraudulent conduct.

61. Mr. de LUNA said he questioned the view put forward by Mr. Jiménez de Aréchaga, that corruption could be assimilated to a special case of fraud or *dol* as a means of procuring the consent of a State. That was too general a definition since it could also be applied to coercion, for threats directed against a representative were only one way of procuring his consent.

62. A definition of fraud in internal law had been given in 1889 in the case of *Derry v. Peek*, from which it appeared that fraud was not to be confused with corruption. According to that definition fraud was "to induce any other person by intentional misrepresentation or concealment of a material fact peculiarly within his own knowledge, to enter into a contract, conveyance or similar transaction with him which he would not have entered into had he known the truth." In French internal law, there was fraud when one of the contracting parties misled the other.

63. If Mr. Jiménez de Aréchaga admitted that consent invalidated by corruption could not produce its full legal effect, it should be possible to reach agreement on the *sedes materiae*. But it would never be fraud, which was not a matter of determining the will of the representative of the State, but of deceiving the State itself. A well-known example was the treaty of Ucciali of 1889 between Italy and Abyssinia,⁸ by the Amharic text of which Abyssinia retained the right to conduct its own foreign relations, whereas by the Italian text, which he could not read, the Emperor of Abyssinia granted Italy the right to represent his country in foreign affairs.

64. It was clear from those examples that, legally speaking, corruption was not a special case of "*dol*" or fraud. The general idea of means of procuring consent was so wide that it covered practically all the articles dealing with defect of consent,

65. Mr. TUNKIN said that Mr. Jiménez de Aréchaga, while admitting that the possibility of corruption should be covered, had tried to persuade the Commission that

⁶ Paras. 84-93.

⁷ *Yearbook of the International Law Commission, 1963*, vol. II, p. 195.

⁸ *British and Foreign State Papers*, vol. LXXXI, p. 733.

that was already done in article 33; yet the division of opinion proved that some doubt subsisted as to whether fraud included corruption. A specific provision on the matter was needed to obviate any possible misconstruction, particularly in view of the categorical nature of the rule in the second sentence of the revised article 30,⁹ which read "A treaty the invalidity of which is established under the present articles is void".

66. Mr. JIMÉNEZ de ARÉCHAGA said that fraud or "*dol*", in the wide sense used by the Commission, covered any method employed by one contracting party with the deliberate intention of leading the other party into an error which determined consent. Corruption in which a contracting party was the active agent was one such method. Mr. Tunkin's argument that the divergence of view proved that an article was necessary was not persuasive, since in other instances of possible doubt about the scope of an article, the necessary explanations had been inserted in the commentary.

67. But his main objection was that the proposed article did not confine itself to stating that in the case of corruption the provisions on fraud would apply: it went much further. In contradistinction to article 33, the scope of application of the proposed paragraph 2 of article 35 was too wide and would bring to the ground, as null *ab initio*, any treaty consent to which had been obtained by corruption from any source whatever.

68. The CHAIRMAN, speaking as a member of the Commission, said he would try to give his view of the position in international law. There were, it was true, judgments which assimilated corruption to fraud, but that was due to the role of jurisprudence in internal law, especially in countries where the law was codified, for although there were articles on fraud in internal law, there were none on corruption. A judge who had to try a case of corruption was naturally bound to condemn it, but instead of basing his judgment on elements from which he could formulate a new rule to fill that gap in the law, he would probably prefer to base it on an existing article and proceed by analogy, even though the analogy might not always be a very close one.

69. The Commission was not trying a case, however; it was preparing a draft of international legislation and had more freedom of action than a judge in a national court. It should deal with the case direct, and, since many of its members considered that corruption and fraud were different defects in consent, it should formulate a rule accordingly.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that he was in the difficult position of agreeing partly with a great deal of what had been said. He might have been able to subscribe to the arguments developed by Mr. Jiménez de Aréchaga, because acts involving the corruption of a representative must be regarded as fraudulent, but if corruption were to be treated as a ground of invalidity it would have to be corruption attributable to a State and that would mean having to interpret corruption in a broad sense. If the term "fraud" were generally accepted as denoting such acts as the bribing of a representative to induce consent, it might be possible to cover the matter in the way suggested by Mr. Jiménez de Aréchaga.

71. Manifestly there was a difference of opinion in the Commission on that very point, although all might agree that, at least by implication, corruption would be understood to be covered. As a result of the discussion at the second part of the seventeenth session, he had attempted to produce a provision on corruption while still of the opinion that, if anything were to be included in the draft on the subject, it must be done as discreetly as possible, because the reaction of States to a provision framed in very bald terms might be unfavourable.

72. At the outset he had suggested a simple mention of corruption in article 35, paragraph 1, but that suggestion had been left aside by the Drafting Committee, which preferred that the problem of coercion should be treated entirely separately. He had not been very impressed by the need for a separate article because, for example, blackmail of a representative of a State, which was one form of coercion, was not very different from the corruption of that representative, so far as the obtaining of his signature to a treaty was concerned.

73. Should the Commission decide not to have a separate article but to insert a provision in article 35, it must take a clear position as to whether the provisions concerning estoppel and separability should apply in cases of invalidity due to corruption.

74. Now that the order of articles 33 and 34 had been reversed, if corruption were to be dealt with in a separate article its logical place would be between articles 33 and 35, in other words between "fraud" and "personal coercion".

75. There was a difference of opinion in the Commission as to whether corruption was necessarily a reason for avoiding the whole treaty. Some members considered that only certain provisions might be tainted and that the injured State would not necessarily wish the whole treaty to fall to the ground; others considered that corruption would fundamentally undermine confidence between the parties and therefore put an end to the whole treaty.

76. By and large the discussion at the present meeting had revealed some weight of opinion in favour of drafting an explicit provision instead of leaving the matter to be covered by the article on fraud. If that were the Commission's final conclusion, perhaps a separate article would be preferable and would make it easier for a diplomatic conference to decide the question when the Commission's draft came to be examined. There was some irony in the fact that at one stage, even the mention of corruption in the title of his draft article 35 had been received with alarm by the Drafting Committee as giving too much prominence to "corruption".

77. Whatever the Commission's final decision, members must be clear as to where the responsibility for a representative's yielding to corruption would lie. A State necessarily had a certain responsibility for its own selection of competent and honest representatives, so that the mere fact that a representative had taken a bribe from some person would not be enough. The corruption of a representative for the purpose of invalidating a treaty must mean corruption by the other party, whether by direct or by indirect means.

78. The problems that had arisen during the discussion prompted him to suggest that the article be referred back

⁹ See 862nd meeting, para. 75.

to the Drafting Committee with a tacit directive that a decision was needed on whether or not to insert a separate provision in the draft articles, and if so where.

79. The CHAIRMAN said that the Commission had to decide three questions. First, should a provision on corruption be included in the draft articles? Secondly, should the provision be in article 35 or should it form a separate article? Thirdly, if the provision formed a separate article, would the status of corruption be that of coercion or of error, and that raised the question of separability and estoppel. The Commission should perhaps decide, by voting, what instructions it wished to give the Drafting Committee.

80. Mr. CASTRÉN said he could agree to the inclusion in the draft of a provision on corruption on condition that it was a separate article, preferably placed after article 33 on fraud, that it was made clear that it applied only to corruption by another contracting party and not by a third State or private person or association, and that the legal consequences of corruption were the same as those of fraud, namely, not nullity, but voidability, and that the rule of separability of the provisions of a treaty also applied.

81. Sir Humphrey WALDOCK, Special Rapporteur, said he doubted whether it was necessary for the Commission to vote at that stage because he had enough information about members' views to enable him to prepare a new text on corruption for examination by the Drafting Committee. The discussion had revealed little support for the present text of article 35, paragraph 2.

82. Mr. BRIGGS said that there were only fourteen members of the Commission present at that moment, so it was undesirable to take a vote. It was the Commission's custom to refer articles to the Drafting Committee for re-examination in the light of the discussion. Clearly the choice lay between three alternatives, a provision in article 35, a separate article, or a modification of article 33. The matter should be referred back to the Drafting Committee.

83. Mr. TUNKIN said he agreed that there was no need to take a vote, but unless more precise instructions were given to the Drafting Committee the discussion on substance might be reopened there. The Commission should either take a vote or instruct the Drafting Committee to put forward proposals for a provision on corruption for inclusion in the draft articles, together with a recommendation as to its placing.

84. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Tunkin. The trends of opinion were now known and the question could be referred back to the Drafting Committee in the light of the discussion.

85. The CHAIRMAN suggested that article 35 be referred back to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*¹⁰

The meeting rose at 12.45 p.m.

¹⁰For resumption of discussion, see 865th meeting, paras. 1-27, article 34 (*bis*).

864th MEETING

Monday, 6 June 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 51 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)¹ [62]

1. The CHAIRMAN invited the Commission to consider the title and new text for article 51 proposed by the Drafting Committee, which read:

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

“1. A party which claims that a treaty is invalid, or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under its provisions, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

“2. If, after the expiry of a period which shall not be less than three months except in cases of special urgency, no party has raised any objection, the party making the notification may carry out the measure which it has proposed. In that event, article 50 shall apply.

“3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations.

“4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

“5. Without prejudice to article 47, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.”

¹ For earlier discussion, see 845th meeting, paras. 1-65.

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that several changes had been made to the 1963 text (A/CN.4/L.107). The order of articles 50 and 51 had been reversed and the 1963 title "Procedure in other cases" had accordingly been changed to "Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty".

3. With regard to the text, the opening words of paragraph 1 had been amended so as to draw a distinction between a party claiming that a treaty was invalid *ab initio* and a party alleging a ground for terminating, withdrawing from or suspending the operation of a treaty. In the French text, the term "*allègue*" had been replaced by "*fait valoir*" and "*motif*" by the more appropriate term "*cause*".

4. The former sub-paragraphs (a) and (b) had been dropped as such, but the substance of sub-paragraph (a) had been incorporated as the second sentence of the new paragraph 1, while that of sub-paragraph (b) had been transferred to the new paragraph 2, less the concept of a time period set by the claimant party.

5. Paragraphs 3 and 4 in English were identical with the 1963 text; in the French text, the words "*une autre partie*" in paragraph 3 had been replaced by "*toute autre partie*" and the plural noun "*dispositions*" in paragraph 4 by the singular. Paragraph 5 had been re-drafted without altering the substance, so as to make the meaning clearer.

6. The CHAIRMAN invited the Commission to consider the new text for article 51 paragraph by paragraph.

Paragraph 1

7. Mr. JIMÉNEZ de ARÉCHAGA said that the 1963 presentation had the advantage of leaving no doubt on the very serious matter of the scope of article 51. By placing it after article 50, and entitling it "Procedure in other cases", the Commission had then stressed the fact that the provisions of article 51 applied in all cases in which a State claimed invalidity or termination, or alleged grounds for withdrawing from or suspending the operation of a treaty, under any of the draft articles.

8. There was some danger that the presentation now proposed might introduce an element of unilateralism. No doubt it had been the intention of the Drafting Committee that the provisions of article 51 should continue to govern the initial procedure in all cases and that the provisions of article 50 should come into play only after the procedure of article 51 had been followed, but that intention had not been made sufficiently clear. Paragraph 2 of article 51 stated that, in the cases governed by it, article 50 would apply, but it did not say that article 50 would not apply in other cases.

9. In a matter of such great importance as the procedure to be followed to invalidate or terminate treaties, it was essential to avoid all ambiguity. The presentation now proposed could lead to the interpretation that article 51 governed only those cases in which invalidity could be invoked at the option of the interested party, whereas article 50 governed cases of invalidity *ab initio*. It was clearly not the Drafting Committee's intention to arrive at such a result, but that interpretation was not only

possible but even plausible. The difficulty could be overcome if in the first sentence of paragraph 1, after the words "claims that a treaty is invalid", the words "under any of the provisions of articles 31 to 37" were added, and the words "otherwise than under its provisions" were replaced by the words "under articles 39 and 41 to 45 inclusive".

10. Mr. BRIGGS said that, if those changes were made, any ground of invalidity based on earlier articles of the draft would be excluded from the procedure laid down in article 51.

11. Mr. JIMÉNEZ de ARÉCHAGA said that it had been the Commission's understanding that all the grounds of invalidity and termination were set forth in the articles to which he had referred.

12. Mr. ROSENNE said that paragraph 1 of article 30 as adopted at the 862nd meeting² stated "The validity of a treaty may be impeached only through the application of the present articles". Paragraph 2, as adopted at the second part of the seventeenth session, stated that termination, denunciation, withdrawal or suspension could be effected "only as a result of the application of the terms of the treaty or of the present articles".³ During the discussion on those provisions, the question had been raised whether the draft articles covered all cases of invalidity and termination and it had been pointed out that there could be cases that lay outside the law of treaties altogether;⁴ one example given had been that of termination which might arise as a consequence of State responsibility or State succession. For that reason, he would need time for reflection before he could give an opinion on Mr. Jiménez de Aréchaga's suggestion.

13. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 51 and 50 must be viewed in the light of the earlier articles, particularly article 30. The order of the two articles had been deliberately reversed by the Drafting Committee, so as to make it clear that article 50, which dealt with the final act of termination of a treaty, presupposed that the act was performed in circumstances in which termination was legitimate.

14. The difficulty in article 51 was that despite its safeguards, its provisions on negotiations and its reference to Article 33 of the Charter, it did not deal with the possibility of a deadlock. Clearly, under article 50, if no settlement was reached after exhausting the procedures specified in article 51, the parties would be left to act on their own responsibility. That looseness was inherent in the rules of contemporary international law on the adjudication of disputes.

15. He sympathized with Mr. Jiménez de Aréchaga's wish to see the provisions of article 51 made as clear as possible but it should be remembered that the Commission had not covered all the factual causes of termination in its draft articles; obsolescence, for example, had not been dealt with specifically. As far as State responsibility and State succession were concerned, however, he himself believed that they were governed by different principles.

² Para. 75.

³ *Yearbook of the International Law Commission, 1966*, vol. I, part I, 841st meeting, para. 21.

⁴ *Ibid.*, 823rd and 841st meetings.

16. The CHAIRMAN, speaking as a member of the Commission, said he had no difficulty in accepting paragraph 1, which was an improvement on paragraph 1 of the article adopted in 1963. It was impossible fully to understand article 51 without referring to article 30, which made it clear that the grounds for invalidity were stated exhaustively in the articles.
17. Mr. AGO said he hoped the Commission would take time to reflect on the proposal made by Mr. Jiménez de Aréchaga, which he himself regarded quite favourably. It was important to draft the article very precisely. The Commission should continue its examination of the article, and return later to paragraph 1 and Mr. Jiménez de Aréchaga's proposal.
18. Quite apart from that proposal, he would suggest that, in the French text, the words "*autrement qu'en vertu des dispositions*" be replaced by the words "*autrement que sur la base des dispositions*", as had already been done in several articles. Also in the French text, at least, the title should be improved by amending it to read "*Procédure à suivre en cas de nullité d'un traité, de cause pour y mettre fin,*" etc., because the word "*fin*" used by itself suggested an "end" in the absolute sense.
19. The CHAIRMAN, speaking as a member of the Commission, said he supported Mr. Ago's proposal concerning the title; furthermore, the words "*du traité*" should be inserted after the word "*retrait*".
20. Mr. CASTRÉN said he agreed that the proposed additions to the title were justified, but they might make it rather too long.
21. The CHAIRMAN, speaking as a member of the Commission, said it was essential that the title should be not only accurate, but also grammatically correct.
22. Mr. TUNKIN said that he would hesitate to introduce the reference to specific articles suggested by Mr. Jiménez de Aréchaga. Paragraph 1 as it stood could hardly give grounds for apprehension as to the scope of its provisions.
23. Those provisions, both in the 1963 text and in the Drafting Committee's rewording, were placed within the framework of the Charter, and referred specifically to the methods of peaceful settlement laid down in Article 33 of the Charter. Article 51 was incomplete to the extent that Article 33 of the Charter itself was incomplete. If the States chose a specific procedure to try and settle their dispute, and that procedure did not lead to a settlement, the State concerned might take some other action, subject of course to the prohibition of the threat or use of force contained in the Charter itself. In 1963, it had been clear that in such cases, unilateral action could be taken by the State under its responsibility.
24. Mr. de LUNA said that, although he sympathized with the desire of Mr. Jiménez de Aréchaga to uphold the security of international relations by tightening the procedure for termination, he did not favour the introduction of references to specific articles. The experience of codification in municipal law emphasized the dangers of enumeration; even if, at the time of codification, an enumeration could be shown to be complete, there could be no certainty that new cases for which provision had not been made would not arise in the future.
25. In the circumstances, he favoured the approach adopted by the Drafting Committee, subject to a possible improvement of the language.
26. Mr. JIMÉNEZ de ARÉCHAGA said that reference had been made to the situation arising under paragraph 3, which specified that, if objection was raised, the parties must seek a solution through the means indicated in Article 33 of the Charter. As he interpreted that situation, no unilateral action was possible under paragraph 3; unilateral action was permitted only in the event of no objection being made, which was the situation covered by the provisions of paragraph 2.
27. As far as paragraph 1 was concerned, he had no strong feelings as to the formulation, provided its provisions were kept as comprehensive as they had been in the text adopted in 1963.
28. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Jiménez de Aréchaga's object could be achieved in some other way. For example, the opening words could be amended to read: "Any party which claims that any treaty" and the words "otherwise than under its provisions" could be replaced by the words "under the provisions of the present articles"; if that second change were adopted, the comma after the words "a treaty is invalid" should be dropped.
29. Another point which deserved consideration was the inappropriateness of referring to the "parties" to an invalid treaty, bearing in mind the definition of "party" in article 1 (*f*) (*bis*) as "a State which has consented to be bound by a treaty and for which the treaty has come into force".
- Paragraph 2*
30. Mr. REUTER said that the object of paragraph 2 was to establish a kind of moratorium; that was a fair and salutary idea, but he doubted whether it was applicable to all the cases contemplated in paragraph 1. In particular, in the case of supervening impossibility of performance provided for in article 43, the treaty would in fact cease to be applied before the period had expired. In the present drafting, the expression "may carry out the measure" seemed to mean that the party in question could legally take the measure it had proposed. It might therefore be more accurate to say "may consider the measure it has proposed as having been accepted", which would not decide the question whether the measure was taken or not.
31. Mr. AGO said he agreed that the moratorium could not be applied in the case contemplated by Mr. Reuter. He would hesitate to accept the wording suggested by Mr. Reuter, however, because to generalize the idea that after three months the State could consider the measure it had proposed as having been accepted, would give the impression that the measure could be taken immediately, whereas, generally speaking, that was not what the Commission intended. The Drafting Committee should review the wording carefully and try to reconcile all the requirements.
32. Sir Humphrey WALDOCK, Special Rapporteur, said that the term "measure" was intended to refer to a step or legal act performed with respect to the treaty.

33. In the example given by Mr. Reuter, if the impossibility of performance was real, there was nothing in the provisions of paragraph 2 to prevent the State concerned from raising the question of the continued validity of the treaty on its own responsibility.

34. Mr. JIMÉNEZ de ARÉCHAGA said that the words "except in cases of special urgency" ought to allay Mr. Reuter's concern, particularly as, in cases of impossibility of performance, the treaty would not have been performed and the question discussed by the parties would be that of responsibility for the non-performance.

35. Mr. BRIGGS said that the problem went back to the second sentence of paragraph 1, which required the notification to indicate the measure proposed to be taken with respect to the treaty. Perhaps that sentence should be made more explicit.

36. Mr. REUTER said he had only intended to comment on the drafting, because there seemed to be no doubt about the meaning of paragraph 2. In the French version, at least, the expression "*prendre la mesure*" was too active and too precise to apply to all the cases contemplated in paragraph 1. It might perhaps be better to say "*appliquer la solution*". The word "solution" would certainly be better than the word "measure" in cases where a State claimed that a treaty was valid.

Paragraph 3

37. Mr. BRIGGS asked whether the second sentence of paragraph 2, "In that event, article 50 shall apply", should not also apply to paragraph 3.

38. Mr. AGO said that the expression "a solution of the question" was not very felicitous. It would be more accurate to speak of a "settlement of the dispute", for if the parties had to resort to the means indicated in Article 33 of the Charter, the question to be settled was certainly a dispute. Alternatively, if the Commission preferred not to use the word "dispute", it could delete the words "of the question".

39. The CHAIRMAN, speaking as a member of the Commission, said he preferred Mr. Ago's second alternative.

40. Sir Humphrey WALDOCK, Special Rapporteur, said that he was not in favour of using the term "dispute", as he did not wish to prejudge the technical question whether a dispute would actually arise. As far as the English text was concerned, the expression "solution of the question" was satisfactory.

41. With regard to the question raised by Mr. Briggs, it was by no means clear that article 50 would apply in the cases contemplated in paragraph 3; the parties might reach an agreement, so that no unilateral action would take place. The purpose of the last sentence of paragraph 2 was to make it clear that the unilateral act of the State concerned could not be of an informal character; for example, under article 50, the State receiving the notification could call for full powers from the State making it.

42. Mr. TUNKIN said that the reference to article 50 was not necessary either in paragraph 2 or in paragraph 3. The matter was clear from the sequence of the articles.

43. Mr. BRIGGS said that he was inclined to share that view.

44. Mr. JIMÉNEZ de ARÉCHAGA said that he could agree to the omission of the reference to article 50 in paragraph 3, but he thought that its inclusion was necessary in paragraph 2 in order to emphasize the sequence of events, particularly since it was proposed to reverse the order of the two articles.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that it might be an improvement to combine the second sentence of paragraph 2 with the first, which would then conclude with some such wording as "in the manner provided for in article 50".

Paragraph 4

No comment.

Paragraph 5

46. Mr. CASTRÉN said he still thought the Swedish Government had been right in criticizing paragraph 5. It was dangerous, because it could be understood as an invitation to dispense with the procedure laid down in the previous paragraphs, which would reduce the already rather weak safeguards to nothing. Moreover, it dealt with a point of detail, whereas the draft articles should deal only with general problems. He therefore proposed that paragraph 5 be deleted or transferred to the commentary.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of paragraph 5 were not very important but should be retained, because they were logical. They had been included in order to avoid creating a situation in which a State, merely because a notification had not been made, might be prevented from raising some self-evident grounds of termination such as impossibility of performance.

48. Mr. de LUNA said he also was in favour of retaining paragraph 5. If it were dropped, the effect might well be the opposite of that desired by the advocates of that course. A State which had doubts with regard to the validity of a treaty might be tempted to put forward a claim of invalidity, or call for the termination or suspension of a treaty, merely as a precaution. Under the provisions of paragraph 5, a State in that position could remain on the defensive and only raise the issue if another State claimed the performance of the doubtful treaty, or alleged its violation.

49. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion on article 51, said that some useful drafting suggestions had been made but there was no disposition to depart from the main structure of the 1963 article. The general feeling was that the shorter text proposed by the Drafting Committee represented an improvement but that further improvement was still possible. He accordingly proposed that article 51 be referred back to the Drafting Committee for reconsideration in the light of the discussion.

50. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 51 back to the Drafting Committee as proposed by the Special Rapporteur.

*It was so agreed.*⁵

⁵ For resumption of discussion, see 865th meeting, paras. 28-53.

ARTICLE 50 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) [63,64]

51. The CHAIRMAN invited the Commission to consider article 50, for which the Drafting Committee had proposed a new title and text⁶ which read:

“Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty”

“1. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of the present articles shall be carried out through an instrument communicated to the other parties in accordance with article 29 (*bis*).

“2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.”

52. Mr. BRIGGS, Chairman of the Drafting Committee, said that in addition to reversing the order of articles 50 and 51, the Drafting Committee had proposed a new title which described better the contents of the article as redrafted.

53. In paragraph 1, the reference to communication through the diplomatic or other official channel had been replaced by a reference to “an instrument communicated to the other parties in accordance with article 29 (*bis*)”.

54. The new paragraph 2, dealing with the evidence of authority to denounce a treaty, embodied an idea originally contained in article 49, which had since been dropped.

55. The former paragraph 2 had been deleted and its contents made the subject of the new article 50 (*bis*) entitled “Revocation of notifications and instruments provided for in articles 51 and 50”.⁷

56. Lastly, the purport of the article had been changed by adding the words “or of the present articles” after the words “of the treaty” in paragraph 1.

57. Mr. ROSENNE said he wished to suggest, as a general question, the insertion of a provision, either in article 50 or elsewhere in the draft articles, to the effect that termination of or withdrawal from a treaty should be registered with the Secretariat of the United Nations under Article 102 of the Charter and article 25 of the Commission’s draft articles, which made provision for the registration and publication of the conclusion of treaties. Article 2, paragraph 1, of the General Assembly’s regulations⁸ to give effect to Article 102 of the Charter called for the registration of any “subsequent action” which effected a change in a treaty, and article 26, paragraph 4, of the draft articles (Correction of errors in texts or in certified copies of treaties) contained a special provision on registration.

⁶ For previous title and text, see document A/CN.4/L.107. For earlier discussion, see *Yearbook of the International Law Commission, 1966, vol. I, part I, 836th meeting, paras. 52-91, and 842nd meeting, para. 107.*

⁷ See below, para. 74.

⁸ Reproduced as an annex to the Commission’s report on its fourteenth session; see *Yearbook of the International Law Commission, 1962, vol. II, pp. 194-195.*

58. His reason for that suggestion was that articles 51 and 50 were intended to introduce order into the process of the termination of treaties and to close the door to certain abuses which had occurred in the period between the two world wars. That purpose would be furthered if a provision were included somewhere requiring the registration of the termination of, or withdrawal from, a treaty.

59. Mr. BRIGGS said that since articles 48 and 49 had been deleted, adoption of the Drafting Committee’s proposal to reverse the order of articles 50 and 51 would make article 51 follow article 47, which dealt with estoppel.

60. In view of the insufficient safeguards embodied in article 51, it was unfortunate that the redraft of article 50 referred to acts by which a treaty was declared invalid or terminated. In actual fact, none of the substantive articles adopted by the Commission provided a basis for a unilateral act of denunciation or termination; the various substantive articles referred to grounds of invalidity or termination and article 51 itself referred not to “acts” but to “measures”. He would accordingly suggest that, in paragraph 1, the words “or of the present articles” be replaced by the words “or in application of article 51 of the present articles”.

61. Mr. REUTER said that article 51 provided for two kinds of act: first, the act by which the State made its claim and secondly, the act by which, after the expiry of the period of three months, the State unilaterally took the measure it had proposed if the means indicated in Article 33 of the Charter had not made it possible to reach a solution. In view of that possibility of a unilateral act which was reserved in article 51, paragraph 1 of article 50 was correct.

62. Mr. TUNKIN said that the Commission must be consistent and face realities. Even in the situations contemplated in article 51, paragraphs 2 and 3, States might in the end have recourse to unilateral action to declare a treaty invalid or their intention to withdraw from it, and article 50, paragraph 1 did not exclude such a possibility. To argue the other way would mean providing for compulsory international adjudication and it was common knowledge that for the time being such a provision had no chance of being accepted by States. The Drafting Committee had given a great deal of thought to article 50 and he doubted whether it would be able to improve on the present wording which was clear and not open to misconstruction.

63. Mr. EL-ERIAN said that in the Drafting Committee he had expressed his apprehensions about any attempt to modify article 50 because of the danger that it might upset the balance achieved at the fifteenth session in regard to the doctrinal division of opinion in the Commission. As he understood it, the view of certain members was that, in the last resort, the problems raised by unilateral acts must be treated in their proper perspective as aspects of the pacific settlement of disputes in accordance with Article 33 of the Charter.

64. Mr. JIMÉNEZ de ARÉCHAGA said that, in view of the suggestion by Mr. Briggs and the comments by other members about the close links between articles 50 and 51, the two should be re-examined to-

gether by the Drafting Committee. The whole discussion seemed to suggest that the fundamental pattern established at the fifteenth session, which had then proved acceptable to the Commission, would have to be maintained.

65. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission must decide how it wished to handle articles 50 and 51. Personally he had never lost sight of the fact that the balance achieved at the fifteenth session was a delicate one. He had always been in favour of fairly strict procedural safeguards and the force of the safeguards had not been diminished by the changes now introduced in those two articles by the Drafting Committee. Article 50 in its new form was of value at the present stage in the development of international law, and article 51 should help to protect the stability of treaties by introducing some measure of regularity in procedure. Read together the two articles constituted a progressive development.

66. Mr. Briggs might be right in thinking that the procedural safeguards in article 51 were inadequate, but they were reinforced by various other provisions in the draft articles designed to accomplish the same result.

67. The Commission must face the fact that a compulsory adjudication clause was unlikely to be accepted in a codifying convention and that once the alternative procedures laid down in article 51 had been tried unsuccessfully, a state of deadlock might be reached between the parties. However, there was no reason to suppose that the draft articles would be interpreted as licensing States to resort lightly to unilateral action. Article 50 in its revised form did not authorize States to do anything not already authorized in other provisions of the draft and, far from derogating from the procedural safeguards laid down, should in fact strengthen them.

68. Mr. TUNKIN said that there was no point in referring article 50 back to the Drafting Committee. The problems involved had been discussed at great length, both in the Commission and in the Drafting Committee, at various stages of the work and no new considerations had come to light at the present discussion. The Commission should speed up its work so as to give the Special Rapporteur enough time during the session to prepare the draft texts of the commentaries, a task he could not undertake until the Commission had reached a final decision about the articles themselves.

69. Mr. JIMÉNEZ de ARÉCHAGA and Mr. TSURUOKA said they could not vote for article 50 until they knew what the content of article 51 would be.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that it was not Mr. Jiménez de Aréchaga's proposal concerning article 50 that he had challenged, but his suggestion that the Commission might have to revert to the 1963 structure of articles 50 and 51, a step which could hardly be taken at that stage. It seemed to him unnecessary to refer article 50 back to the Drafting Committee.

71. Mr. EL-ERIAN said that he had always appreciated the way in which the Special Rapporteur tried to take account of differing views expressed in the Commission itself and those emanating from governments or dele-

gations to the Sixth Committee. A number of improvements had been introduced in articles 50 and 51, but the general framework established at the fifteenth session must be maintained because of the delicate balance it reflected.

72. The CHAIRMAN, speaking as a member of the Commission, said he supported Mr. Jiménez de Aréchaga's view, because he considered that the two articles were very closely connected. Once article 51 had been reviewed, it would not take long to discuss article 50.

73. Speaking as Chairman, he put to the vote Mr. Jiménez de Aréchaga's proposal that article 50 be referred back to the Drafting Committee.

Mr Jiménez de Aréchaga's proposal was adopted by 7 votes to 4, with 5 abstentions.⁹

NEW ARTICLE

ARTICLE 50 (*bis*) (Revocation of notifications and instruments provided for in articles 51 and 50) [64]

74. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new article 50 (*bis*), based on the former paragraph 2 of article 50 (A/CN.4/L.107), reading:

"Revocation of notifications and instruments provided for in articles 51 and 50"

"A notification or instrument provided for in articles 51 and 50 may be revoked at any time before it takes effect."

75. The CHAIRMAN, speaking as a member of the Commission, said he had no objection to the new drafting, but wondered whether it was possible to speak of the revocation of "an instrument" in French; he thought it was only the legal act which could be revoked.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the word "instrument" had been used in order to refer the reader back to article 50 and to make clear that there was a difference between a notification, which might be of a preliminary kind, and a final act, which should be a formal communication to the other parties. In the commentary on article 50 (*bis*), it would be necessary to explain why the Commission had rejected the idea that any assent by other parties would be needed in the latter case.

77. Some governments had criticized an earlier version of the provision concerning the revocation of notifications and instruments provided for in articles 50 and 51, on the ground that one of the objects of notifications or time-limits was to enable the other parties to make the necessary administrative arrangements for the situation that would develop, once the act took effect. Those governments found unacceptable the proposition that, if a time-limit were imposed and the other parties had made administrative changes, they could then be confronted with a simple act of revocation which, to take effect, would not require their assent. In the Commission, arguments for and against had been put forward, but the consensus of opinion in the Drafting Committee

⁹ For resumption of discussion, see 865th meeting, paras. 54-63.

had been that the wisest course was to drop the requirement that the assent of the other parties would be needed for an act of revocation to take effect.

78. Mr. BARTOŠ, replying to Mr. Yasseen, said that the word "instrument" had been used in order to emphasize that the act must take a special form, because a most important question was involved. It would be very difficult for the Commission, having adopted that system and given the act in question a very formal character, to reduce it again to a simple act. It was well to emphasize that an act of revocation must be in solemn form, even though the Commission had not prescribed that form for the initial act of concluding a treaty, but only required the expression of consent in writing by a State party to the treaty.

79. He supported the Drafting Committee's text for the article.

80. The CHAIRMAN, speaking as a member of the Commission, said that he had not been expressing an opinion on the substance of the article, merely a doubt about the possibility, in French, of speaking of the revocation of an instrument.

81. Mr. TSURUOKA said that if the article were put to the vote he would have to abstain, because the interest of the State to which the revocation was addressed did not seem to him to be sufficiently protected if the act of revocation produced its effect immediately the notification or instrument was revoked.

82. The CHAIRMAN put to the vote article 50 (*bis*) as proposed by the Drafting Committee.

Article 50 (bis) was adopted by 12 votes to none, with 3 abstentions.

ARTICLE 52 (Consequences of the invalidity of a treaty) [65]¹⁰

83. The CHAIRMAN invited the Commission to resume consideration of article 52, for which the Drafting Committee proposed a new title and text reading:

"Consequences of the invalidity of a treaty"

"1. The provisions of a void treaty have no legal force.

"2. If acts have nevertheless been performed in reliance on such a treaty:

(a) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) Acts performed in good faith before the nullity was invoked are not rendered unlawful by reason only of the nullity of the treaty.

"3. In cases falling under articles 33, 35 or 36, paragraph 2 does not apply with respect to the party to which the fraud, coercion or corrupt act is imputable.

"4. In the case of invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty."

84. Mr. BRIGGS, Chairman of the Drafting Committee, said that the word "legal" had been dropped from the title of the article. Paragraph 1 was new. In paragraph 2 the order of the sub-paragraphs in the 1963 text had been reversed and the wording sharpened. Paragraph 3 was based on the former paragraph 2, but had been amplified so as to refer to a corrupt act. Paragraph 4 contained a restatement of the principle set out in the former paragraph 3.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that his earlier attempts to draft an article on the consequences of invalidity had been complicated by the existence of articles 37 and 45 that dealt with a further ground of invalidity by reason of conflict with *jus cogens*. It was important that members should know, in discussing article 52, that there was now in addition a separate article 53 (*bis*)¹¹ which would deal in one paragraph with cases under article 37, and in a second paragraph with cases under article 45.

86. Mr. ROSENNE said that he had no difficulty in accepting the Drafting Committee's text of article 52 but wished to know what was its relationship to article 39 (*bis*) (A/CN.4/115) as adopted at the second part of the seventeenth session. The provision in article 39 (*bis*) had originated in article 38, paragraph 3 (*b*) of the 1963 text (A/CN.4/L.107), which had been exclusively concerned with termination. Now that article 39 (*bis*) stood alone in part II, it could also be interpreted as being applicable in cases where the treaty was voidable at the option of one of the parties, especially under articles 31, 32, 33 and 34. He was less concerned with cases where treaties were void under articles 35, 36 and 37.

87. In cases when a treaty was rendered void by the action of one party successfully invoking one of the grounds invalidating consent so that it ceased to be a party, and the number of parties fell below the minimum necessary for the entry into force of the treaty, he assumed that article 39 (*bis*) would apply. If a problem did exist, perhaps it was article 39 (*bis*) and not article 52 that would need to be re-examined.

88. Mr. de LUNA said he agreed with Mr. Rosenne. If there was nullity *ab initio* of the consent of a State to a multilateral treaty, it was impossible to apply the provisions of article 39 (*bis*). The *sedes materiae*, however, was not article 52 but article 39 (*bis*), because it was established *a posteriori* that there had never been a sufficient number of parties for the treaty to enter into force, and the result was therefore nullity *ab initio*, in the same way as if there had been no consent by one of the parties, although such a situation would be impossible.

89. Sir Humphrey WALDOCK said he understood Mr. Rosenne's preoccupation but the point was covered in article 39 (*bis*).

90. Mr. AGO said that one article that might affect article 52 was the new article 53 (*bis*), to which the Special Rapporteur had referred. As he personally would prefer article 53 (*bis*) to be deleted and its two paragraphs included in two other articles, he hoped approval of

¹⁰ For earlier discussion, see 846th meeting, paras. 1-57.

¹¹ For the text of article 53 (*bis*), see 865th meeting, para. 71.

article 52 would be without prejudice to the fate of article 53 (*bis*), paragraph 1.

91. The CHAIRMAN, speaking as a member of the Commission, said that it was on the strength of the Special Rapporteur's assurance with regard to article 53 (*bis*) that several members of the Commission had accepted article 52, to which otherwise there would have been many objections.

92. Mr. TSURUOKA said that paragraph 3 contained a reference to corruption. As the Commission had not yet taken any decision on that matter, he presumed that the vote on article 52 would be without prejudice to whatever position it might take with regard to corruption.

93. Mr. BRIGGS, Chairman of the Drafting Committee, said that the vote on article 52 should be deferred until the Commission had before it the Drafting Committee's text of article 53 (*bis*): they must be examined together.

94. Mr. TUNKIN said he agreed with the Chairman of the Drafting Committee. Article 52 stated a general rule and article 53 (*bis*) would provide particular rules concerning invalidity as a consequence of a conflict with *jus cogens*.

95. The CHAIRMAN suggested that the decision on article 52 be deferred until the Commission had examined article 53 (*bis*).

*It was so agreed.*¹²

ARTICLE 53 (Consequences of the termination of a treaty) [66]¹³

96. The CHAIRMAN invited the Commission to resume consideration of article 53, for which the Drafting Committee had proposed a new title and text reading:

"Consequences of the termination of a treaty"

"1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any rights or obligations of the parties or any legal situation created through the execution of the treaty prior to its termination.

"2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

97. Mr. BRIGGS, Chairman of the Drafting Committee, said that paragraph 2 of the 1963 text was to be transferred to article 53 (*bis*), while paragraph 4 of the 1963 text was now incorporated in article 30 (*bis*) (A/CN.4/L.115), leaving only paragraphs 1 and 3, the substance of which the Drafting Committee had sought

to cover in the revised text. The principles it set out had been approved by the Commission at its fifteenth session.

98. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion at the present session had been focussed on paragraph 1 of the 1963 text. The Drafting Committee had tried to devise a formula that would safeguard the legitimate interests of the parties under the treaty, leaving aside the difficult issues raised by the doctrine of vested rights.

99. Mr. BRIGGS said that he had already recorded his objection to the proviso "unless the treaty otherwise provides or the parties otherwise agree", which was inappropriate from a drafting point of view.

100. Mr. BARTOŠ said he would abstain in the vote on article 53 because it was directly connected with article 29 (*bis*). He was not satisfied with the system provided for in article 29 (*bis*), which was still being considered by the Drafting Committee.

101. The CHAIRMAN put article 53 as revised by the Drafting Committee to the vote.

*Article 53 was adopted by 10 votes to none, with 5 abstentions.*¹⁴

102. Mr. PAREDES, explaining his vote, said that his objections applied only to paragraph 1 (*b*). He considered it impossible to maintain, as the Commission did in that provision, that the rights and obligations created while the treaty was in force could subsist, while at the same time affirming in article 52, paragraph 2 (*a*), a sort of right to restitution *in integrum* for those who had suffered from the consequences of the invalidity of a treaty. There was a duality if not an actual opposition, contrary to all legal thinking, between the two points of view: on the one hand full restitution, and on the other hand the thesis that the rights and obligations had been created in a valid manner and produced legal effects.

The meeting rose at 5.45 p.m.

¹⁴ The Drafting Committee subsequently made some changes in the French text of article 53, which was therefore put to the vote a second time (see 865th meeting, paras. 66-69). For a further amendment to the text of the article, see 891st meeting, para. 88.

865th MEETING

Wednesday, 8 June 1966, at 10 a.m.

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

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

¹² For decision on article 52, and the discussion of article 53 (*bis*), see 865th meeting, paras. 64, 65 and 71-85.

¹³ For earlier discussion, see 846th meeting, paras. 59-78, 847th meeting, paras. 2-89, and 848th meeting, paras. 1-18.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

NEW ARTICLE

ARTICLE 34 (bis) (Corruption of a representative of the State) [47]

1. The CHAIRMAN invited the Commission to consider the text of the Drafting Committee's new article on corruption.

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee had considered the form that the provision concerning the corruption of a representative should take, a question which had been referred back to it by the Commission. In the Drafting Committee's text for article 35 which had been considered at the 862nd and 863rd meetings, the provision had appeared in paragraph 2.¹ After further consideration the Drafting Committee now proposed that the provision be incorporated in a separate article, the wording of which should be modelled on the articles concerning fraud and error. The new text proposed read :

*Article 34 (bis)**"Corruption of a representative of the State"*

"If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another contracting State, the State may invoke such corruption as invalidating its consent to be bound by the treaty."

3. The Drafting Committee had also considered what bearing article 46 on separability and article 47 dealing with estoppel would have on the new provision and had concluded that those two articles would need to be modified so that the corruption of a representative would have the same legal effect as consent procured by fraud.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had been at pains to express the idea that the corruption must ultimately be imputable to the other contracting State, and the phrase "through the corruption of its representative directly or indirectly by another contracting State" was intended to cover all the possible circumstances in which a State could invoke corruption as a ground of invalidity.

5. Mr. BARTOŠ said he was glad that the Drafting Committee had devoted a separate article to corruption, for he believed that that cause of invalidity of consent should be distinguished from the others.

6. He was also glad to note that the article provided that "the State may invoke such corruption", which meant that only the State directly concerned was entitled to invoke it as a reason for invalidity and that other States could not invoke it before the international community;

indeed, national honour sometimes required that a case of corruption should not be made public.

7. On the other hand, the Commission should be careful to avoid saying that corruption had the same effect as fraud. In his opinion, it would be wrong to assimilate corruption either to coercion or to fraud.

8. Mr. TSURUOKA said the text was a great improvement on the previous proposal: according to the new text, the corruption referred to must have been carried out, directly or indirectly, by another contracting State; the State would only be entitled to invoke it, and the effect it would have on the validity of the treaty was less drastic.

9. He was not convinced, however, of the need to include an article on corruption in the draft. In the first place, there was a difference between fraud and corruption. In the case of fraud, there was an evil intention to impair the understanding of the representative of the other contracting party, whereas corruption depended on some weakness of the representative and did not affect the freedom of expression of the State's consent. In the case of corruption, the result depended on the personality of the representative, who might or might not be able to resist temptation, rather than on the act itself. From the point of view of freedom to express consent, that was a very important difference, so that assimilation of the effects of the two cases was not entirely justified.

10. Secondly, as the article was drafted, it would be sufficient for the other contracting State to say that it had no intention of corrupting, but had merely wished to maintain good relations with the State and its representative by offering him decorations and all kinds of facilities to visit the country, for example. It was so difficult to prove corruption that it was hard to see when the rule could be applied.

11. Mr. AGO said he did not think that cases of consent obtained by corruption were either so rare or so difficult to prove. Indeed, it was easier to corrupt than to apply personal coercion. He would not wish the Commission to leave the case of corruption out of account, but he was quite willing that it should allay anxiety by providing a clear explanation in the commentary to the effect that the article was intended to deal with serious acts of corruption in the true sense of the term.

12. It must be proved that consent had been invalidated, because if it were found that consent would have been given without corruption, there was no case.

13. The French text would probably be clearer if the word "*opérée*" were inserted before the word "*directement*".

14. Mr. TSURUOKA said it would be very difficult to prove that consent would not have been given without corruption. By definition, all negotiations consisted in obtaining mutual concessions, and a country seldom adhered to its original position. The fact that there had been concessions and retreats from original proposals did not necessarily mean that consent had been invalidated. It was a question of nuances which it was very difficult to decide in practice.

15. Mr. AMADO said he would be sorry to believe that States were so careless of their own interests as to

¹ See 862nd meeting, para. 81.

entrust them to venal individuals liable to be corrupted. In the law of contract, which had come down from the Romans, there was the age-old classification of error, fraud and coercion: why should the Commission add to it?

16. He would vote against the article, because he considered he would not be true to his principles if he voted in favour of it.

17. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was legislating for human beings, who had their failings, and it must try to protect the interests of the community, so although he hoped that the article need never be applied, he considered that its inclusion in the draft was essential.

18. Mr. BRIGGS said that he could not agree with the Chairman. For the persuasive reasons given by Mr. Amado, and for the reasons he himself had given at the 863rd meeting,² he would be unable to vote in favour of article 34 (*bis*), which added nothing to the Commission's draft articles and was unnecessary.

19. Mr. de LUNA said that although an ambassador acting as a messenger had some of the characteristics of an angel, he was nevertheless a fallible human being and cases of corruption were by no means purely hypothetical.

20. If it were now accepted that once consent had been invalidated no fiction could revive it, and if it were recognized that fraud and error invalidated consent, why should the same consequence not ensue when consent no longer existed because it had been bought?

21. He had no wish wantonly to impair the security of international relations, but feared that, in the future, corruption would be a much greater danger than coercion. Having condemned coercion, the Commission could not omit to condemn corruption. It must do so in strict and serious terms which would require corruption to be proved; but once it had been proved and the consent of the State did not exist, the Commission must not recognize the monstrous fiction that a consent which had been bought was true consent.

22. Mr. AGO said he did not wish to question the morals of a profession which he regarded with the greatest respect. The reason why he thought that the danger of corruption might increase was that the twentieth century was not like the period of the Treaty of Westphalia, when the number of treaties concluded had been very small. Today, there was a continuous network of treaties and agreements covering the most diverse subjects, and they were not always negotiated by foreign ministers or ambassadors, but by technicians and representatives of government departments. That was why he had drawn attention to the need for safeguards.

23. Sir Humphrey WALDOCK, Special Rapporteur, said he hoped the Commission would not expect him to draft a passage for inclusion in the commentary on article 34 (*bis*) which would reflect moral considerations of that kind. At the fifteenth session some members had even been reluctant to include a separate article concerning fraud.

24. Mr. CASTRÉN said that the Special Rapporteur's proposal met all the points on which he had expressed concern, so that he was now in a position to vote in favour of the article.

25. Mr. REUTER, referring to Mr. Ago's comment regarding the wording of the French text, suggested that the word "*réalisée*" be inserted before the word "*directement*".

26. Sir Humphrey WALDOCK, Special Rapporteur, said that no corresponding change was needed in the English text.

27. The CHAIRMAN put article 34 (*bis*), with the amendment to the French text, to the vote.

*Article 34 (bis) was adopted by 9 votes to 3, with 2 abstentions.*³

ARTICLE 51 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) [62]⁴

28. The CHAIRMAN invited the Commission to consider the revised text proposed by the Drafting Committee for article 51, which read:

"1. A party which claims that a treaty is invalid or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the present articles must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

"2. If, after the expiry of a period which shall not be less than three months except in cases of special urgency, no party has raised any objection, the party making the notification may carry out the measure which it has proposed in the manner provided in article 50.

"3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

"4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

"5. Without prejudice to article 47, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation."

29. Mr. BRIGGS, Chairman of the Drafting Committee, said that in the light of the points raised at the previous meeting, the Drafting Committee had examined the relationship between articles 50, 51, 52, 53, 53 (*bis*) and 54. In the case of article 51, it had not re-examined the substance of the article, but only the suggestions made by members. It now proposed, in paragraph 1, the substitution of the words "under the provisions of

³ For later amendments to the text of article 34 (*bis*), see 887th meeting, para. 77; and 893rd meeting, para. 74 (French text only).

⁴ For earlier discussion, see 864th meeting, paras. 1-50.

² Paras. 40-43.

the present articles" for the words "otherwise than under its provisions"; in paragraph 2 the substitution of the words "in the manner provided in article 50" for the sentence "In that event, article 50 shall apply" and in paragraph 3 the deletion of the words "of the question" after the word "solution".

30. Sir Humphrey WALDOCK, Special Rapporteur, said that he ought to explain that it was the clear opinion of the Drafting Committee that the order of articles 50 and 51 should be reversed. He would go so far as to say that the agreement reached on the texts of the articles themselves had been conditional on the Commission's agreeing to that recommendation.

31. Mr. TSURUOKA asked the Chairman of the Drafting Committee to explain the choice of the term "under" used in the English text of paragraph 1, and the term "*sur la base de*" used in the French.

32. Mr. BRIGGS, Chairman of the Drafting Committee, said that, as he understood it, the words "under the provisions of the present articles" meant that a party invoking a ground of invalidity or claiming a right to terminate, withdraw from or suspend a treaty in pursuance of any of the substantive articles in the Commission's draft must notify the other parties of its claim.

33. Mr. JIMÉNEZ de ARÉCHAGA said that he interpreted the phrase as covering every ground of invalidity that a State could invoke under the Commission's draft articles.

34. Sir Humphrey WALDOCK, Special Rapporteur, said that that had been the Drafting Committee's intention.

35. Mr. AGO said he thought that the words "*conformément à l'article 50*" in the French text of paragraph 2 were better placed than the corresponding expression in the English text, "in the manner provided in article 50".

36. Sir Humphrey WALDOCK, Special Rapporteur, said that the words "in the manner provided in article 50" could be transposed to follow the words "the party making the notification may carry out".

37. Mr. BARTOŠ said he wished to make two technical comments on paragraph 2. First, who was authorized to fix the period of three months? Was it the party which made the notification? Also it was rather paradoxical to talk of a period of "not less than three months", when the legal conception of a period was always something specific. Secondly, who was to decide when a case was "of special urgency"?

38. Sir Humphrey WALDOCK, Special Rapporteur, answering Mr. Bartoš's first point, said that the Drafting Committee's concern had been to ensure that the time-limit fixed by the State making the notification should not be unreasonable, and in order to escape the kind of objections to which such wording as "within a reasonable time" gave rise, it had decided on the present formula, "a period which shall not be less than three months except in cases of special urgency".

39. Mr. Bartoš's second point was difficult to answer because there was no compulsory international jurisdiction. There could be cases of special urgency, particularly in situations involving breach, which as Special

Rapporteur he had always considered should not be overlooked. The only answer he could give was that all the draft articles had to be interpreted and applied in good faith. At the present stage in the development of international law the Commission could not go further, and problems of the kind that Mr. Bartoš had in mind could only be resolved by reference to an objective criterion of good faith.

40. The CHAIRMAN, speaking as a member of the Commission, said with regard to Mr. Bartoš's first point that the text adopted in 1963⁵ clearly showed that it was the State making the notification that fixed the period within which the reply must be made. The Commission did not appear to have changed its views on that point, but paragraph 2 of the new text was less clear because it was too impersonal.

41. Mr. REUTER said that, at the 845th meeting,⁶ he had made an objection to article 51, on the ground that the State making the notification would be putting itself in the disagreeable position of plaintiff and that it would be inadvisable from the diplomatic point of view to oblige it to set the time-limit for the reply, since its action would inevitably look like an ultimatum. To that objection it could be replied that, if the rule were stated in a general text, the behaviour of the notifying State would not be interpreted as unfriendly. But he still maintained his objection, because it was clear from the Special Rapporteur's explanations that the new text only appeared to meet that objection and that the Commission had in no way changed its attitude. It would be better if the text were unambiguous on the point.

42. Mr. TSURUOKA said that he understood that, under the terms of article 51, the State to which the notification was addressed could object at any time. Even if the State which had taken the initiative claimed that the matter was urgent, the other State was not obliged to formulate its objection immediately; some time could elapse between the notification and the objection.

43. Moreover, he did not think that, according to the text, every measure taken became lawful automatically at the end of three months; the questions could always be discussed between the contracting parties concerned.

44. Mr. de LUNA said that in specifying a period of not less than three months except in cases of special urgency the Commission had arrived at a text which meant much the same thing as the previous text, but said it far less clearly: it had reverted to the idea of a "reasonable period". The purpose of choosing a period of three months had been to avoid the vagueness of the idea of a "reasonable period", but once an exception was made for cases of "special urgency", the idea of the reasonable period was automatically reintroduced.

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

45. Mr. JIMÉNEZ de ARÉCHAGA said that the change introduced in paragraph 2 by the Drafting Committee was designed to take into account the well-founded comment by Mr. Reuter at the previous meeting.⁷ The Drafting Committee's earlier text had

⁵ Yearbook of the International Law Commission, 1963, vol. II, p. 214.

⁶ Para. 25.

⁷ Para. 30.

placed the State making the claim in the invidious position of having to fix the time-limit within which the other party or parties had to raise any objection. The new text was to be interpreted as meaning that the State making the claim was not obliged to fix any time-limit, for which provision was already made in the draft articles themselves, but would only have to do so in cases of special urgency, when it could propose a time-limit of less than three months. The text being proposed by the Drafting Committee was certainly an improvement on the 1963 version.

46. The CHAIRMAN,* speaking as a member of the Commission, said that he would like to vote against article 51, which he regarded as quite inadequate for reasons he had already given, particularly at the 845th meeting,⁸ but out of respect for the views of other members, he would merely abstain. He regarded many provisions in the draft as going beyond existing law and containing subjective notions which really required more adequate procedures for their determination or settlement than those set forth in article 51.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that as far as the English text was concerned, the phrase “in the manner provided in article 50” was preferable to some such wording as “in conformity with article 50”, so as to make it quite clear that the procedure laid down in that article had to be followed.

48. Mr. AGO proposed that, in the French text of paragraph 2, the words “*conformément à l'article 50*” be replaced by the words “*dans les formes prévues à l'article 50*”.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's amendment would be acceptable so far as its concordance with the English text was concerned.

50. Mr. CASTRÉN asked for a separate vote on paragraph 5, which he found unacceptable.

51. The CHAIRMAN put paragraph 5 of the Drafting Committee's text to the vote.

Paragraph 5 was adopted by 12 votes to 1, with 1 abstention.

Article 51 as a whole, as amended, was adopted by 11 votes to none, with 3 abstentions.⁹

52. Mr. REUTER said that he had voted for article 51, subject to the following explanations concerning paragraph 2. First, he understood that paragraph in the sense indicated by Mr. Jiménez de Aréchaga. Secondly, he considered that the word “measure” had been used, for want of a more precise term, to designate the measure by which the State clearly defined its legal position; the rule stated in paragraph 2 did not prevent a State from ceasing to apply the treaty before the expiry of the period fixed, in particular in the case contemplated in article 43, namely, that of supervening impossibility of performance.

53. Mr. BARTOŠ said he had abstained from voting because of the lack of precision in paragraph 2 about the

time-limit, to which he had drawn attention during the general discussion.¹⁰

Mr. Yasseen resumed the Chair.

ARTICLE 50 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) [63]¹¹

54. Mr. BRIGGS, Chairman of the Drafting Committee, said that, after re-examining articles 51 and 50, the Drafting Committee had decided to propose two changes in paragraph 1 of the text put forward at the previous meeting. The first change was to substitute the words “paragraphs 2 or 3 of article 51” for the words “the present articles” and the second change was to delete the concluding words, “in accordance with article 29 (*bis*)”. The text now read:

“Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty”

“1. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 51 shall be carried out through an instrument communicated to the other parties.

“2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.”

55. The act referred to in paragraph 1 was not the notification provided for in article 51, paragraph 1. At the previous meeting¹² he had drawn attention to the fact that, in the substantive articles on invalidity, the word “grounds” had been used and that the word “act” appeared for the first time in article 50. It was intended to designate the action taken by a party under the provisions of the treaty in question or of the procedure laid down in article 51, paragraphs 2 or 3.

56. The Drafting Committee proposed no change in paragraph 2.

57. Mr. TSURUOKA asked whether there was not some conflict between the rule contained in paragraph 2 and the provisions on the conclusion of treaties in section II of the draft, under which the ambassador of one State accredited to another State enjoyed rather wide powers for the conclusion of a treaty between those two States. In the case covered by paragraph 2, it would be surprising if a State receiving an instrument signed by the ambassador accredited to it were to ask him to produce his full powers.

58. The CHAIRMAN, speaking as a member of the Commission, proposed that in the French text the second line of the title be amended to read: “... *prononçant le retrait du traité ou en suspendant l'application*” and that the same change be made in paragraph 1.

It was so agreed.

59. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Tsuruoka, said that at an earlier stage

* Mr. Briggs.

⁸ Paras. 10-21.

⁹ For later amendments to the text of article 51, see 893rd meeting, para. 105; also paras. 97 and 106 (French text only).

¹⁰ Para. 37.

¹¹ For earlier discussion, see 864th meeting, paras. 51-73.

¹² Para. 60.

he had favoured a closer parallel between the provision concerning full powers in the present context and the provisions of article 4 on the conclusion of treaties, but the Commission had rejected that view. But despite the apparent discrepancy between the two articles, the consequences as far as diplomatic practice was concerned would not be grave. The presumption in article 50 was that full powers would not be required. For the conclusion of a treaty they must be produced, or at least evidence of intention to dispense with them, unless the person concerned was a head of State, head of government, or minister for foreign affairs. The Drafting Committee's new text was better adapted to instruments concerning termination or invalidity than his own original proposals.

60. Mr. ROSENNE said that, if article 50 were adopted in the form proposed by the Drafting Committee, the definition of full powers in article 1 (A/CN.4/L.115) might have to be reconsidered.

61. Mr. TSURUOKA thanked the Special Rapporteur for having clarified the meaning of the article by tracing the stages of its drafting. He agreed that the text would not create any serious obstacles in international practice.

62. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Rosenne that the definition of full powers might require a slight adjustment.

63. The CHAIRMAN put to the vote article 50 in the new text proposed by the Drafting Committee.

Article 50 was adopted by 14 votes to none.

ARTICLE 52 (Consequences of the invalidity of a treaty) [65]¹³

64. Mr. BRIGGS, Chairman of the Drafting Committee, reminded the Commission that the vote on article 52 had been deferred at the previous meeting so as to give the Drafting Committee time to correlate that article with articles 53 (*bis*) and others. No changes to the text of article 52 were proposed by the Drafting Committee.

65. Sir Humphrey WALDOCK, Special Rapporteur, said that as article 34 (*bis*) had now been approved, a reference to it would have to be inserted among the articles listed in paragraph 3 of article 52.

*Article 52, as amended, was adopted by 14 votes to none.*¹⁴

ARTICLE 53 (Consequences of the termination of a treaty) [66]

66. Mr. BRIGGS, Chairman of the Drafting Committee, recalled that, at its previous meeting, the Commission had adopted for article 53 a text which read:

"1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty:

¹³ For the text of article 52 and earlier discussion, see 864th meeting, paras. 83-95.

¹⁴ For a later amendment to the text of article 52, see 893rd meeting, para. 111.

(b) does not affect any rights or obligations of the parties or any legal situation created through the execution of the treaty prior to its termination.

"2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

67. The Drafting Committee had subsequently examined the article in the light of other articles adopted by the Commission and had made three minor drafting changes, which applied only to the French text. First, in the opening sentence of paragraph 1, the word "*autrement*" had been deleted after the word "*dispose*". Secondly, in the same sentence, the words "*en vertu de*" before the words "*ces dispositions*" had been replaced by the words "*sur la base de*". Thirdly, in paragraph 1 (*a*) the words "*toute obligation*" had been replaced by "*l'obligation*".

68. At the previous meeting, he had abstained from voting on article 53, and would abstain once more because, for purely drafting reasons, he objected to the opening proviso "Unless the treaty otherwise provides", as he had done when the Commission was discussing article 56.¹⁵ While he agreed with the substance, he preferred the formula "Unless otherwise agreed".

69. The CHAIRMAN put article 53, with the French text thus amended, to the vote.

*Article 53 was adopted by 13 votes to none, with 1 abstention.*¹⁶

70. Mr. ROSENNE said that he had voted for article 53 but that, as far as the drafting was concerned, his views were similar to those of Mr. Briggs.

NEW ARTICLE

ARTICLE 53 (*bis*) (Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law) [67]

71. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new article 53 (*bis*) which read:

"Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law"

"1. In the case of a treaty void under article 37, the parties shall:

(a) eliminate as far as possible the consequences of any act done in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) establish their mutual relations on a basis which is in conformity with the peremptory norm of general international law.

"2. In the case of a treaty which becomes void and terminates under article 45, the termination of the treaty:

¹⁵ See 850th meeting, paras. 20-22.

¹⁶ For a later amendment to the text of article 53, see 891st meeting, para. 88.

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any rights or obligations of the parties or any legal situation created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new preemptory norm of general international law.”

72. The purpose of the new article was to include in a single article certain provisions which had previously been placed elsewhere in the draft. It now incorporated certain provisions formerly in article 53, paragraph 2, which had misled a number of governments with regard to the consequences of a *jus cogens* rule under article 37, as distinct from the consequences of the emergence of a new *jus cogens* rule under article 45. The Drafting Committee had decided that the draft would gain in clarity if the consequences of rules of *jus cogens* under both articles 37 and 45 were juxtaposed in a single article.

73. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 1 of the new article contained certain provisions that had not appeared in the 1963 draft articles; those provisions dealt with cases where both parties in concluding the treaty had transgressed a preemptory rule of international law, which was the situation envisaged in article 37. As he had said in paragraph 4 of his observations on article 52 in his sixth report (A/CN.4/186), in cases of that kind it would not be open to any party to speak of “acts performed in good faith in reliance on the void instrument”, so that those cases would automatically be excluded from the benefit of the relieving provisions contained in the former paragraph 1 (a), now paragraph 2 (b), of article 52.

74. However, in its formulation of article 53 (bis), the Drafting Committee had considered that it was not sufficient to make express provision for that exclusion: for a proper formulation of the rule in the matter, it was necessary to state in a more positive manner the consequences of invalidity under article 37. The Drafting Committee had accordingly included in the new article 53 (bis) a paragraph 1 (b) requiring the parties to establish their mutual relations on a basis which was in conformity with the rule of *jus cogens* in question.

75. Mr. TSURUOKA said he had some doubts about paragraph 1 (b). Since the whole draft related to the law of treaties, it appeared to mean that States were required to enter into treaty relations in conformity with the preemptory norm of general international law. But all that States were required to do was to conform with the norm unless, of course, the norm also ordered them to enter into treaty relations. The paragraph was open to an interpretation which was not in accordance with the Commission's intentions.

76. Mr. BARTOŠ said that the authors of paragraph 1 (b) had gone too far; they seemed to have assumed that the existence of the preemptory norm of general international law required the establishment of certain relations in conformity with the norm. But States were required to bring existing relations into conformity with the norm, not to establish new relations. Was it perhaps the intention of the authors that after

relations not in conformity with the preemptory norm had been terminated, their existing relations should be made to conform with it? In his view, the provision needed further redrafting.

77. Mr. ROSENNE said that the misunderstanding could perhaps be dispelled by introducing the word “legal” before “relations” in paragraph 1 (b). It had clearly not been the intention of the Drafting Committee to refer to relations in fact or to diplomatic relations.

78. Sir Humphrey WALDOCK said that the hypothesis envisaged in paragraph 1 was that the parties had established their relations on a basis that was not in conformity with the rules of *jus cogens*. Consequently, sub-paragraph (a) called on the parties to eliminate as far as possible the consequences of any act done in reliance on treaty provisions which conflicted with the rules of *jus cogens*, while sub-paragraph (b) called on them to place their relations on a plane of full conformity with international law; it did not of course call on the parties to create any new treaty relations. In fact the provisions of paragraph 1 (b) were perhaps self-evident; They had been included *ex abundanti cautela*.

79. The CHAIRMAN, speaking as a member of the Commission, said he also thought that paragraph 1 (b) raised a problem. The parties must not only eliminate the consequences of their act in accordance with paragraph 1 (a), but must also establish certain mutual relations in accordance with paragraph 1 (b). Under the proposed wording the latter operation seemed to comprise two stages: first, the establishment of relations on a certain basis, and then steps to ensure that that basis was in conformity with the preemptory norm. But States might not wish to seek such a basis, and might prefer to make their relations directly subject to the norm.

80. Mr. REUTER said that paragraph 1 (a) dealt with the immediate consequences of the nullity of a treaty under article 37, whereas paragraph 1 (b) raised the problem of relations between the parties. The Chairman had just suggested that another possible solution would be to do nothing with regard to those relations. The Commission could state in paragraph 1 (b) that the parties were required to “define” their mutual relations in conformity with the preemptory norm.

81. Mr. AMADO suggested that the word “establish” be replaced by the word “adapt”.

82. Mr. TSURUOKA said he agreed that it was probably the word “establish” that created the difficulty. Perhaps paragraph 1 (b) was not really necessary. If the Commission wished to retain it, however, it could be amended to read: “bring their mutual relations into conformity with the preemptory norm of general international law”.

83. Sir Humphrey WALDOCK, Special Rapporteur, said that objection had in fact been made both to the term “established” and to the expression “on a basis”. Those objections would be met by rewording paragraph 1 (b) to read as suggested by Mr. Tsuruoka: “(b) bring their mutual relations into conformity with the preemptory norm of general international law”.

84. The CHAIRMAN, speaking as a member of the Commission, said that he found that new wording very satisfactory.

85. Speaking as Chairman, he put article 53 (*bis*) to the vote, with paragraph 1 (*b*) amended as proposed by the Special Rapporteur.

*Article 53 (bis), as thus amended, was adopted by 16 votes to none.*¹⁷

86. Mr. ROSENNE said it was with some concern that he noted that the Commission had now adopted three separate articles on the problem of *jus cogens*: articles 37, 45 and 53 (*bis*). He suggested that the Special Rapporteur and the Drafting Committee, when reconsidering the organization and the order of the draft articles as a whole, should examine the possibility of placing those articles in a separate section of their own.

ARTICLE 54 (Consequences of the suspension of the operation of a treaty) [68]¹⁸

87. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a revised title and text for article 54 which read:

“Consequences of the suspension of the operation of a treaty”

“1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or under the present articles:

(a) relieves the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(b) does not otherwise affect the legal relations established by the treaty.

“2. During the period of the suspension the parties shall refrain from acts calculated to render the resumption of the operation of the treaty impossible.”

88. The text differed from the one adopted by the Commission in 1963 (A/CN.4/L.107) only in minor points of drafting. Paragraph 1 (*c*) had, however, been dropped because its contents seemed to be already covered by paragraph 1 (*b*).

89. Mr. BARTOŠ said he doubted whether paragraph 2 was sufficient. It might also be necessary to specify that the parties which had suspended the application of a treaty must equally abstain from any acts calculated to render impossible its performance by the parties which continued to apply it.

90. Mr. ROSENNE said that he had a general difficulty with regard to the whole question of suspension as it emerged from the draft articles adopted by the Commission. Some of those articles stressed the inherently temporary character of suspension, but in article 42, which dealt with breach, the temporary character of suspension did not appear at all.

91. In the Drafting Committee, he had suggested that the temporary character of suspension should be emphasized in article 54 by amending paragraph 2 to read:

¹⁷ For a later amendment to the text of article 53 (*bis*), see 893rd meeting, para. 113.

¹⁸ For earlier discussion, see 848th meeting, paras. 19-80.

“During the period of the suspension the parties shall refrain from acts calculated to render impossible the resumption of the operation of the treaty as soon as the ground [or cause] of suspension has ceased to exist.”

92. Since the Drafting Committee had not accepted that suggestion, he now raised the point in order to have his views in the matter placed on record.

93. Mr. TUNKIN said that the Drafting Committee had rejected Mr. Rosenne's suggestion because the temporary element was already stressed in paragraph 2, both by the opening words “During the period” and by the implications of the term “suspension” itself. Moreover, the additional words suggested by Mr. Rosenne would have introduced into article 54 a totally extraneous element, relating to the grounds of suspension, a matter which was dealt with in other articles in the draft.

94. Mr. JIMÉNEZ de ARÉCHAGA said that there was no need to stress the temporary character of suspension in those articles which made provision for the suspension of the operation of a treaty as a measure which could be taken in cases where termination was also permitted. Clearly, if it was possible to terminate the treaty, it was also possible to suspend its operation, since termination was the stronger of the two measures.

95. His own view was that it was in article 40, not in article 54, that provision should be made for some guarantee that suspension would not become a disguised form of termination.

96. It was quite common to include in multilateral treaties safeguards emphasizing the temporary character of the suspension of certain treaty provisions. An example was the provisions of article 16, on the suspension of the right of innocent passage, in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.¹⁹

97. Mr. ROSENNE said that he would welcome the inclusion in article 40 of the safeguard mentioned by Mr. Jiménez de Aréchaga. However, a change in article 40 would still leave unsolved the question of what Lord McNair called “retaliatory suspension” in cases of breach, and he would therefore abstain.

98. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Rosenne, said that if the Commission wished to tighten the provisions on suspension, it must do so elsewhere and not inject into article 54 a point of substance which was outside the scope of the consequences of suspension.

99. The CHAIRMAN put article 54 to the vote.

*Article 54 was adopted by 15 votes to none, with 1 abstention.*²⁰

100. The CHAIRMAN invited the Commission to resume consideration of the draft articles on second reading.

¹⁹ United Nations Conference on the Law of the Sea, *Official Records*, vol. II, p. 134.

²⁰ For later amendments to the text of article 54, see 891st meeting, para. 101, and 893rd meeting, para. 117.

ARTICLE 68 (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law) [38]

Article 68 [38]

Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law

The operation of a treaty may also be modified :

(a) By a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible;

(b) By subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions; or

(c) By the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.

101. The CHAIRMAN invited the Commission to consider article 68, for which the Special Rapporteur had proposed a new title and text reading :

“ Modification of a treaty by subsequent practice

“ The operation of a treaty may be modified by subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions. In the case of a multilateral treaty, the rules set out in article 67, paragraph 1, apply to an alteration or extension of its provisions as between certain of the parties alone. ”

102. Sir Humphrey WALDOCK, Special Rapporteur, said that, in the light of the discussions both in the Commission and in the Drafting Committee, it was very likely that articles 69 to 71 on interpretation would be moved up to an earlier position in the draft, so as to be placed closer to the article on *pacta sunt servanda*. As a result, article 68 would in all probability ultimately be placed after the articles on interpretation, a fact which should be borne in mind when discussing its provisions.

103. Government comments on the 1964 text of article 68 had not been very numerous but those which had been made, and his own reflections, had led him to propose considerable changes in the wording of the article. In the first place, as explained in paragraph 4 of his own observations (A/CN.4/186/Add.5), he had dropped the word “ also ” from the opening phrase, in response to a valid point raised by the Government of Israel. As indicated in paragraph 6 of his observations, following another comment by the Government of Israel, he had also dropped sub-paragraph (a), the provisions of which were not as complete as those of article 63, which contained an adequate formulation of the rules regarding the effect of a subsequent treaty.

104. He had, however, been unable to accept the suggestion by the Government of Israel that sub-paragraph (b) should also be dropped on the ground that it was indistinguishable in its practical effects from the provisions of article 69 on the interpretation of a treaty in the light of subsequent practice in its application; he had explained his reasons at length in his fifth report (A/CN.4/186/Add.5 paras. 8, 9 and 10). In bilateral treaties, the dividing line between interpretation and modification was somewhat blurred and the distinction

was not very important in practice, but the position was quite different in the case of multilateral treaties. In the case of multilateral treaties which operated bilaterally, it was possible for a number of States to apply the treaty in a certain way in the relations between themselves, but other States which did not carry out the same practice were not bound by that *inter se* interpretation. It was therefore essential to give separate treatment to the two different problems of modification and interpretation.

105. Three governments, including that of the United Kingdom, had proposed the deletion of sub-paragraph (c). The first reason given by the United Kingdom Government was the difficulty of determining the exact point of time at which a new rule of customary law could be said to have emerged; but customary law could not be ignored, whatever the difficulties of establishing the exact situation in a particular case.

106. As explained in his own comments, he had been impressed by the United Kingdom Government’s second objection, which was based on the need to take into account the will of the parties, and by the Israel Government’s comment regarding the connexion between sub-paragraph (c) and the provisions of article 69 on interpretation. He therefore proposed that sub-paragraph (c) be dropped, on the understanding that the Commission would consider the question of covering its contents in article 69.

107. In the light of those considerations, he had prepared a new draft of article 68 which consisted of the opening phrase and the contents of sub-paragraph (b) of the 1963 text, and a new second sentence to take into account the problem of *inter se* modification of multilateral treaties.

The meeting rose at 1 p.m.

866th MEETING

Thursday, 9 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 68 (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law) (continued)¹

¹ See 865th meeting, para. 100.

1. The CHAIRMAN invited the Commission to continue its consideration of article 68.
2. Mr. CASTRÉN said he agreed with the Government of Israel and the Special Rapporteur that there was some overlapping between sub-paragraph (a) and other provisions of the draft, especially article 63. Furthermore it was clear that if all the parties to a treaty had the right to terminate it by concluding another treaty on the same subject, as provided in article 41, they could also modify the treaty in that way. Consequently, sub-paragraph (a) might be regarded as superfluous.
3. But a draft on the law of treaties should cover all the principal ways of modifying a treaty, not only those which operated implicitly but, first and foremost, those which operated directly. While, therefore, he would be reluctant to agree to the deletion of sub-paragraph (a), he was not opposed to redrafting it and inserting a reference to article 63, as the Special Rapporteur had suggested.
4. The new wording proposed by the Special Rapporteur for sub-paragraph (b) was very satisfactory. In particular, the addition of the second sentence was fully justified. The safeguards provided in article 67 for modifications by agreement *inter se* should be generally applicable, and should therefore also apply under article 68.
5. With regard to sub-paragraph (c), for the reasons he had already stated in connexion with sub-paragraph (a) and in spite of the comments of certain governments and of the Special Rapporteur, he thought that it should be retained where it was. As the Special Rapporteur had suggested in paragraph 13 of his report, the words "in their mutual relations" could be added at the end of the sub-paragraph.
6. Mr. JIMÉNEZ de ARÉCHAGA said he supported the Special Rapporteur's proposal to delete sub-paragraph (a), the contents of which were already covered by the provisions of other articles, in particular by article 63.
7. He also supported the Special Rapporteur's rewording of sub-paragraph (b) and the introduction of the additional sentence dealing with *inter se* modification by subsequent practice among some of the parties, with the valuable reference to the guarantees established in article 67.
8. It was important to retain in an independent article the idea that a treaty could be modified by the subsequent practice of the parties, as held by the International Court of Justice in the *Case concerning the Temple of Preah Vihear*;² and by the Arbitral Tribunal in the arbitration between France and the United States regarding the interpretation of an Air Transport Services Agreement, in its award of 22 December 1963, cited in paragraph (2) of the commentary to article 68 in the Commission's report on its sixteenth session.³
9. Some concern had been expressed that a very wide admission of the possibility of modification by subsequent practice might have the result that any State official, even a minor official, could alter what had been agreed in a formally ratified treaty. It should therefore be made clear in the commentary that the subsequent practice referred to in article 68 must be a subsequent practice "of the parties". Since "party" was defined in article 1 (*f*) (*bis*) as "a State which has consented to be bound by a treaty and for which the treaty has come into force", it followed that the subsequent practice capable of modifying a treaty must be attributable to the State through the acts or omissions of those officials competent to bind the State on the international plane, taking into consideration the nature of each treaty and the possibility of subsequent express or tacit confirmation by the competent authority of the State, as provided for in article 4 (*bis*).
10. He supported the Special Rapporteur's proposal for the deletion of sub-paragraph (c), but suggested that discussion of that sub-paragraph be postponed until the Commission came to consider article 69, paragraph 1 (*b*), on which there were a number of government comments and on which the Special Rapporteur would be submitting his proposals.
11. Mr. AGO said he was in favour of the proposal made by the Special Rapporteur at the end of his report.⁴ The wording of the only paragraph of article 68 that would remain under that proposal was satisfactory. There was one change to the French text that he would suggest however—and Mr. Reuter agreed—which was that the words "*établissant leur accord*" be replaced by the words "*dans la mesure où elle fait apparaître leur accord*".
12. Mr. ROSENNE said he was prepared to accept the Special Rapporteur's proposals for the deletion of sub-paragraphs (a) and (c), but would have no objection to a postponement of the decision on the second of those two provisions.
13. On sub-paragraph (b) he reserved his position until the Commission had considered article 69; he was not yet convinced of the need for its retention, even in its modified form.
14. Subject to those remarks, he wished to make two suggestions regarding the wording proposed by the Special Rapporteur. First, he would suggest that the words "subsequent practice of the parties" be replaced by the expression used in article 69, "subsequent practice of all the parties", and secondly, that the two sentences proposed by the Special Rapporteur be made into two separate paragraphs, since they dealt with different topics.
15. Mr. TUNKIN said that modification must be kept separate from interpretation; he was strongly opposed to any broadening of the concept of interpretation which would make it possible to disguise the modification of a treaty as an interpretation of its provisions.
16. He supported the Special Rapporteur's proposal to drop sub-paragraph (a), the contents of which could be regarded as covered by article 63.
17. Sub-paragraph (b) dealt with the crucial problem of the effects of subsequent practice on the provisions of the treaty. It was an undoubted fact that treaties were developed and their operation modified by practice.

² *I.C.J. Reports 1962*, page 6.

³ *Yearbook of the International Law Commission, 1964*, vol. II, p. 198.

⁴ See also 865th meeting, para. 101.

For subsequent practice to have the effect of modifying treaty provisions, however, two conditions were necessary. First, the practice must provide evidence of an agreement to modify or develop the treaty provisions. Secondly, such an agreement should comprise all or nearly all the parties to the treaty.

18. Another delicate problem was that of deciding, for the purposes of the provisions of sub-paragraph (b), whether a distinction should not be drawn between the essential provisions of a treaty and the secondary or minor provisions. Perhaps the Commission should adopt a cautious approach to that problem and indicate that the key provisions of a treaty could not be amended by subsequent practice. He merely wished to raise that problem: he had himself no ready answer to offer.

19. With regard to the Special Rapporteur's redraft of paragraph (b), the proposed second sentence seemed to him to go too far if it meant the acceptance of modification by the practice of certain of the parties. The *inter se* modification of a treaty had been surrounded by safeguards, set forth in article 67, but not all those safeguards were practicable in the case covered by sub-paragraph (b); in particular, the requirement of notification to all the other parties could not be complied with in the case of modification by subsequent practice. The parties to a treaty could thus find themselves in a situation in which some of them had modified certain of the provisions of the treaty on an *inter se* basis, while the other parties remained unaware of the fact until a very late stage.

20. He was prepared to accept the deletion of sub-paragraph (c). The problem it dealt with could be covered by amending the wording of sub-paragraph (b); in fact, the idea of a customary norm was already present in sub-paragraph (b). However, he would not oppose the suggestion that the Commission defer its decision on sub-paragraph (c) until it had considered article 69.

21. Mr. de LUNA said he supported the Special Rapporteur's proposal to delete sub-paragraph (a). That would have the advantage of avoiding certain awkward problems, such as that of treaties which could not be amended merely by agreement of the parties. For example, the treaties on the protection of minorities, concluded after the First World War, specified that a majority decision of the Council of the League of Nations was necessary for their amendment.

22. The Special Rapporteur's proposal to confine article 68 to the problem of incompatibility reduced the article to the well-accepted rule of interpretation, that a subsequent expression of the will of the parties superseded a prior expression of that same will. He therefore supported the first sentence of the Special Rapporteur's redraft.

23. With regard to the second sentence, he shared Mr. Tunkin's doubts. If the subsequent practice amounted to an *inter se* agreement, such an agreement should logically be treated in the same manner as an *inter se* amending agreement under article 67. The problem arose, however, that, in the event of modification by subsequent practice, no notification was possible, so that the Special Rapporteur had confined the reference to the provisions of paragraph 1 of article 67. He had

naturally not found it possible to make reference to paragraph 2, which dealt with notification.

24. He did not consider that the contents of sub-paragraph (c) could properly be transferred to article 69. Modification and interpretation should be kept separate. He could accept the deletion of paragraph (c), because any attempt at an adequate formulation of its provisions would involve dealing with certain extremely difficult problems, including that of the relationship between a treaty and a norm of general customary international law which emerged after its conclusion. The case could occur of the parties to a treaty contributing to the formation of a new customary rule of international law, without any intention to derogate from the *lex specialis* embodied in the treaty provisions, and it must be remembered that *lex specialis derogat legi generali*.

25. Mr. BRIGGS said he accepted the Special Rapporteur's recommendation for the deletion of sub-paragraphs (a) and (c) but agreed with Mr. Jiménez de Aréchaga that it would be better to postpone a decision on sub-paragraph (c) until the Commission had dealt with the provisions of article 69 on inter-temporal law.

26. He disagreed, however, with the proposal to retain the provisions of sub-paragraph (b). The problem dealt with in that sub-paragraph was already implicit in paragraph 3 (b) of article 69. The method of dealing with the problem was the same in both provisions; the difference was only one of degree in that, whether the result was arrived at by way of establishing the "agreement" of the parties under article 68 (b) or by establishing their "understanding" under article 69, paragraph 3 (b), the change was achieved by stretching the meaning of the terms of the treaty rather than by way of modifying its terms. It was important to note that under article 68 the treaty as such was not modified or amended by paragraphs (a), (b) or (c), although its "operation" or "application" might be.

27. The rule expressed in both cases was that the treaty must be interpreted and applied in the light of the subsequent practice of the parties, and it was essential to refer to "all" the parties in article 68, if the article was to be retained. The word already appeared in article 69, and for modification as for interpretation the concurrence of all the parties was logically necessary.

28. Furthermore if, contrary to his view, the Commission decided to retain sub-paragraph (b) as the only provision of article 68, then the second sentence proposed by the Special Rapporteur should be dropped.

29. Mr. TSURUOKA said he was in favour of deleting the whole of article 68.

30. Everyone seemed to be agreed on sub-paragraph (a) and he had nothing to add.

31. Sub-paragraph (b) was the only one that would remain, under the Special Rapporteur's proposal. If the modification of the operation of the treaty as provided for in that sub-paragraph was based on the agreement of all the parties, whether that agreement was established by practice or expressed in some other manner, the case was already covered by article 65, dealing with the amendment of treaties by agreement between the parties, which agreement was not necessarily in written form.

As to modification of a treaty or of its operation by agreement *inter se*, it was clear that it must satisfy the conditions stated in the article dealing with that subject.

32. With regard to sub-paragraph (c), the word "binding" could be interpreted in two ways. If it meant that the parties were really bound to observe the rule of customary law, then that rule was a rule of *jus cogens* and the case was already covered by another article. If, on the other hand, it meant that derogations from the rule of customary law that had emerged were permitted, then obviously the treaty would stand, since derogation was allowed.

33. There would be nothing startling about a decision to delete article 68 entirely, because rights and obligations under a treaty derived from the agreement of the parties and agreement was just as necessary for their modification; but that question was already settled by other provisions of the draft.

34. From the doctrinal point of view he agreed that there was a distinction, as made by Mr. Briggs, between the operation and the existence of a treaty; but in practical life the distinction was too subtle. Even if practice showed that the parties all agreed to modify the operation of a treaty, one of them might still subsequently assert that it had not accepted the modification. The security of treaty relations between States demanded clear and precise rules; article 68 might increase doubt and uncertainty.

35. The CHAIRMAN, speaking as a member of the Commission, said that sub-paragraph (a) was unnecessary, because the rule it contained was already stated in other articles.

36. Sub-paragraph (b) reflected an obvious fact, namely, that a treaty could be modified not only by the tacit or formal agreement of the parties, but also by their subsequent practice in the application of the treaty. That practice could not be considered as an interpretation; it introduced something new, widened or restricted the field of application of the treaty's provisions, and was equivalent to a modification. He attached great importance to the distinction between the interpretation and the modification of treaties, since they were two operations of a different kind, as he had emphasized during the first reading. For the same reason, he would be opposed to the transfer of sub-paragraph (b) to the section on interpretation.

37. No doubt, as Mr. Tsuruoka had said, the content of sub-paragraph (b) was already partly covered by article 65. That article might perhaps apply to the modification of a treaty by subsequent practice, but the emphasis was clearly on written agreements. It seemed useful therefore to retain a provision on the concordant practice of the parties in the application of the treaty as a means of modifying it.

38. As drafted in 1964, sub-paragraph (b) was not entirely in conformity with the general structure of the draft where multilateral treaties were concerned. In article 67, the Commission had provided certain safeguards by laying down that *inter se* derogations from multilateral treaties must satisfy certain conditions. In his opinion the modification of multilateral treaties by subsequent practice should be subject to the same

conditions. In cases where a derogation by written agreement was not permitted, it should not be permitted, without formal agreement, by the indirect method of subsequent practice.

39. The Special Rapporteur's proposal was therefore fully justified. The rule proposed should have its place in the section of the draft relating to the modification of treaties; it should certainly not be linked with the interpretation of treaties.

40. Sub-paragraph (c) touched on a general problem of capital importance, the competition between sources of international law, that was to say the written law of treaties as opposed to the unwritten law, especially custom. The situation was not entirely clear in positive law. It could not be said that one particular source took precedence over another or that a treaty always took precedence over custom. It was the substance of the rules themselves which must decide the issue. There were customary rules of transcendent importance and most of the rules of *jus cogens* originated in custom. For instance, there was no general treaty condemning slavery, but it could be said that the basis of the rule against slavery, which was unquestionably a rule of *jus cogens*, was established custom. Thus it was not the source itself which decided the hierarchy of international rules of law. It was a question that ought to be settled, and sub-paragraph (c) did not seem to settle it completely.

41. Sub-paragraph (c) did not really clarify the conditions in which custom took precedence. It related to a new rule of customary law—though the word "customary" appeared to have been translated in the French text by the word "*international*"—"binding upon all the parties". To what extent was it binding? Was there a rule of *jus cogens* which took precedence over the provisions of a treaty, or were there rules of equal force? Why should precedence be given to the new rule if it was not absolutely clear that the parties had wished to derogate from their formal agreement by their practice and by the rule to whose formation they had contributed? In his opinion it was not the emergence of the new rule, but the tacit will of the parties which could terminate or modify a previous treaty.

42. He wondered whether the problem ought to be solved in the draft, and if so how. As he still had certain doubts, he could not express an opinion for the time being and thought, like Mr. Jiménez de Aréchaga and Mr. Tunkin, that the Commission should perhaps wait a while before taking a position, not only on sub-paragraph (c) but on the problem as a whole.

43. Mr. EL-ERIAN said that the whole of article 68 ought to be retained in the section dealing with the modification of treaties. Admittedly the content of sub-paragraph (a) was covered in article 63 on the application of treaties having incompatible provisions, but there a subsequent agreement between the parties was treated from the standpoint of its effects on the operation of the treaty. Some members believed that articles 66 to 67 would suffice since the conditions and procedure for the modification of multilateral treaties were laid down in those articles; but they still did not cover implied modification.

44. The Special Rapporteur had rightly pointed out that the dividing line between interpretation and

modification might not always be clear-cut but from the legal standpoint, it was important to keep the two processes distinct.

45. He agreed with Mr. Tunkin that safeguards were needed in sub-paragraph (b): not all subsequent practice established by the parties would necessarily have general application. Some provision on that point would have to be inserted in the draft articles.

46. He noted that Mr. Castrén, the Chairman and to some extent Mr. Tunkin found sub-paragraph (c) acceptable, though Mr. Tunkin had indicated that its content could be covered in sub-paragraph (b). In article 62, on rules in a treaty becoming generally binding through international custom, the Commission had provided for the effects of such rules on third States and it would be only logical in article 68 to deal with the matter from the point of view of their effect on the parties to the treaty themselves. In order to bring sub-paragraph (c) into line with article 62, the word "general" should be inserted before the word "rule" so as to make clear that the rules of a treaty modified in that manner would become binding on all States in the community of nations, including those that had not taken part in the formation of the customary rule in question.

47. The argument that the whole of article 68 really belonged to the section on interpretation was untenable. That section should be moved so that it preceded the sections on the application and on the modification of treaties. The emergence of a new rule of customary international law could not affect the rules concerning interpretation set out in the Commission's draft. As Judge Huber had argued in the *Island of Palmas* case,⁵ a treaty had to be interpreted by reference to the rules of interpretation in existence at the time of its conclusion, and also in the light of the subsequent evolution of the law and the bearing that that might have on the rights of third parties.

48. Mr. AGO said he feared the Commission might be causing some confusion in article 68, probably because it was juxtaposing two different questions: the practice followed in applying the treaty and, what was much more important, the emergence of a new customary rule of general international law. He would prefer that the article should deal with one question only; practice in the application of the treaty establishing the agreement of the parties to modify or extend the operation of the treaty itself.

49. In reality, the Commission was considering the very simple case of modification of a treaty by consent of the parties. The only difference was that, instead of modifying the treaty by means of another treaty or another express agreement, the parties did so tacitly by their practice in its application, but there was still consent by the parties. It was true that practice could either merely provide elements for interpreting a treaty or justify its actual modification, but once practice modified a treaty, that showed that the parties were in agreement on the matter.

50. The emergence of a rule of customary law raised quite a different problem. He had been rather concerned to hear the idea put forward that the mere emergence of a customary rule of general international law would automatically entail modification of a treaty which contained different rules. He agreed that the customary rule of general international law could, in certain exceptional cases, be a rule of *jus cogens* and in that case, for which the Commission had made provision, the rule would affect the life of the treaty, which would cease to exist. In all other cases, however, there was nothing to prevent the parties from settling their mutual relations, and continuing to do so, in a different manner from that prescribed by the rule of customary law. Consequently, if the parties agreed to modify the treaty so as to bring its provisions into conformity with the new rule of customary law, they were at liberty to do so; otherwise, the emergence of a new customary rule of general international law would have no effect on the existence of the treaty.

51. Mr. AMADO said that even where there was a rule of customary law, there was nothing to prevent States from reaffirming their agreement.

52. Mr. TSURUOKA said that, in his opinion, article 65 dealt with the amendment of treaties in a very general manner, and it was impossible to say that it emphasized one means of modification rather than another.

53. As the final stage of drafting had been reached, it might perhaps be necessary to point out to the Drafting Committee a certain lack of uniformity between the English and French texts. For instance, the French word "*application*" was used to correspond sometimes to the English word "operation"—for example, in the title of part II, section VI, and in articles 49, 54 and 68—and sometimes to the English word "application"—for example, in the title of part III and in article 56; also in article 63, paragraph 5, the word "applying" was rendered in French by "*exécute*".

54. Mr. TUNKIN said he was convinced that the only issue that need be covered in article 68 was the modification of a treaty by subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions. On that point he agreed with Mr. Ago.

55. He agreed with the Chairman about the relationship between article 68 and article 65, which provided for a formal agreement between the parties, and that view was reinforced by the procedure laid down in articles 66 and 67.

56. The importance of practice in the context of article 68 justified a separate article but he was radically opposed to the view that sub-paragraph (b) was no more than a matter of interpretation. Such an approach was exceedingly dangerous and would jeopardize the stability of treaties by throwing doubt on their status once a practice established by the parties had come into existence. Mr. de Luna was quite right in arguing that when it came to interpretation it was the provisions of the instrument themselves that had to be examined; subsequent practice might deviate from the letter of the treaty.

⁵ *United Nations Reports of International Arbitral Awards*, vol. II, p. 845.

57. If sub-paragraph (b) were retained, no reference should be made to *inter se* modification of multilateral treaties through the development of practice, as great caution was needed because of the difficulty of establishing whether or not an actual agreement regarding modification had come into being between certain parties.

58. Mr. ROSENNE said that he feared the consequences of being over-subtle about the underlying doctrinal issues, as that could adversely affect the texts of the articles themselves. He doubted whether the Commission should include in its draft an article of any kind concerning the controversial problem of the relationship between customary and treaty law. It should not attempt to go any further than the firm rule approved at the previous meeting in regard to one type of customary law, namely *jus cogens*, in article 53 (*bis*). Generally speaking, he agreed with the Chairman that rules of *jus cogens* usually derived from custom or appeared to have done so.

59. The second theoretical issue that had been brought to the fore, particularly by Mr. Reuter, though not in sufficiently broad terms, was whether an article should be included in the draft on rules of inter-temporal law and if so, whether it could be limited to conflicts between treaties in time, a matter partially covered in article 63, and whether inter-temporal conflicts as between customary and treaty law could be left aside. Personally he did not think that the Commission should attempt to formulate rules for that very complex branch of law in a draft on the law of treaties designed for a diplomatic conference.

60. Some members had touched on the fringes of another problem, namely, obsolescence and desuetude which constituted a kind of recognition of a further ground or cause of termination, not as yet expressly provided for in the draft articles. Obsolescence and desuetude might be an aspect of the problem posed by *inter se* agreements to modify. All members seemed to admit that in one way or another obsolescence or desuetude could be used as a means of bringing a treaty to an end, and *a fortiori* as a means of modifying it. The conclusions finally reached on that issue would help resolve at least one of the difficulties that had arisen over sub-paragraph (b).

61. Mr. TSURUOKA said that, according to Mr. Yasseen and Mr. Tunkin, article 65 referred mainly to written agreements. Either, then, that should be stated, or the Commission should refer to "express or tacit agreement". Otherwise, the word "If" at the beginning of the second sentence of article 65 would be meaningless and should be deleted. It was essential to be clear. The articles could either refer to the two possibilities one after the other, or deal with the question in a general manner first and then distinguish between two separate phases, in different paragraphs or different articles. If there were already differences in interpretation within the Commission, the confusion would be much greater when interpretation was on a world-wide scale.

62. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that although doubts had been expressed about various aspects of the problems raised in article 68, at least the discussion had served to clarify the position of members. Clearly, there was

very little support for retaining sub-paragraph (a), and personally he subscribed to the view that, if article 63 could be satisfactorily revised, that should suffice.

63. Opinion was divided on retaining sub-paragraph (b) which was the only one that he believed ought to be kept in the section on modification. Some members had contended that it should be dropped altogether because the point could be covered in article 69 and because the dividing line between interpretation and modification by a subsequent practice was not sufficiently marked. As far as bilateral treaties were concerned, the point was not very important because, with only two parties modifying a treaty *inter se*, it did not matter whether the process was designated as interpretation or modification. But instances could be imagined when it was really impossible to regard the practice as not amounting to a modification of the treaty, and the *Case concerning the Temple of Preah Vihear* was such a one. In that case the treaty had laid down a perfectly clear criterion for a boundary, namely the line of the watershed, intended to apply not in one place alone but throughout the length of the boundary. In a given area there had been an unquestionable deviation from that criterion and if that was not an instance of "modification" rather than "interpretation", the words would no longer have their true meaning.

64. In any event, where multilateral treaties were concerned, the distinction between modification and interpretation must be kept clear. He had been impressed by Mr. Tunkin's judicious comments, but his question as to whether anything should be said about *inter se* agreements, and his suggestion that a distinction be drawn between the essential and other provisions of a treaty, raised extremely delicate issues. While appreciating the reasons that lay behind those comments, as a draughtsman he would shrink from the task of having to cover the points in the text of sub-paragraph (b). Nor was it even certain that the attempt would be justified.

65. The Commission must take a position on the problem of *inter se* modification by subsequent practice so as to ensure that the provision, if any, in article 68 was consistent with the comparable provision in article 69. As he had indicated in his sixth report, there was a difference between the texts of the two articles as approved in 1964 and it was not wholly accidental. It had been due to some uncertainty at the sixteenth session as to whether it would be correct in the context of article 68 to require the agreement of *all* the parties to a modification affecting the operation of a multilateral treaty by subsequent practice.

66. The other view was that, for any modification by subsequent practice of a multilateral treaty regarded as an entity, the agreement of all the parties would be needed. That would be consistent with the provision concerning the amendment of multilateral treaties according to which an *inter se* arrangement was only permissible for modifying the operation of the treaty as between the parties to the arrangement if the conditions laid down in article 67 were met. He had not yet reached a final conclusion as to how or whether that problem should be dealt with, but it could be referred to the Drafting Committee for examination in connexion

with general matters concerning the rules applicable to the modification of multilateral treaties.

67. As far as sub-paragraph (c) was concerned, he was firmly of the opinion that it ought to be dropped. Whatever the Commission decided to do in regard to the relationship between customary and treaty law, it was certainly inappropriate to deal with it in the somewhat perfunctory manner adopted in sub-paragraph (c). At the sixteenth session the Commission had scratched the surface of the subject without really coming to grips with it, and the general view had been that it would be wiser not to embark upon a general examination of the relationship between different sources of international law, although specific aspects of the question might have to be taken into account in certain articles of the draft.

68. A number of members would prefer to leave aside the whole question of the bearing of the inter-temporal law on article 68 until the Commission had examined the section on interpretation. He could endorse that standpoint but, owing to the divergence of opinion in the Commission itself and among governments and delegations, his final conclusion in respect of article 69 was that the issue should be left aside. The choice lay between a fairly comprehensive provision or a general formula that would not take the matter very far. Further consideration of sub-paragraph (c) could be deferred until the Commission had discussed the section on interpretation and the Drafting Committee had received clearer instructions.

69. Subject to those considerations article 68 could now be referred to the Drafting Committee.

70. The CHAIRMAN suggested that article 68 be referred to the Drafting Committee as proposed by the Special Rapporteur.

*It was so agreed.*⁶

The meeting rose at 1 p.m.

⁶ For resumption of discussion, see 876th meeting, paras. 11-64.

867th MEETING

Friday, 10 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Tabibi, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to consider the texts of articles submitted by the Drafting Committee.

ARTICLE 55 (*Pacta sunt servanda*) [23]¹

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the only change the Drafting Committee wished to propose in article 55 was to the opening words in the English text where the words "A treaty" had been amended to read "Every treaty". No change was needed in the French or Spanish versions. The English text would thus read:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

3. The CHAIRMAN put to the vote article 55 with the amendment to the English text proposed by the Drafting Committee.

Article 55 was adopted by 14 votes to none.

ARTICLE 56 (Non-retroactivity of treaties) [24]²

4. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new title and new text for article 56, reading:

"Non-retroactivity of treaties"

"Unless it otherwise appears from the treaty, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

5. The article had now been reduced to a single paragraph and the provision contained in paragraph 2 of the 1964 text (A/CN.4/L.107) concerning the binding force of a treaty that had ceased to exist, had been dropped.

6. Sir Humphrey WALDOCK, Special Rapporteur, added that during the discussion of article 56 at the present session, the view had been expressed that paragraph 2 of the 1964 text was closely linked with article 53, on the legal consequences of the termination of a treaty. The Drafting Committee, after examining the relationship between the two provisions, had concluded that paragraph 2 of article 56 was unnecessary and might be misunderstood.

7. The CHAIRMAN, speaking as a member of the Commission, said he had no objection to the article so far as its substance was concerned, but the English and French texts were not fully concordant.

8. Mr. AGO said that what had happened was that, in the second line of the French text, the word "*antérieur*" had been omitted after the word "*fait*".

9. The CHAIRMAN put to the vote the Drafting Committee's text for article 56, subject to correction of the French version.

Article 56 was adopted by 12 votes to none, with 1 abstention.

10. Mr. BRIGGS, speaking as a member of the Commission, said that he had been forced to abstain on article 56, which went too far in excluding past acts, facts or situations. He had in mind particularly treaties

¹ For earlier discussion, see 849th meeting, paras. 2-78.

² For earlier discussion, see 849th meeting, paras. 79-91, and 850th meeting, paras. 1-84.

with jurisdictional clauses about which he had commented on previous occasions as well as at the 850th meeting.³

ARTICLE 57 (Application of treaties to territory) [25]⁴

11. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new title and text for article 57, reading:

"Application of treaties to territory"

"The application of a treaty extends to the entire territory of each party unless it otherwise appears from the treaty."

12. Comparing that text with the 1964 version, he said that the words "scope of" had been omitted because they were open to misconstruction and the proviso had been amended by the substitution of the words "it otherwise" for the words "the contrary".

13. The CHAIRMAN put to the vote the Drafting Committee's text for article 57.

Article 57 was adopted by 13 votes to none.

ARTICLE 1 (Use of terms): additional definition [2]

14. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a definition of a third State, for inclusion in article 1, reading:

"Third State means a State not a party to the treaty."

15. The proposed definition was put forward at that juncture because the examination of other provisions dealing with the rights and obligations of non-parties had revealed that one was needed.

16. Mr. de LUNA said that in his view it would be preferable for the Commission to postpone consideration of that definition until it took up article 1 again, because the definition of "third State" entailed a reference to another notion, that of "party", which had not yet been defined.

17. Mr. EL-ERIAN said that the Commission could take a provisional decision that, in principle, a definition of a third State should be inserted in article 1. The precise wording could be considered at a later stage.

18. Sir Humphrey WALDOCK, Special Rapporteur, said that a provisional decision on the definition would have to be taken because the expression "third State" or "third States" was used in the titles and texts of articles 58 and 59 that the Drafting Committee would be proposing. The expression had been used in the titles of certain articles approved at the sixteenth session without any indication of what was meant.

19. The CHAIRMAN suggested that the Drafting Committee's definition be provisionally approved, subject to further examination in connexion with article 1.

It was so agreed.

ARTICLE 58 (General rule regarding third States) [30]⁵

³ Paras. 17-23.

⁴ For earlier discussion, see 850th meeting, paras. 85-101, and 851st meeting, paras. 1-73.

⁵ For earlier discussion, see 851st meeting, paras. 74-86, and 852nd meeting, paras. 1-52.

20. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new title and text for article 58, reading:

"General rule regarding third States"

"A treaty does not create either obligations or rights for a third State without its consent."

21. The main change, which the Drafting Committee did not consider affected the essential meaning of the 1964 text, was the omission of the words "applies only between the parties". It was proposed in order to avoid the theoretical controversy that had arisen over the article.

22. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's proposals took account of the objections to the wording he had previously submitted to that Committee, "binds only the parties", on the ground that it might be misinterpreted as proclaiming that a treaty could not be binding on individuals but only on the States parties to it. The reference to "the parties", both in the title and in the text of the 1964 version, was unnecessary in a statement of the rule and was better omitted.

23. The CHAIRMAN put to the vote the Drafting Committee's text for article 58.

Article 58 was adopted by 12 votes to none, with 1 abstention.

ARTICLE 59 (Treaties providing for obligations for third States) [31]⁶

24. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new text for article 59, reading:

"An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be a means of establishing the obligation and the third State has expressly accepted that obligation."

25. That text did not vary in principle from the one adopted by the Commission in 1964; only a few minor drafting changes had been introduced.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that, in its previous discussions on article 59, the Commission had considered the problem of the relationship of the provisions of that article with the case of an aggressor State on which certain obligations had been imposed. A number of governments, including those of the United States and the USSR, had suggested in their comments that article 59 should cover that point.

27. Some members had supported that suggestion but others had felt that the matter was already sufficiently covered by article 36, which stated that a treaty was void if its conclusion had been procured by the threat or use of force "in violation of the principles of the Charter of the United Nations", since a treaty imposed on an aggressor would not constitute a violation of the Charter. The Drafting Committee had examined the question and had decided not to include any provision on the matter in article 59 but to prepare, for

⁶ For earlier discussion, see 853rd meeting, paras. 3-88, and 854th meeting, paras. 1-23.

submission to the Commission, the text of a possible general article to deal separately with the problem of a treaty imposed on an aggressor State. That text would be submitted to the Commission shortly.⁷

28. The CHAIRMAN put to the vote the Drafting Committee's text for article 59.

Article 59 was adopted by 13 votes to none.

The meeting rose at 11.45 a.m.

⁷ See 869th meeting, para. 3.

868th MEETING

Monday, 13 June 1966, at 3 p.m.

Chairman: Mr Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to consider the text of articles submitted by the Drafting Committee.

ARTICLE 60 (Treaties providing for rights for third States) [32]¹

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new text for article 60 reading:

“1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and the State assents thereto. Unless after becoming aware of the provision it indicates the contrary, its assent shall be presumed.

“2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.”

3. The first sentence in paragraph 1 more or less followed the 1964 text (A/CN.4/L.107) except for some

¹ For earlier discussion, see 854th meeting, paras. 24-103, and 855th meeting, paras. 1-30.

changes of punctuation in the interests of clarity. The second sentence was new and replaced the former sub-paragraph (b) that dealt with express or implied assent; it had been revised by the Drafting Committee in the light of Mr. Ago's suggestion at the 855th meeting.² No change was proposed in paragraph 2.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's suggestion had been designed to bridge the division of opinion in the Commission and had been welcomed by some members.

5. The CHAIRMAN, speaking as a member of the Commission, said that he was not entirely satisfied with the second sentence of paragraph 1, whereby a third State was obliged to take immediate action as soon as it had become aware of the provision under which it was offered a right; no allowance was made for a reasonable interval. An obligation of that kind should not be imposed on third States and the sentence should therefore be recast.

6. Mr. PAREDES said that he agreed with Mr. Yasseen. The sentence should be drafted in the contrary sense. If a State which had been offered a right remained silent on the subject of that right, it should be assumed that it did not accept the right. At all events, a reasonable interval should be allowed for it to say whether it accepted or rejected it. He did not see how a right could be imposed on a State without its full knowledge and consent. It seemed to him essential that there should be an explicit statement regarding the right by the State to which it was offered, before the right could be regarded as having been acquired by that State and incorporated in its law.

7. Mr. JIMÉNEZ de ARÉCHAGA said that the second sentence in paragraph 1 was an improvement on the 1964 text and would not entail the dangers which the Chairman apprehended. It had been framed in the form of a presumption, and it would always be open to the third State not to exercise the right conferred upon it or expressly to refuse to accept it; it would in fact protect the position of a third State in cases when it might not wish to manifest its will in a formal way. The text could surely not be interpreted as imposing a right.

8. Mr. BARTOŠ said that he took the same view as Mr. Yasseen and Mr. Paredes. The new wording was an improvement on the old, but the second sentence of paragraph 1 was unsound, since it provided that, as soon as a State had become aware of the provision offering it a right, it was assumed that it had formally assented to it.

9. What in fact was the process by which a State became aware of a provision in a treaty and expressed its assent? In the ordinary course of events, those operations were performed by diplomatic agents of that State who might or might not be qualified to express the formal consent of the State to accept, not merely a right but an obligation arising under it. It was therefore very difficult to argue that, as soon as a State had knowledge of a communication indicating to it that there was a treaty under which it had acquired a right, it was presumed to have given its assent to accepting that

² Para. 20.

right. What did the presumption mean? Did it imply that the onus of proving the contrary rested with the State with regard to which the presumption was made? Could a State be obliged to reverse a presumption without saying that it had accepted the provision of a treaty concluded between other States under which a right had been created to its own advantage?

10. It was doubtful whether the wording succeeded in safeguarding the principle that the position of a State could not be changed without its consent. The intention had been to strengthen that principle by means of the presumption, but by stating categorically that the assent should be presumed, the article violated the principle whereby no one could be obliged to express his view at the request of another person. It seemed to him that the State for which it had been intended to create the right was placed in an unfavourable situation and he would therefore hesitate to vote for the second sentence of paragraph 1.

11. Mr. TABIBI said he endorsed the Chairman's views; the second sentence must be redrafted so as to state in clear language that the third State was entitled to accept or reject a right conferred upon it.

12. Sir Humphrey WALDOCK, Special Rapporteur, said that one of the difficulties of drafting the provision had been the objections that had been raised in the Commission to the various ways of expressing the idea of "a reasonable time". On the point of principle, there seemed to be general agreement.

13. The text of the second sentence in paragraph 1 must be interpreted in good faith as meaning that the third State should be allowed a reasonable interval to take its decision. It was difficult to understand why the text should be misconstrued as imposing a right upon the third State when in fact its effect would be to protect the interests of that State. Paragraph 1 must be read as a whole and it must be remembered that the article was concerned with rights, not with obligations. The rule set out in the first sentence was fairly strict and, if interpreted in the manner in which the second sentence had been interpreted by the Chairman and others who had supported his view, could be taken to mean that, unless the third State had clearly given its assent to the conferment of the right, the right would be lost.

14. The important thing to ensure was that the third State had become aware of the existence of the right, and that was particularly vital in the case of treaties providing general rights in favour of third States.

15. Mr. REUTER said he thought that the difficulty arose, not from the time factor but from the idea of tacit consent. It was perhaps going too far to speak of a presumption; something more flexible was necessary. If the Commission could agree on the idea of tacit consent, all that was needed was to use the expression "expressly or impliedly". On the other hand, if the Commission was against tacit consent, it should say so. But in any event, everything that there was to say on that very interesting question had already been said and the Commission should not reopen the discussion but take a vote on specific proposals.

16. Mr. TUNKIN said that the 1964 sub-paragraph (b) was sufficiently clear because it contained the phrase "expressly or impliedly assents thereto", and there was no need to abandon it. If the first sentence in the Drafting Committee's text could be reworded to reintroduce that phrase, the new second sentence would then be unnecessary.

17. Mr. AGO said that he felt to some extent responsible for the wording proposed in the second sentence of paragraph 1. Its purpose was to secure the support of those members who were opposed to the very idea of the need for assent.

18. He could not see why all those who had been in favour of assent, whether express or implied, were now finding it necessary to show such concern about the wording. What in fact was the issue? A third State was offered a right and, in full accord with the theory of consent, was being given an opportunity to refuse it. Why were there so many misgivings at the idea that, once a State had become aware of the offer and so long as it had not expressed any opposition, its assent could be presumed?

19. He had no objection to the reintroduction of the idea of express or implied consent, but it seemed to him that it came to the same thing as the new wording and he could not understand the objections raised against the new draft.

20. Mr. BARTOŠ said that he could not support Mr. Ago's contentions.

21. In the first place, in the text now before the Commission, the question was not merely one of an acquired right but also of the duties and obligations arising from the exercise of that right.

22. In the second place, the obligations arising under such rights might entail very complicated procedures in the beneficiary State; so much so that there could be times when the State could not make use of a right except under conditions which might jeopardize its sovereignty. In such a case, it would be better for the State not to have the right than to submit to the obligations associated with it.

23. In the third place, the second sentence of paragraph 1 introduced a legal inequality as between the States which had taken part in drawing up the treaty and third States. Those which had drawn up the treaty which created the right for third States were given time to express their views and to ratify it; but it was being suggested that, for those which had not taken part in drawing up the treaty, a mere notification, a diplomatic note regarding the contents of the treaty, would be sufficient to place them in such a position that their assent was to be presumed. If the underlying intention of the article was to make a gift to third States, then it should be remembered that gifts sometimes brought heavy liabilities for small States.

24. If the idea of express or implied consent were introduced, the position would be different, because it would then be a question of an act by which the State manifested its will. As it was, the article created a presumption based on the silence of the third State—and not even a prolonged silence at that, no period being

specified—that did not correspond to an already existing obligation to come to a decision.

25. Mr. JIMÉNEZ de ARÉCHAGA said that the 1964 text had been regarded as unsatisfactory both by several governments and by some members of the Commission, including the Special Rapporteur himself, because the condition in sub-paragraph (b) could be interpreted as meaning that some kind of formal assent must be given. That would jeopardize the rights of third States, particularly in respect of treaties establishing an objective régime on such matters as navigation. Mr. Ago's suggestion at the 855th meeting had been prompted by the need to take such practical considerations into account, and it appeared to have won support.

26. Possibly the Drafting Committee's formula for the second sentence of paragraph 1 was not a particularly happy one because it introduced the time factor and the idea that the third State must be aware of the provision conferring the right. A way out of the present difficulty might be found by dropping those two apparently controversial elements and referring the text back to the Drafting Committee to see whether an acceptable wording could be devised on some such lines as "Such assent shall be presumed, unless the third State rejects or refuses to exercise the right".

27. Mr. VERDROSS said his impression was that the new wording, which had been evolved in a spirit of conciliation, was still influenced by the theory of consent. Surely it was not being contended that a State not a member of the United Nations which, under the Charter, had the right to bring a dispute before the Organization, could reject that right by stating that it did not accept it? In his view, that right existed, whether or not a State was a member of the United Nations and it could not be rejected.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that he agreed with much of what had been said by Mr. Verdross but would refrain from reopening the discussion on the fundamental issue.

29. It was, however, important to explain that the drafting of the second sentence in paragraph 1, for which he was largely responsible, represented an honest attempt to take account of the point made by Mr. Bartoš during the discussion that the time factor should not be overlooked. But it was not easy to express. In the Drafting Committee he had suggested the phrase "unless after becoming aware of the provision", to satisfy those members who had insisted on the right of the third State to accept or reject the right; obviously unless that State were aware of the existence of the provision in question, it could not be regarded as having impliedly assented. In his opinion the new text safeguarded that right.

30. In cases where onerous obligations were attached to the right, no doubt the provisions of article 59 as well as those of article 60 might apply. If the obligations were merely conditions governing the exercise of the right, then it would be reasonable to make them subject to the condition set out in article 60, paragraph 2.

31. The Drafting Committee, in the new text it was going to propose for article 61,³ had sought to bring

out the rather subtle distinction, as far as revocation or amendment was concerned, between obligations and rights. In paragraph 1 of that new text it was going to propose that an obligation that had arisen for a third State could only be revoked or modified with the mutual consent of the parties to the treaty and the third State concerned, but under paragraph 2 of the new text a right that had arisen for a third State could not be revoked or modified by the parties if the intention under the treaty had been to render it irrevocable or not subject to modification without the consent of the third State. That being so, the position of the beneficiary from the point of view of the freedom to accept or reject a conferred right was surely sufficiently covered in article 60. In any case, a beneficiary third State possessed a general right under international law to renounce a right conferred upon it under a treaty régime. He doubted whether any further protection was needed.

32. It was important to bear in mind, when considering treaties creating general rights in favour of third States, that when a third State had for a long time not taken up the right, the contrary inference might be drawn that it had no wish to do so and that, owing to lapse of time, the right was lost. Such an interpretation would be particularly unfortunate in the case of treaties concerned with, for instance, international navigation régimes.

33. Mr. AGO said that the proposal he had made at the 855th meeting was rather different from the Drafting Committee's proposal, since it was worded "(b) if the State assents thereto. Its assent shall be presumed in the absence of any indication to the contrary". In other words, the State was given every opportunity to declare its opposition, although no time-limit for it to do so was laid down.

34. It might be possible to revert to that formula. It was perhaps unnecessary to speak of its "becoming aware of the provision", for obviously the State could not give its assent until it had become aware of the provision.

35. Mr. AMADO said that jurists had always felt misgivings about presumptions. Both sides were right to some extent, but since perfection could never be attained, he personally was prepared to revert to the formula "expressly or impliedly", which would make it possible to rely on precedents and under which third States would not be obliged to accept a gift which they did not want.

36. Mr. BARTOŠ said that, at the 855th meeting,⁴ he had supported Mr. Ago's proposal in principle, while expressing the hope that the Drafting Committee would give some thought to the question of the time factor and ensure that the presumption was linked with some sort of time-limit which would allow the beneficiary State time for reflection. He was still in favour of Mr. Ago's proposal, subject to the addition he had suggested regarding the time factor.

37. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, the Drafting Committee's text was an improvement on the 1964 text. As far as the point under discussion was concerned,

³ See below, para. 53.

⁴ Para. 22.

there was no difference in nature between rights and obligations, and that was also Mr. Ago's view.

38. It was now proposed that consent should be presumed. The acceptance of a presumption did not conflict with the theory that a State's consent was required in order to permit a right benefiting it to come into existence; but, in formulating a presumption, the first necessity was to build on a basis of reality. To contend that a State was presumed to have accepted a right immediately it had become aware of the provision under which it was offered was, however, a presumption which, in his view, did not have a basis of reality, because it took no account of the time factor and did not allow the State time to reflect.

39. Mr. Ago's proposal was certainly an improvement, but it was impossible to presume that a State had accepted, without giving it enough time to realize what kind of right was being proposed. If members of the Commission objected to the notion of "reasonable time", they should also object to an arbitrary presumption which did not correspond to reality.

40. Mr. BRIGGS said that if the choice lay between the 1964 text of sub-paragraph (b) and a clause stipulating that in certain specified circumstances the assent of the third State should be presumed, he was in favour of the latter, for the reasons given by the Special Rapporteur. Like Mr. Tabibi, he was concerned as to where would lie the onus of proof that a State had become aware of a right conferred upon it.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that his personal preference had been for a formula of the kind just suggested by Mr. Ago, which was undoubtedly superior to that used in the 1964 text because it would safeguard the position of the third State, and on a strict interpretation of the first sentence of the Drafting Committee's new text, that position might be jeopardized by reason of a possible inference that could be drawn from failure to indicate assent.

42. Mr. TUNKIN said that the difficulty which had arisen over the Drafting Committee's new text was of no great importance. He would have been prepared to accept a second sentence in paragraph 1 on the lines of the formula proposed by Mr. Ago at the 855th meeting, while still preferring the 1964 version of paragraph 1, but if Mr. Ago's latest formula for the second sentence rallied more support, he would not oppose it.

43. Mr. de LUNA said he agreed with Mr. Verdross. Rights were created, even though the beneficiary State was not placed under an obligation to use them. From that point of view, he was satisfied neither with the 1964 text nor with the new one.

44. In conformity with his position on the origin of the right that was offered, he preferred Mr. Ago's proposal, which was closer to reality. The situation he was thinking of was that where States, without having signified their assent, took some action which, in his view, constituted the use of a right which they were free either to use or not to use, but in the view of others constituted the actual birth of the right.

45. He therefore supported Mr. Ago's proposal as originally formulated, in other words, without any reference to a State "becoming aware" of the provision.

46. Mr. TABIBI said that Mr. Ago's formula was more precise than the Drafting Committee's version, and was consequently acceptable. His main preoccupation had been about rights conferred upon third States which had not taken part in the drawing up of the treaty. Every right must be linked with an obligation and the obligation could be so onerous as to render the right an intolerable burden. A third State must be entitled to indicate whether it accepted or rejected the conferment of a right.

47. The CHAIRMAN, speaking as a member of the Commission, said that, although Mr. Ago's proposal was an improvement on the Drafting Committee's text, the time-factor was still lacking; the assent of the State was presumed immediately it became aware of the provision under which it was offered a right. Thus some time elapsed during which the State was presumed to have assented even though it had not had time to reflect.

48. The question, however, was not of great importance, more especially as there was the safeguard of good faith which governed the application and interpretation of treaties; he could therefore join the majority of the Commission in accepting Mr. Ago's text.

49. Mr. BARTOŠ said that he too could accept Mr. Ago's text, provided it was noted in the summary record that, in his view, the text also embodied the idea that the State was entitled to declare within a reasonable period of time that it did not accept the right "conferred" upon it.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that in English it might be better to render Mr. Ago's text to read: "The assent of the third State shall be presumed so long as it does not indicate the contrary."

51. Mr. VERDROSS asked for paragraphs 1 and 2 to be put to the vote separately.

52. The CHAIRMAN put the Drafting Committee's text to the vote paragraph by paragraph, with the amendment proposed by Mr. Ago to the second sentence of paragraph 1.

Paragraph 1, as amended by Mr. Ago, was adopted by 16 votes to none, with 2 abstentions.

Paragraph 2 of the Drafting Committee's text was adopted by 17 votes to none, with 1 abstention.

Article 60, as a whole, as amended, was adopted by 16 votes to none, with 2 abstentions.

ARTICLE 61 (Revocation or modification of obligations or rights of third States) [33]⁵

53. The CHAIRMAN invited the Commission to consider the new title and text for article 61 proposed by the Drafting Committee, which read:

"Revocation or modification of obligations or rights of third States"

"1. When an obligation has arisen for a third State, the obligation may be revoked or modified

⁵ For earlier discussion, see 855th meeting, paras. 31-83, and 856th meeting, paras. 1-59.

only with the mutual consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

“ 2. When a right has arisen for a third State, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.”

54. Mr. BRIGGS, Chairman of the Drafting Committee, said that the words “ of provisions regarding ” had been dropped from the title of the article. No distinction had been drawn in the 1964 text between obligations and rights, but that had now been done, so that paragraph 1 dealt with obligations and paragraph 2 with rights. The words “ to which it is not a party ” had been dropped because of the definition provisionally approved by the Commission of a “ third State ”.⁶

55. In the course of the discussion on article 60,⁷ the Special Rapporteur had already explained the reasons for the changes introduced by the Drafting Committee in paragraphs 1 and 2 regarding the requirements that had to be met for a revocation or modification of obligations on the one side and of rights on the other.

56. Sir Humphrey WALDOCK, Special Rapporteur, said that members would appreciate the important change of emphasis now being proposed in article 61. In the 1964 text (A/CN.4/L.107) and in the revision he had proposed in his sixth report (A/CN.4/186/Add.2), the problem of revoking or modifying an obligation for a third State had been handled from the point of view of the parties to the original treaty, but in reality attempts to modify an obligation were more likely to come from a third party rather than the parties themselves. Accordingly it seemed proper to stipulate that the obligation could only be revoked or modified by the mutual consent of the two sides.

57. That argument did not hold for the revocation or modification of rights, because the beneficiary third State was not compelled to exercise the right; it could even go further and categorically renounce it.

58. Mr. AGO said that there was one point which might seem self-evident but which he desired to emphasize; perhaps it would be sufficient to mention it in the commentary. It was clear that, in the same way as a right, an obligation which had come into existence for a third State could not be modified except with the consent of all the parties, on condition that the provision of the treaty containing the offer was valid and remained so. It might happen, however, that the treaty in which the right was offered ceased to exist as a result of a fundamental change of circumstances or of the emergence of a new rule of *jus cogens*; obviously in such a case the obligation imposed on the third State could not survive the disappearance of the treaty.

59. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Ago's suggestion with regard to the obligations of the parties, which were the counterpart of the rights of the third State. Such obligations could be

terminated by the normal grounds of termination laid down in the draft articles. The explanation to be inserted in the commentary should also indicate that the procedures established for the termination of treaties were also applicable in that case.

60. The text of article 51 as it now stood was fairly strict and had been drafted in such a manner as only to take account of the position of the parties: it did not cover the possibility of a party to the original treaty putting forward vis-à-vis a third State a claim to terminate an obligation, but provided only for claims between the parties themselves. He had in mind the example that could be drawn from the *Free Zones* case,⁸ when France had claimed vis-à-vis Switzerland that the French obligation to maintain the Free Zones was terminated because of a change of circumstances.

61. Mr. BARTOŠ said that he shared Mr. Ago's concern. In such a situation, there could be no question of the kind of modification for which article 61 provided, but only of a modification *ipso jure*, as a result of a change in international public order. It would be sufficient to mention that idea in the commentary and thus to indicate that the Commission was aware of the situation.

62. States which had concluded a treaty had not only the right but the duty to ensure that it ceased to be in force as soon as it was in conflict with *jus cogens*. In his opinion, such a situation was the consequence of the introduction of a new law of *jus cogens*; it was not an act introducing a right or a modification.

63. Mr. de LUNA said that he had no objection to the inclusion in the commentary of the passage proposed by Mr. Ago. It should, however, be made clear that there was a second, or collateral, agreement between the third State and the parties to the main treaty, a collateral agreement that was governed by all the rules applicable to treaties; that proposition was the only one consistent with the sovereignty of States.

64. The CHAIRMAN, speaking as a member of the Commission, proposed that the words “ under article 59 ” be inserted in paragraph 1 after the words “ When an obligation has arisen for a third State ” and the words “ under article 60 ” be inserted in paragraph 2 after the words “ When a right has arisen for a third State ”. Those additions would make the text clearer.

65. Mr. BRIGGS, Chairman of the Drafting Committee, said that the reference to articles 59 and 60 had been included in the 1964 text, but had been dropped by the Drafting Committee as unnecessary. As a member of the Commission, however, he now felt that the idea would be more clearly expressed if the reference were reintroduced.

66. Sir Humphrey WALDOCK, Special Rapporteur, said that the main difficulty was a reluctance to use the French expression “ *en vertu de* ”. Perhaps the difficulty could be overcome by using the words “ in conformity with article 59 ”—in French “ *conformément à l'article 59* ”—after “ arisen ” in paragraph 1 and “ in conformity with article 60 ” after “ arisen ” in paragraph 2.

⁶ See 867th meeting, para. 14.

⁷ See above, para. 31.

⁸ *P.C.I.J.* (1932), Series A/B, No. 46.

67. Mr. ROSENNE said he was not in favour of introducing those references to articles 59 and 60. The whole group of articles 58 to 62 would now constitute a separate section, so that paragraphs 1 and 2 of article 61 would be quite clear without the additional words.

68. Mr. TUNKIN said he supported the Special Rapporteur's proposal, which would help to prevent any misinterpretation of article 61.

69. Mr. AGO said that the expression "*en vertu de*" was clearly wrong. He had no objection to "*conformément à*" but it might be dangerous, especially in paragraph 2, since it would give the impression that the right arose from article 60. The majority of members considered that the right arose, as a result of the consent of the third State, from an agreement between the parties to the treaty and the third State; care should be taken not to introduce a contrary theory in article 61.

70. The CHAIRMAN, speaking as a member of the Commission, said he was still convinced that something more was needed to make it clear that the obligation or the right arose from the processes described in articles 59 and 60 and not from some other source, such as custom or a general principle of international law.

71. Mr. BARTOŠ said that, while the point at issue might be of minor importance, the insertion of a reference to articles 59 and 60, though not absolutely necessary, would nevertheless be of value, since it would show that article 61 referred solely to rights and obligations arising in the conditions described in the two previous articles. Third states might have other rights and obligations arising, for instance, from general international law.

72. To avoid the drafting difficulty, it would perhaps be sufficient to insert a reference in brackets such as "(article 59)" in paragraph 1 and "(article 60)" in paragraph 2, and he accordingly proposed that that should be done.

73. Mr. PAREDES said that he could accept paragraph 1 after the explanations which had been given, but would have to vote against paragraph 2. He could not accept the proposition that a right established in favour of a third State could subsequently be modified by the parties. The consent of the third State should be required for the termination or modification of the right, since the third State could well have taken steps, or even performed concomitant obligations, to exercise the right.

74. Mr. REUTER suggested that the wording "in the circumstances envisaged in article . . ." might meet the difficulty mentioned by the Chairman and Mr. Bartoš.

75. He had abstained on article 60 and he would also abstain on articles 61 and 62, because it seemed to him that there should be some logic in the matter. If the Commission, in the name of State sovereignty, was opposed to the idea that a right for a State could arise from a treaty to which it was not a party, there was no reason why it should suddenly change its attitude and say that a right or obligation for a third State might very well arise by other processes. The discussion seemed to be dominated by an idea that rules could be

imposed on a State without its consent, as a result, for instance, of general multilateral treaties or by virtue of *ius cogens* rules.

76. Mr. CASTRÉN suggested that the difficulty could be overcome by adopting the solution proposed by Mr. Rosenne in the Drafting Committee, which was to eliminate article 61 by incorporating its paragraph 1 in article 59 and its paragraph 2 in article 60.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had already considered that possibility. Personally, he considered that the best solution was to introduce in the first line, after the words "third State," the words "in conformity with article 59" in paragraph 1 and "in conformity with article 60" in paragraph 2; in French, "*conformément à l'article 59*", and "*conformément à l'article 60*".

78. Mr. VERDROSS asked for a separate vote to be taken on each paragraph.

79. The CHAIRMAN said that the two paragraphs as amended by the addition of the words just suggested by the Special Rapporteur, would be voted upon separately.

Paragraph 1, as thus amended, was adopted by 16 votes to none, with 2 abstentions.

Paragraph 2, as thus amended, was adopted by 15 votes to 1, with 2 abstentions.

Article 61, as a whole, as thus amended, was adopted by 15 votes to none, with 3 abstentions.

ARTICLE 62 (Rules in a treaty becoming binding through international custom)[34]⁹

80. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 62:

"Rules in a treaty becoming binding through international custom"

"Nothing in the present articles precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law."

81. There were a number of drafting changes from the text that the Commission had unanimously approved in 1964 (A/CN.4/L.107). The words "articles 58 to 60" had been replaced by the words "the present articles", the plural noun "rules" had been replaced by the singular noun "rule", the expression "States not parties to that treaty" had been replaced by the expression "a third State", the words "being binding" had been changed to "becoming binding" and the words "if they have become customary rules" had been replaced by the words "as a customary rule".

82. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had on a number of occasions discussed the relationship between treaties and customary law. Article 62 was not designed to announce any large principles dealing with that relationship; it was merely intended to safeguard the possibility of a rule embodied

⁹ For earlier discussion, see 856th meeting, paras. 60-106.

in a treaty becoming in fact binding on a third State in a manner quite different from that set forth in articles 59 and 60. The intention was to refer to the familiar phenomenon of a treaty rule developing into a rule of customary international law.

83. Mr. REUTER said he had had the impression, first in the Drafting Committee and then while listening to the explanations which the Special Rapporteur had just given, that the meaning of article 62 was fairly clear. It should be noted, however, that in that article the expression "third State" referred to third States in relation to the treaty and not to third States in relation to custom or in relation to the process of the formation of custom. The Commission was not deciding whether the customary rule could become binding on States which had not participated in its formation or whether it bound only States which had manifested their consent to its formation. The very fact that it was unwilling to decide that question—although it had not hesitated to take a decision when a right or an obligation based on a treaty had been involved—was in itself rather interesting.

84. Mr. VERDROSS said that he approved of the idea on which article 62 was based, but thought it was not clearly expressed. It was not correct to say that a rule could become binding "as a customary rule of international law". What was meant was that that rule became binding if it changed into a customary rule of international law.

85. Mr. BARTOŠ said he had misgivings similar to those of the two previous speakers. Article 62 dealt with the case in which treaty rules were transformed into rules of customary law. It could, of course, be said that the treaty rule had been the source of the custom; for instance, the Nuremberg Tribunal had noted in its verdict that certain provisions of certain treaties were binding on all States, not as contractual rules but because they had passed into the universal custom of international law.

86. The principle stated in article 62 was correct, but it went beyond the scope of the draft; once the treaty rule had changed into a customary rule, the binding character of the rule was no longer governed by the law of treaties. The case dealt with in article 62 concerned neither the formation of treaties nor their effects—since the effect considered was that of custom—nor the termination of the treaty, since the treaty remained in force as such. What happened was merely that the rules of the treaty coincided with rules of a different kind. Treaty and custom then had parallel effect; the treaty was binding on States which were parties to it, and custom had binding force for all States, but its force did not derive from the fact that it had first been proclaimed as a treaty rule. The Commission was drafting a convention on the law of treaties, not on the sources of international law; if it wished to deal with custom, it should also study all the other sources mentioned in the Statute of the International Court of Justice.

87. In article 62, the Commission noted that the formation of custom might be based on treaty practice. The fact that the treaty rule had changed into a customary

rule had given it binding force for all States, whether they were parties to the treaty or not. The States parties to the treaty were doubly bound, while the others were bound only by custom. But the position of the States parties to the treaty had also changed, since they could no longer terminate their obligation; even if they could terminate the treaty, they remained bound by the provisions which had become custom. The other States were bound only from the moment of the change and, after that moment, all States were bound in the same way.

88. If a rule of *jus cogens* emerged, with which a treaty was in conflict, that treaty must be amended or terminated, but that was a different case.

89. In the case referred to by article 62, once the transformation into custom had occurred, the treaty did not lose its effect, but that effect assumed another character. Article 62 dealt with a question of general public international law and, in his view, it should therefore be removed from a draft on the law of treaties.

90. Mr. TUNKIN said that there had been no intention on the part of the Commission in 1964, or of the Drafting Committee and the Commission at the present session, to go into the question of substance of the relationship between treaty law and customary law. Article 62 contained a useful safeguard; it stated that a rule embodied in a treaty could become binding on a third State by custom. The provisions of article 62 did not enter into the problem of the creation of customary rules of international law.

91. Many examples could be given of a treaty rule gradually extending its sphere of application by custom and becoming accepted as a customary rule by States not parties to the treaty. There was of course no suggestion that a rule embodied in a treaty adopted, say, by one-half of the States forming the international community, could automatically become a rule of customary international law. The intention was to refer to such rules as that which had outlawed aggressive war; that rule had been laid down in the Pact of Paris of 1928, the Briand-Kellogg Pact, but had gradually become a customary rule of international law for States not parties to that treaty and had been recognized as such by the Nuremberg Tribunal.

92. Mr. TSURUOKA said he understood the meaning of the article to be that the fact that a rule had been stated in a treaty did not prevent that rule from becoming a customary rule of international law. As Mr. Tunkin had noted, the term "customary rule of international law" covered all kinds of rules of customary international law. Perhaps that idea would be expressed more clearly if the words "upon a third State" were deleted; they seemed quite unnecessary, since the Commission was not trying to emphasize the distinction between customary rules and treaty rules.

93. Mr. TABIBI asked the Special Rapporteur whether there was any real need to include in the draft articles a provision on the lines of article 62.

94. Sir Humphrey WALDOCK, Special Rapporteur, replied that the Commission had considered that question in 1964¹⁰ and had arrived at the conclusion

¹⁰ See *Yearbook of the International Law Commission, 1964*, vol. I, 740th meeting, paras. 39-83, and 754th meeting, paras. 89-99.

that, bearing in mind the provisions of articles 58 to 61, a reserving clause on the lines of article 62 should be included. His own view was that such a clause was desirable in order to avoid any possibility of articles 58 and 59 being misconstrued as suggesting that a third State could dispute the binding character of a customary rule that had emerged from a treaty to which it was not a party.

95. Mr. ROSENNE said he shared the Special Rapporteur's view that article 62 served a useful purpose as a general negative reservation and should be retained. However, he was concerned at the risk of possible duplication with the provisions of article 30 (*bis*), which dealt with the possibility that an obligation embodied in a treaty which had been invalidated, denounced or terminated might be also binding under some other rule of international law. If a State ceased to be a party to a treaty under any of the provisions of part II of the draft articles, it would become a third State and the provisions of article 62 would be applicable. If articles 30 (*bis*) and 62 remained separate articles, it would be desirable to bring their wording into line.

96. The CHAIRMAN, speaking as a member of the Commission, said he thought article 62 stated a correct idea and contained a useful reservation. Nevertheless, as the specific reference to articles 58 to 60, which had been included in the text adopted in 1964, had been replaced by a broader reference to "the present articles"—that was to say all the articles in the draft—it might perhaps be well to widen the reservation by adopting Mr. Tsuruoka's suggestion. If a provision of a treaty became a customary rule, the treaty itself might disappear as an instrument, but the rule remained binding on all States, including the parties. In that way, article 62 would become even more useful.

97. Mr. JIMÉNEZ de ARÉCHAGA said he favoured the Drafting Committee's text, with its reference to a "third State". Article 62 was a survival from the Special Rapporteur's proposal on objective régimes, as explained in paragraph (3) of the 1964 commentary.¹¹

98. Mr. TUNKIN said he was not in favour of Mr. Tsuruoka's suggestion for the deletion of the reference to the "third State" since it would make the provisions of article 62 much too general.

99. Mr. de LUNA said that article 30 (*bis*) dealt only with the parties to the treaty and not with third States. Moreover, it referred to other rules of international law, and not merely to customary rules, and covered in addition the case of a treaty rule embodying a general principle of law.

100. Article 30 (*bis*) dealt with the case in which a treaty contained provisions which were declaratory of pre-existing customary international law, whereas article 62 dealt only with the case in which a treaty rule subsequently became a norm of customary international law. Since article 30 (*bis*) did not deal with the third State, it might be desirable to amend the provisions of article 62 so as to cover not only the case of a treaty clause which subsequently became a rule of customary international law, but also that of treaty clauses which

were declaratory of pre-existing customary international law.

101. Mr. AMADO said he welcomed Mr. de Luna's statement. He himself had been uncertain whether, in using the expression "as a customary rule of international law" the article referred only to the case in which the rules of a treaty became customary rules or whether it also referred to the case in which pre-existing customary rules were embodied in a treaty. The present text was not clear on that point, but it was important that it should be, because of the different interpretations that might be placed on it. For example, mention had been made of objective régimes, and the Special Rapporteur had rejected the idea that the scope of article 62 might be extended to such régimes.

102. If the words "upon a third State" were deleted, the Commission would be stating a rule which was already applied in general international law and it would not be necessary to state it in the draft. The purpose of article 62 was to complete what was said in the preceding articles concerning the law of treaties in relation to third States.

103. Unless further explanations were given, he was willing to vote for the text as it stood, since he thought it referred both to a customary rule which had existed when the treaty was concluded, and to a customary rule which had derived from the treaty.

104. The CHAIRMAN, speaking as a member of the Commission, said it might be better to restore the specific reference to articles 58 to 60.

105. Sir Humphrey WALDOCK, Special Rapporteur, said he was opposed to Mr. Tsuruoka's suggestion, because it would be inconsistent with the Commission's decision not to enter into the general question of the relationship between treaty law and customary law. The Commission should confine the provisions of article 62 to a negative reservation. For that purpose, it could either revert to the 1964 text or adopt the text proposed by the Drafting Committee, replacing the opening words "Nothing in the present articles" by a reference to specific articles.

106. Mr. ROSENNE said that the appropriate reference in that case would be to articles 58 to 61.

107. Mr. TSURUOKA said that the purpose of his suggestion had been merely to have it stated in the text that a treaty rule which became a customary rule became binding on all States, both parties to the treaty and third States. The suggestion would lose its point if the reference to articles 58 to 61 were restored.

108. Mr. de LUNA said that his suggestion would fill a gap in the text of article 62, which did not deal with the case where a treaty contained clauses that were declaratory of customary international law and as such were binding on a third State.

109. Sir Humphrey WALDOCK, Special Rapporteur, said that, rather than adopt that suggestion, he would prefer to revert to the 1964 text which spoke of treaty rules "being binding" upon a third State "if they have become customary rules of international law".

110. Mr. TUNKIN said that the Drafting Committee's text was more precise than the 1964 text and he therefore

¹¹ *Op. cit.*, vol. II, p. 185.

supported the Drafting Committee's text, subject to the replacement of the words "the present articles" by the words "articles 58 to 61".

111. Mr. REUTER suggested that the words "upon a third State" be replaced by the words "upon a State not a party", an expression which would be more precise and would eliminate any doubt as to whether the reference was to third States in relation to the treaty or to third States in relation to custom.

112. Sir Humphrey WALDOCK, Special Rapporteur, said that, according to the definition of a third State which was to be inserted in article 1, that expression meant, precisely, a State not a party to the treaty.

113. The CHAIRMAN, speaking as a member of the Commission, said that he certainly understood the third State referred to in article 62 to be a third State in relation to the treaty.

114. As Chairman, he put to the vote the article 62 submitted by the Drafting Committee, as amended by the replacement of the words "the present articles" by the words "articles 58 to 61".

Article 62, as thus amended, was adopted by 13 votes to none, with 3 abstentions.

115. Mr. BARTOŠ said that, although he approved of the idea expressed in the article, he had abstained from voting because, in his opinion, in the case in question, a treaty rule which had become a customary rule also had effects for States parties to the treaty as a customary rule, and they had thus become doubly bound—by treaty and by custom.

The meeting rose at 6.5 p.m.

869th MEETING

Tuesday, 14 June 1966, at 11 a.m.

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

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

NEW ARTICLE: Case of an aggressor State [70]¹

¹ For earlier discussion, see 853rd meeting, paras. 3-88, 854th meeting, paras. 1-23 and 867th meeting, paras. 26-27.

1. The CHAIRMAN invited the Commission to consider the text of a new article proposed by the Drafting Committee on the case of an aggressor State.

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that as he was not in favour of the inclusion of such a provision in the draft articles, he would prefer that the Special Rapporteur should introduce the text.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee wished to put forward for discussion a draft article to cover in a general way the case of an aggressor State. It read:

"Nothing in the present articles may be invoked by an aggressor State as precluding it from being bound by a treaty or any provision in a treaty which in conformity with the Charter of the United Nations it has been required to accept in consequence of its aggression."

4. The Governments of the Soviet Union, the United States and others had indicated in their observations on article 59 that the reservation in paragraph (3) of the 1964 commentary regarding the imposition of an obligation upon an aggressor State² was not enough. They considered that the matter should be covered in the text of the draft articles.

5. During the discussion of the problem at the present session, there had been a division of opinion. Some members had considered that the reference in article 36, on coercion of a State by the threat or use of force, to the principles of the United Nations Charter excluded by implication the case of an obligation imposed on an aggressor State. Others had considered that the matter should be dealt with explicitly in article 36 or in article 59, while yet others had been in favour of a separate article.

6. After some discussion, the Drafting Committee had finally decided to put forward a text in the form of a separate article which, if accepted, would need to be placed towards the end of the draft articles as a general exception to the provisions of articles 36, 59 and other articles such as article 44, on fundamental change of circumstances, dealing with the grounds most commonly invoked by an aggressor State for releasing itself from an obligation. The whole question raised problems of principle which the Drafting Committee had only begun to discuss and its members had reserved their position pending the general debate in the Commission itself.

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

7. Mr. VERDROSS said that he approved the article in principle, but since it referred to the United Nations Charter, it should be made clear that, under Article 39 of the Charter, the Security Council alone was competent to determine the existence of an act of aggression and that its determination was binding on all Members under Article 25 of the Charter.

8. The situation was therefore a special one, since the organ empowered to determine whether or not an act of aggression existed had already been decided. Consequently, instead of saying merely "by an aggressor

² *Yearbook of the International Law Commission 1964*, vol. II, p. 181.

State”, the article might read “by a State declared to be an aggressor in accordance with Article 39 of the United Nations Charter”; without that addition, the opening passage of the article was inconsistent with the remainder.

9. He wondered what was intended by the word “any” in the phrase “any provision in a treaty”. Surely it would be enough to speak of “a provision in a treaty”.

10. Mr. CASTRÉN said he was still of the opinion that the question had not yet been studied with sufficient thoroughness. It seemed to him that the Drafting Committee’s text went too far when it stated that an aggressor State was bound, apparently for an indefinite period of time, by a treaty or any provision whatever in a treaty; it would thus be bound even where the treaty was impossible to apply or where it had been substantially violated by the other contracting party, and so on.

11. Instead of just a mention of one article—article 59—in the commentary, it was now proposed that there should be a general reservation which was excessive and unreasonable, even where an aggressor State was concerned. The new article provided specifically that nothing in the draft articles could be invoked by such a State. Several members who had taken part in the discussion before the article had been sent to the Drafting Committee had wanted the Commission to confine itself to dealing with the problem in connexion with article 36 or articles 59 to 61. In any case, the question of aggression was not, strictly speaking, a matter for the law of treaties.

12. For those reasons, he would be unable to vote for the proposed article as it was now worded.

13. Mr. JIMÉNEZ de ARÉCHAGA said that, in criticizing the Drafting Committee’s text, he did not wish to be accused of defending aggression or obsolete rules of international law on the subject. He was in favour of any stringent measures that might be taken against aggressor States in conformity with existing international law. His primary concern was that the Commission’s draft articles on the law of treaties should form a consistent and coherent whole.

14. A broad exception of the kind now being proposed seemed neither reasonable nor requisite for contemporary needs. There was no necessity to incorporate in a separate article the substance of paragraph (3) of the commentary on the 1964 text of article 59³ merely because of the existence of new rules of international law, particularly the United Nations Charter. Nothing in the Commission’s draft articles could add to or detract from the force of the Charter. It would suffice to explain in the commentary why a separate article on the subject should not be included.

15. The Drafting Committee’s text was even less acceptable to those members who had been against the inclusion of a provision on the point in article 59. It was far too sweeping and would mean that States, including those former enemy States which were parties to the Second World War peace treaties, would be unable to invoke any of the provisions of the Com-

mission’s draft with respect to provisions of those treaties. Thus, such a State would be unable to avail itself of the rights laid down in article 40 if a provision of one of the peace treaties were abrogated by a subsequent agreement of all the parties. It would also be prevented from invoking the provisions of article 41, and, worse still, the provisions of article 42, which, in cases of breach, would result in inequality if the other party to the treaty in question had violated its terms. The same would be true of article 43. It was altogether too harsh to outlaw those States permanently and to deny them any of the protection that had always been applied under customary law in respect of peace treaties.

16. The only specific exception that perhaps need be taken into account was in regard to treaties secured by the coercion of a State. Some exception might also be admissible in regard to entry into force and ratification, but such matters were usually covered in the provisions of the treaty itself and those provisions must take precedence according to the way in which the Commission had framed residual rules in its draft.

Mr. Yasseen resumed the Chair

17. Mr. de LUNA said that he supported the principle laid down in the article, which was not a novel one in contemporary international law, since there was a similar provision in Article 107 of the Charter.

18. He thought, however, that the article in its present form was rather too sweeping. The Commission had been led to discuss the problem in connexion with the effects of treaties on third States; in examining the extent to which obligations could be imposed on third States, it had considered the possibility, in the context of article 59, of making an exception to the conditions it had laid down in the case of an aggressor State. He would therefore be in favour of starting the article, not with a very general expression such as “Nothing in the present articles” but with the words “Nothing in articles 58, 59, 60 and 61 . . .”. He was aware that the *rebus sic stantibus* clause could not operate in the case of an aggressor State at a given point of time, but international practice showed that rules of treaty law intended to be permanent sooner or later ceased to be so.

19. Mr. ROSENNE said that the Commission had first to decide whether an article on the case of an aggressor State was to be inserted at all and, if so, what should be its scope. The text suggested by the Drafting Committee might be inadequate, because it dealt only with the problem of an aggressor State being bound by a treaty or by a provision in a treaty. No light was shed on the meaning of the words “being bound” or on the duration of the obligation. The question arose whether an aggressor State could invoke the various grounds for invalidation or termination other than that specified in article 36 and, if so, at what point in time. During the period between the First and Second World Wars, there had been instances of abuse of the law of treaties in order to escape from the provisions of the Treaty of Versailles and other peace treaties. In an effort to prevent such abuses in the future, the Commission had sought to fill some of the gaps in the law of treaties, particularly by means of its article on fundamental

³ *Yearbook of the International Law Commission, 1964, vol. II, p. 181.*

change of circumstances. But contemporary international law within the framework of the Charter perhaps called for an examination of the bearing on the law of treaties of a properly established finding of the existence of an act of aggression, and of the effect of such a finding on the treaty relations of an aggressor State. Quite apart from any questions of *jus cogens*, the problem had arisen in practice of an aggressor being obliged to terminate or withdraw from certain treaties. The Drafting Committee's text did not cover that point. The whole matter was exceedingly complex and needed much more thorough examination than the Commission had been able to give it.

20. Mr. TSURUOKA said he had already made it quite clear that he could not agree to the incorporation in the draft articles of an article of the type proposed. He did not intend to recapitulate the reasons which had led him to take that negative attitude, but, after reading the Drafting Committee's text, he still had the impression that the provision might lend countenance to the idea that, in the modern world, victorious States could impose their will on defeated or weak States. That was perhaps a psychological point which had nothing to do with the law, but it was not without importance.

21. He could endorse all the arguments put forward by previous speakers against the article. In addition, since the articles of the draft would not have retroactive effect, they would apply only to situations arising after the entry into force of a treaty of the kind considered. So before such an article could be included, it would be necessary to study a wider range of possible situations, to consider every eventuality, and to decide what rule would be appropriate and what its consequences would be in the world of the future. That would be an arduous task, and would take more time than the Commission could spare.

22. Indeed, the idea was not directly relevant to the law of treaties. It might perhaps be indirectly connected with the work of international organizations, particularly the United Nations, the primary purpose of which was to prevent aggression, but the Commission was merely studying questions relating to the law of treaties. The Commission had not made a study of United Nations practice and did not know what the future fate would be of the articles of the Charter dealing with the maintenance of peace and the sanctions imposed on an aggressor. In his view, the least that could be said was that to adopt such an article would be premature.

23. Mr. TUNKIN said that the observations of the previous speaker were reminiscent of certain discussions on the definition of aggression that had taken place in the Disarmament Conference in 1932 and 1933. There was, however, no need to go into the stand taken at that time by certain States, the reasons for which were well known.

24. Most members of the Commission believed it was necessary to include some safeguard in the draft, particularly in respect of articles 59 and 62. The Drafting Committee's text was perhaps a little too broad in scope, but Mr. de Luna's suggestion offered a starting point for the formulation of a new text that would confine the application of the article to specific provisions in a

treaty. The task of devising an acceptable text would again have to be entrusted to the Drafting Committee.

25. With regard to the argument that the case of an aggressor State did not fall within the law of treaties he wished to point out that the Drafting Committee's text did not attempt to deal with the substantive issue. The problem as a whole would need to be dealt with in a code of the rules of State responsibility, but there was no blinking the fact that a safeguard had to be inserted in the Commission's draft to prevent an aggressor State from claiming that it was not bound by certain international agreements. The obligations must be binding on an aggressor State, even in cases where the treaty had been concluded without its participation. That was all that needed to be said in order to fill the gap in treaty law.

26. Mr. BRIGGS said that the problem of the aggressor State had arisen at the sixteenth session during the discussion of the Special Rapporteur's article 62, on treaties providing for obligations or rights of third States, and some members had questioned the need for the express consent of an aggressor State to an obligation arising out of a treaty; some indeed had thought that the problem did not belong to the law of treaties at all.⁴ Paragraph (3) of the 1964 commentary on article 59 indicated what the trend of the discussion had been and the last sentence in that paragraph set out the Commission's conclusion that a treaty provision imposed upon an aggressor State not a party to the treaty would not infringe article 36.

27. The matter was now being treated in an entirely different context and the Drafting Committee's text had been put forward in the form of an additional article for possible insertion at the end of the draft. He would draw particular attention to the use of the word "accept" in the new text. According to article 12, paragraph 2 (A/CN.4/L.115), the consent of a State to be bound by a treaty was expressed by acceptance or approval under conditions similar to those applicable to ratification, and in article 1(f) (*bis*) a party was defined as a State which had consented to be bound. It was not clear to him whether the Drafting Committee's new text was intended to refer to treaties to which an aggressor State was regarded as being a party by reason of its acceptance of the treaty, or whether the text was intended to cover the situation in which an aggressor was not a party but a third State, whose failure to express consent could not in itself be invoked as a ground for non-compliance with the obligations of the treaty. He shared the doubts expressed by other members about the need for such an article, even if its application were confined to obligations arising out of a treaty for third States. The whole matter seemed to have no relevance to draft articles on the law of treaties.

28. Mr. BARTOŠ said he would vote for the article now that the text had been amended to include the words "in conformity with the Charter of the United Nations". If an obligation was in conformity with the Charter, it was one with which all States were bound to comply; since an aggressor State had to respect such

⁴ *Yearbook of the International Law Commission, 1964*, vol. I, 734th and 735th meetings.

an obligation, there could be no objection to a treaty being binding on that State also.

29. From the theoretical point of view, however, he was still not sure whether it was a question of a treaty concluded with the aggressor State, or of an obligation imposed upon it by a treaty concluded between third States. However that might be, the article was, in his opinion, necessary as a derogation from the rule laid down by the Commission that treaties were not binding on third States. In the proposed new article, the Commission was making an exception; the aggressor State was required to accept, not the treaty as such, but the obligation arising out of it, because it was a measure taken by virtue of and in conformity with the Charter.

30. The new draft seemed to him to be an improvement on the old; he could accept it as a compromise, although he still had doubts regarding the theoretical aspect of the matter.

31. Mr. REUTER said he agreed that the article should refer not to the draft articles as a whole but to certain specific articles. All he wished to add to what had already been said was that the wording proposed by the Drafting Committee contradicted the provisions of the draft articles dealing with the emergence of new rules of *jus cogens*; it would raise a difficulty which could not be solved without recourse to the idea of a higher order of *jus cogens*, which would be absurd.

32. Like Mr. Bartoš, he was not sure that the expression "it has been required to accept" was sufficient; it might perhaps be better to add the words "or to comply with," for some treaties had been imposed on aggressor States without their having even been asked to accept them.

33. A further more delicate question arose out of the article: was it sufficient to refer to the United Nations Charter? In the past, at all events, it seemed clear that certain measures had been taken which had gone beyond the Charter. So far as the future was concerned, it was no doubt difficult to refer to anything other than the Charter, since the Commission had rejected all ideas, such as the theory of a *de facto* international government, which would justify derogations from articles 59 to 62 in the case of aggressor States. He would accept the reference to the Charter, although he had some doubt whether it would be effective.

34. Mr. AGO said that, although the text submitted by the Drafting Committee did not fill him with enthusiasm, it seemed to him to be acceptable. On the other hand, he could not accept the suggestion that the article should contain a specific reference to article 59. Peace treaties imposed on an aggressor State had in most cases been signed and ratified by that State, which had thus become a party to them. The mere suggestion that such a State might remain a third State would run counter to the Commission's purpose. The aggressor State had become a party to the treaty even if it had not participated in drawing it up; in the wholly exceptional cases in which a treaty provided for obligations on an aggressor State which had not accepted it, the obligation for the aggressor State would not arise as the effect of a treaty on a third State but, in reality, from a source other than the treaty.

35. If the Commission decided to revert to a formulation incorporating a reference to article 59, he would be unable to accept the article.

36. Mr. EL-ERIAN said that his views on the issue were known. He shared the doubts of other members about framing the provision in general terms. The Drafting Committee should be asked to narrow the scope of the provision by inserting specific references to the articles to which it related. In the interests of precision, the reference to the United Nations Charter must be retained, as had been done in article 36.

37. The CHAIRMAN, speaking as a member of the Commission, said that he was in favour of including such a provision in the draft, but as a proviso, not as an exception. The article did not state an exception to the principle governing the question of the applicability of treaties to persons; it expressed a proviso, the purpose of which was to emphasize that that principle did not preclude the imposition of certain obligations on an aggressor State.

38. There was no doubt about the source of the obligation: it was to be found, not in the treaty but in a rule of international law, perhaps in a decision taken by an organ of the international community under that organ's rules.

39. Taken in that sense, the inclusion of such a proviso in the draft might further strengthen the measures taken against aggressor States.

40. Sir Humphrey WALDOCK, Special Rapporteur, said that his own position was very similar to that of Mr. Ago; the choice for him lay between the inclusion of a fairly general reservation and the omission of the subject from the draft articles altogether. He would be strongly opposed to reverting to a provision the application of which would be limited to article 59, or to articles 59 and 61. In the past, a defeated aggressor State wishing to evade its obligations under a peace treaty had usually alleged that the treaty had been imposed upon it. Many other pretexts could, however, be invoked. The allegation had not infrequently been made, for example, that the persons who had signed the treaty had not had the necessary authority to represent the people or the State.

41. If the article on the aggressor State were drafted in such a way as to confine the reservation to particular draft articles, it would encourage a search for other methods of evasion. For example, if an aggressor State in due course became a Member of the United Nations, it might try to invoke that development as a fundamental change of circumstances justifying the termination of the treaty under article 44. Another problem was presented by the fact that article 36 did not make a specific exception in the case of a treaty imposed upon an aggressor State. In that article, the Commission had been content to refer to the use of force "in violation of the principles of the Charter of the United Nations", leaving it to be implied from those words that the article did not cover the case of an aggressor State. That implication would suffice if the special article on an aggressor State embodied a safeguard in purely general terms; if, however, reference was made to specific articles, it would be essential to mention at least article 36, in addition to articles 59 and 61.

42. He had noted Mr. Rosenne's remarks with interest but believed that his suggestion went too far and raised questions outside the scope of the law of treaties, such as the possibility of an aggressor State being called upon to terminate a treaty as part of the sanctions against aggression.

43. Finally, it was essential that the Drafting Committee should be given some guidance if the article was to be referred back to it.

44. Mr. TUNKIN said that, in supporting Mr. de Luna's suggestion, it had not been his intention to oppose the Drafting Committee's text, which he was quite prepared to accept; he had merely been trying to explore the possibility of meeting some of the points raised by other members. After listening to the Special Rapporteur, he was inclined to favour a provision couched in general terms.

45. Mr. de LUNA said he had made his suggestion in order to help to meet the objections raised by other members. He nevertheless believed it was necessary to indicate the articles to which the reservation applied.

46. Mr. AGO said that he could agree to the article being referred back to the Drafting Committee so that it could try to find a text which aroused fewer misgivings. But for the reasons which the Special Rapporteur had just given, he was altogether opposed to the article taking the form of a reservation to certain specific articles.

47. Mr. EL-ERIAN suggested that the Drafting Committee be instructed to make the formulation of the article more precise. The possibility of making specific reference to a number of articles should not, however, be ruled out if the Committee concluded that such reference could be made without danger.

48. Mr. TSURUOKA said that, while he was quite willing that the article should be reconsidered by the Drafting Committee, he was still opposed to its inclusion in the draft. If the Commission wished to formulate a provision concerning the case of an aggressor State, it would have to make sure, in order to exclude the possibility of abuse, that the designation of aggressor was applied in accordance with the Charter and the procedure of the United Nations. A mere reference to the principles of the United Nations was too vague; those principles were numerous and had no established order of precedence, so that varying interpretations were possible. It would therefore be necessary to specify what organ was competent to declare a State an aggressor in accordance with current United Nations practice. Otherwise an article of the kind contemplated would be a source of difficulty in treaty relations between States, instead of a contribution to their stability and progress.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had mentioned the Charter of the United Nations deliberately, instead of the principles of the Charter, as in article 36, in order to indicate that the reference was to the Charter in its entirety and not to its underlying principles.

50. Mr. TSURUOKA, after thanking the Special Rapporteur for his explanation, said he still thought that the Charter itself was interpreted in different ways.

It would be necessary to be sure that one organ only was competent to determine the existence of an act of aggression and to impose sanctions in accordance with the established procedure. He greatly doubted whether those points were fully conveyed by the words "in conformity with the Charter".

51. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer the new article back to the Drafting Committee.⁵

It was so agreed.

ARTICLES 69-71 (Interpretation of treaties)

[27]

Article 69

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term:

(a) In the context of the treaty and in the light of its objects and purposes; and

(b) In the light of the rules of general international law in force at the time of its conclusion.

2. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty, including its preamble and annexes, any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion.

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

(a) Any agreement between the parties regarding the interpretation of the treaty;

(b) Any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation. (A/CN.4/L.107)

[28]

Article 70

Further means of interpretation

Recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to verify or confirm the meaning resulting from the application of article 69, or to determine the meaning when the interpretation according to article 69:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty. (A/CN.4/L.107)

[27]

Article 71

Terms having a special meaning

Notwithstanding the provisions of paragraph 1 of article 69, a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. (A/CN.4/L.107)

52. The CHAIRMAN invited the Special Rapporteur to give his views on the best method of discussing

⁵ For resumption of discussion, see 876th meeting, paras. 65-89.

articles 69 to 71, the first three articles of section III, on the interpretation of treaties.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that government comments on articles 69 to 71 had tended to deal with those articles as a group. The Commission might therefore perhaps find it useful not to engage immediately on a detailed discussion of the various provisions of each article, but to begin by considering the general problems which had been raised in connexion with all three articles.

54. The first general problem raised by governments might be described as that of the hierarchy of the rules of interpretation. Paragraph 1 of article 69 laid down the "ordinary meaning" rule, which was subject to certain conditions specified in sub-paragraphs (a) and (b); paragraph 2 defined the context of the treaty, and paragraph 3 laid down two other rules relating to elements to be taken into consideration in conjunction with the context. A number of governments had suggested that those two rules should be treated as rules of interpretation on the same footing as those laid down in sub-paragraphs (a) and (b) of paragraph 1.

55. If that approach were adopted, it would be necessary to rearrange the whole structure of articles 69 to 71. Such a rearrangement would have some implications so far as the concept of "ordinary meaning" was concerned. That concept must, in his view, always be related to the context, to the object and purposes of the treaty and to the general rules of international law. The United States Government wished to relate it also to any agreement between the parties on the interpretation of the treaty.

56. Another problem to be settled was whether article 69 should deal with the question of the inter-temporal law and, if so, in what terms.

57. The Commission should also decide whether it wished to retain the definition of the context of the treaty in article 69, and how the question of preparatory work should be treated.

58. It further had to take a decision on the proposal to incorporate the provisions of article 71 in article 69, and it might also wish to take a decision on the suggestion by the Government of Israel that comparison between two or more authentic versions of a plurilingual treaty should be mentioned in article 69 as an additional principal means of interpretation.

59. In order that the Commission might have before it a text illustrating the broad effect of acceptance of certain of those suggestions by governments, he had prepared the following redraft of article 69, incorporating the former article 71, article 70 remaining unchanged:

"General rule of interpretation"

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

(a) the context of the treaty and its objects and purposes;

(b) the rules of international law;

(c) any agreement between the parties regarding the interpretation of the treaty;

(d) any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally.

"2. Nevertheless, a meaning other than its ordinary meaning shall be given to a term if it is established that the parties intended the term to have that special meaning.

"3. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising, in addition to the treaty, any agreement or instrument related to the treaty which has either been made by the parties or has been made by some of them and assented to by the others as an instrument related to the treaty". (A/CN.4/186/Add.6).

60. The CHAIRMAN suggested that the Commission consider first the main points raised by governments, since the discussion might otherwise become confused.

61. Mr. CASTRÉN suggested that, instead of attempting to deal with those points *seriatim*, which might waste a lot of time, the Commission should begin by discussing the articles themselves. In the redraft prepared by the Special Rapporteur, article 71 would disappear while article 70 would remain unchanged; the Commission should therefore concentrate on the redraft of article 69.

62. Mr. BRIGGS said that he was reluctant to disagree with the Chairman, but considered that the Commission ought to discuss forthwith the text before it and deal with the topical problems as they arose.

63. Mr. REUTER said that the most important questions were dealt with in paragraph 1 of the redraft of article 69; the other provisions dealt rather with technical points. The Commission might therefore begin by discussing the essential paragraph.

64. Mr. AMADO said that the articles on interpretation had been very thoroughly discussed in 1964, when every point of view had been put and listened to.⁶ He himself was among those who at first had been reluctant to see articles on interpretation included in the Commission's draft, because he was very concerned to safeguard the freedom of States and their untrammelled rights in the matter of the interpretation of treaties. But on reading right through the texts of those articles and the commentaries, he had been filled with admiration at the Special Rapporteur's drafting skill, at his ability to clothe ideas in the essential and appropriate words. Those texts and commentaries did honour to the Commission and the less they were interfered with, the better.

65. None of the points made in the comments by governments had any cogency.

66. Mr. TABIBI said that careful consideration should be given to the suggestions made by governments for the re-arrangements of articles 69 to 71.

67. Sir Humphrey WALDOCK, Special Rapporteur, said that he had not himself made any proposal for the amendment of articles 69 to 71; he had merely prepared a text to illustrate the effect of incorporating in para-

⁶ *Yearbook of the International Law Commission, 1964, vol. I, 765th and 766th meetings.*

graph 1 of article 69 the contents of paragraph 3 of the article and of article 71.

68. The comments of governments had not convinced him that the 1964 formulation should be abandoned; he had an open mind on the suggestion that all elements of interpretation should be placed on the same footing.

69. He could accept Mr. Reuter's suggestion that the Commission begin its work on section III by discussing paragraph 1 of article 69, comparing the 1964 text with the one which he had prepared for purposes of illustration.

70. The CHAIRMAN said that the Commission would follow that method when it began its discussion of article 69 at its next meeting.

The meeting rose at 12.50 p.m.

870th MEETING

Wednesday, 15 June, 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLES 69 TO 71 (Interpretation of treaties)(continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of the articles on interpretation, with particular emphasis on the Special Rapporteur's redraft of paragraph 1 of article 69.²

2. Sir Humphrey WALDOCK, Special Rapporteur, said he had made a fairly exhaustive analysis of government comments on articles 69 to 71 (A/CN.4/186/Add.6, pp. 8-25) and hoped that members would state their views on the three major questions to which he had referred at the previous meeting, namely, the question of a hierarchy of the rules of interpretation, the "ordinary meaning" rule, and the possible rearrangement of the structure of the articles.

3. Mr. de LUNA said the Special Rapporteur had analysed the government comments on an extremely difficult subject with remarkable clarity and thoroughness.

4. He would discuss only two of the major questions, because he was in agreement with the Special Rapporteur on the rest.

¹ See 869th meeting, preceding para. 52.

² *Ibid.*, para. 59.

5. His first point related to paragraphs 1(a) and 1(b) of the Special Rapporteur's new version of article 69. He personally preferred the 1964 text in both cases. In international as in municipal law, the text constituted the authentic expression of the will of the parties. A treaty came into existence when the parties reached agreement on the text as an expression of their intention. The will of the parties at the time of the conclusion of a treaty was therefore decisive, and the 1964 text made that fact clearer.

6. The Special Rapporteur's new version was less satisfactory because the concept of the "ordinary meaning" of the terms used was divorced from that of the context of the treaty as a result of the insertion of the words "the light of" before the words "the context of the treaty". The context was thus presented as one of the elements to be investigated if the ordinary meaning of the terms used was not clear, but those terms had an ordinary meaning only in the context in which they were used. The meaning of words was dependent on their context; for instance according to the context in which it was used, the French word "*mineur*" could mean either "miner" or "minor".

7. Since the parties had chosen to express their will in written form, it was the terms used by them, in their context, which must be presumed to reflect their real intentions. He had himself supported that proposition when, at the session of the Institute of International Law held at Granada in 1956, he had voted in favour of article 1 of the resolution on the interpretation of treaties, the first sentence of which read:

"The agreement of the parties having been reached on the text of the treaty, the natural and ordinary meaning of the terms of that text should be taken as the basis of interpretation."³

8. The primacy of the text of the treaty as the basis for its interpretation had been repeatedly upheld by the Permanent Court of International Justice and by the International Court of Justice. Thus, in its advisory opinion in the *Polish Postal Service in Danzig* case, the Permanent Court had held that it was "a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd".⁴

9. For those reasons, he would suggest that the last part of the opening sentence of paragraph 1 be amended to read "... the ordinary meaning to be given to its terms in the context of the treaty and in the light of:

(a) the objects and purposes of the treaty; "

10. His second point related to the question of the inter-temporal law. He could accept paragraph 1(b) as redrafted, provided it was explained in the commentary that the question whether the parties to a treaty had intended to refer to the rules of international law in force at the time of the conclusion of the treaty, or to legal terms the meaning of which could change with the development of international law, was one of interpretation. For example, during the discussions at the Conference on the Law of the Sea at Geneva in 1958,

³ *Annuaire de l'Institut de droit international*, 1956, pp. 364-365.

⁴ *P.C.I.J.* (1925), Series B, No. 11, p. 39.

reference had been made to the case of a State which had entered into a treaty relating to the territorial sea on the understanding that its width was limited to three miles. Obviously, that State would not have signed the treaty had it known that, in the light of subsequent developments in international law, the term "territorial sea" might subsequently be interpreted as covering a wider zone.

11. Other illustrations of the application of the inter-temporal law in the interpretation of treaties were provided by the judgment of the Permanent Court of International Justice in the case of the interpretation of paragraph 4 of the annex following article 179 of the Treaty of Neuilly⁵ and the advisory opinion of the International Court of Justice in the *Conditions of Admission of a State to Membership in the United Nations* case, particularly the magnificent joint dissenting opinion of Judges Basdevant, Winiarski, McNair and Read.⁶

12. His views on the question of the inter-temporal law were close to those expressed by the Netherlands Government (A/CN.4/186/Add.6, p. 4) but he would be prepared to accept sub-paragraph 1 (b) of the Special Rapporteur's new text, subject to the inclusion in the commentary of a passage which would safeguard the intention of the parties.

13. Mr. VERDROSS said that, in his view, the new version was a distinct improvement on the text adopted at the first reading, more particularly because of its paragraph 1 (c).

14. Some provisions had, however, been better expressed in the earlier text. Paragraph 1 (a) of the new text especially gave the impression that the objects and purposes of the treaty might be sought elsewhere than in the text. But the objects and purposes of the treaty must be sought first in the text itself, and only if examination of the text did not enable an adequate solution to be reached should recourse be had to the subsidiary means. The former wording, "In the context of the treaty and in the light of its objects and purposes", was therefore preferable. Paragraph 1 (b) also was more satisfactory in the earlier text.

15. Mr. ROSENNE said the Special Rapporteur's analysis of government comments on articles 69 to 71 was notably thorough.

16. In general, and subject to certain drafting changes, he welcomed the new formulation of article 69 as far as it went. He also welcomed the emphasis placed in paragraph 4 of the Special Rapporteur's observations on the unity of the process of interpretation; that valuable idea should be incorporated in the text of the articles or at least given prominence in the commentary.

17. With reference to paragraph 1 of the Special Rapporteur's observations, he believed that the Commission's purpose in including rules of interpretation in the draft articles was to facilitate the transaction of international business and to prevent transient difficulties from developing into disputes; he felt strongly that it was not the Commission's purpose in Section III to lay down final rules for the settlement of disputes after they had arisen. For that reason alone he questioned the

relevance of international case-law on the subject of interpretation, for it was inevitably strongly influenced by the manner in which each State party to the dispute had pleaded its case. There was a great difference between pleading a case and handling diplomatic negotiations. In diplomatic negotiations, government advisers were not trying to convince a judge with a view to obtaining a favourable decision, but rather to persuade the other party with a view to reaching an acceptable compromise. His own experience had shown that, when a treaty was interpreted for the purpose of its application, its provisions were never clear. As Mr. Ago had pointed out during the 1964 discussions, there were "cases where two States both found a treaty perfectly clear but interpreted it in two different ways".⁷

18. He had no objection to the suggestion by the Czechoslovak Government that article 69 should specifically refer to the text of the treaty as the starting point of interpretation and he had not been convinced by the arguments put forward by the Special Rapporteur in paragraph 2 of his observations.

19. He accepted paragraph 4 of the Special Rapporteur's observations, particularly his statement that the Commission had not intended to establish any positive hierarchy for the application of the various means of interpretation. The reference to all the various elements being "thrown into the crucible" to give the legally relevant interpretation was very apt and should be included in the commentary. It would be remembered that, in 1964, the Commission had agreed on the generally permissive character of the rules on interpretation.

20. He agreed with the Special Rapporteur on the place given to the ordinary meaning of the terms used in a treaty. Even though the ordinary meaning might sometimes be ambiguous, it should constitute the starting point of the whole process of interpretation.

21. He was prepared to accept the views expressed in paragraphs 7 and 13 of the Special Rapporteur's observations and to leave the questions of inter-temporal law and inter-temporal linguistics to be implied. The 1964 debate on the text of article 56⁸ in the Special Rapporteur's third report had shown that the Commission was obviously unwilling to embark on a full treatment of the inter-temporal law. It should, however, be made clear in the commentary that the Commission had not wished to prejudice that question.

22. He could agree to the retention of the definition of "context" in article 69, but would have some difficulty in voting for the new paragraph 3 because of the elimination of the reference to the preamble and the annexes. He did not believe it was self-evident that the preamble and the annexes formed part of a treaty. At the San Francisco Conference, it had been found necessary to take a formal decision on the status of the Preamble of the Charter, to the effect that there were no grounds for supposing that the Preamble had less legal validity than the succeeding chapters.⁹

⁷ *Yearbook of the International Law Commission, 1964*, vol. I, p. 280, para. 79.

⁸ *Ibid.*, vol. I, 728th and 729th meetings.

⁹ Report of Committee I/1, *Documents of the United Nations Conference on International Organization*, vol. 6, p. 448.

⁵ *P.C.I.J. Series A, No. 3.*

⁶ *I.C.J. Reports, 1948*, p. 82.

23. With reference to paragraph 15 of the Special Rapporteur's observations, his own impression was that the Israel Government's comment on the question of the context was not intended to suggest that the definition of "treaty" should be expanded, but rather that an independent definition of "context" should be included in article 1, which he thought would facilitate the application of the articles on interpretation to the articles on the law of treaties themselves. In that connexion, it would be recalled that, in 1965, the Commission had changed the title of article 1 from "Definitions" to "Use of terms" to emphasize that its provisions did not purport to be a general or absolute catalogue of definitions.

24. He agreed with the part of paragraph 16 of the Special Rapporteur's observations which dealt with the concept of the context, but not with the part which dealt with the preamble and annexes of a treaty.

25. There was one point on which he found the 1964 text preferable to the new formulation and that was the reference in the former paragraph 3 (b) to the understanding of "all" the parties regarding the interpretation of the treaty. Since the Commission's adoption of article 3 (bis), a formulation of that type would not necessarily apply to the constituent instruments of international organizations. That was a point to which he had already drawn attention at the sixteenth session.¹⁰

26. He might wish to speak later on the question of the comparison of the different authentic versions of a plurilingual treaty and on that of the preparatory work.

27. With regard to the wording of the new formulation, it would be better if the ambiguous word "term" were replaced by a clearer expression.

28. He suggested that the new text of article 69 might form the basis of a comprehensive rule to serve as a general directive to advisers of governments and others on methods of avoiding disputes. He would also have a suggestion to make later on the possibility of combining articles 69 and 70.

29. Mr. BRIGGS said the Special Rapporteur was to be commended on his admirably presented observations on the articles on interpretation.

30. He fully accepted the statement in paragraph (9) of the Commission's 1964 commentary "that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties".¹¹ It was therefore to the text that the interpreter should first look rather than to the intention of the parties, which was a subjective element distinct from the text itself.

31. The Special Rapporteur's new formulation of paragraph 1 of article 69 was an improvement on the 1964 text. The removal of the former paragraph 2, on the subject of the context, to paragraph 3 and the incorporation of the former paragraph 3 in the present paragraph 1 as a new sub-paragraph (d) were also an advantage.

32. He commended the Special Rapporteur for the new drafting of paragraph 1 (d), formerly paragraph 3 (b); the latter was unduly rigid in its reference to the understanding of "all" the parties. Article 69 did not deal with consent to the assumption of treaty obligations but rather with a common understanding on the interpretation of the treaty; for that reason, the more flexible formulation of the new paragraph 1 (d) was superior.

33. The meaning of the new paragraph 1 (b) was not altogether clear. If the words "rules of international law" were intended to refer to the rules of treaty interpretation, the provision was unnecessary. If, however, they were intended to refer to the rules of inter-temporal law, the provision should give a complete statement of that law and be reworded on the following lines:

"The rules of international law in force at the time of its conclusion as well as those rules in force at the time of its interpretation".

That would leave it to the interpreter to weigh the implications of the inter-temporal law. There was also a possible third meaning, namely, that paragraph 1 (b) was intended to refer to rules other than those of interpretation and of inter-temporal law, but if that were the case, what were those rules? He would prefer to see the provision dropped unless it could be made clear that it referred to the rules of inter-temporal law.

34. It was necessary to clarify the relationship between the agreement mentioned in the new paragraph 1 (c) and that mentioned in the new paragraph 3.

35. With regard to the relationship between article 70 and article 69, the distinction made between the primary means of interpretation in article 69 and the further or subsidiary means in article 70 seemed to him neither logical nor sound. The assumption appeared to be that the reference in article 70 to the preparatory work and to the circumstances of the conclusion of the treaty was not to the text of the treaty and that they were therefore of a subsidiary character. Since, however, sub-paragraphs (b), (c) and (d) of the new paragraph 1 of article 69 were not confined to the text of the treaty, the distinction between primary and subsidiary means of interpretation should be abandoned and the preparatory work and the circumstances of the conclusion of the treaty should be added to paragraph 1 of article 69. Those changes would have the advantage of eliminating the distinction drawn in the existing article 70 between use of the preparatory work and the circumstances of the treaty's conclusion to "verify and confirm" the meaning and their use to "determine" the meaning. He accordingly suggested that paragraph 1 of article 69 be reworded somewhat on the following lines:

"A treaty shall be interpreted in good faith in order to determine the meaning to be given to its terms in the light of all relevant factors, including in particular:

- (a) the context of the treaty;
- (b) its objects and purposes;
- (c) any agreement between the parties regarding the interpretation of the treaty;
- (d) any subsequent practice in the application of the treaty which establishes the common understanding

¹⁰ *Yearbook of the International Law Commission, 1964*, vol. 1, p. 278, para. 41.

¹¹ *Ibid.*, vol. II, p. 201.

of the meaning of the terms as between the parties generally;

- (e) the preparatory work of the treaty;
- (f) the circumstances of its conclusion".

36. Such an approach would also have the advantage of deleting all reference to the "ordinary" meaning, a term which he found just as objectionable as the former reference to the "natural" meaning. Words had no ordinary or natural meaning in isolation from their context and the other elements of interpretation. It would have the further advantage of eliminating paragraph 2 of the Special Rapporteur's text, formerly article 71, which dealt with the special meaning of terms.

37. If his suggestion were adopted, the text would retain its basic importance as the authentic expression of the intentions of the parties, but nothing that might throw light on the meaning of its terms would be excluded and the present distinction between primary and subsidiary means, a distinction which he regarded as undesirable and not in accordance with the practice of States or of international tribunals, would be avoided.

38. Mr. REUTER said that a reluctance to insert provisions on the interpretation of treaties in the draft was understandable because interpretation was an art, not a science. However that might be, he congratulated the Special Rapporteur on his splendid success in producing a clear, simple and progressive text. What his text really proposed was a method, as the title "General rule of interpretation" clearly showed; and that was an excellent thing. The general rule was to rely on the text of the treaty; any departure from the text must be gradual and systematic. The formula contained in the new wording was excellent in that it brought everything back to the text of the treaty. In so doing, it eliminated the alleged problem of the search for the intention of the parties; of course the intention of the parties must be sought but it could only be found in the text.

39. It should be noted that, in the new version of paragraph 1, the term "context" meant the text of the treaty as a whole in its relation to a provision in particular. In the existing version the term might be understood to mean the general climate, political, economic and social in which the treaty had been concluded, and that would make the paragraph incomprehensible. He therefore proposed that the article begin with the words "A provision of a treaty shall be interpreted . . .".

40. The enumeration in sub-paragraphs (a), (b) (c) and (d) indicated a priority of method rather than of value: it was necessary to proceed from the simple to the complex, from the immediate to the remote.

41. In sub-paragraph (a), the word "and" before "its objects and purposes" should be followed by the words "in the light of" or "in particular". Also, the words "its economy" should be inserted before the words "its objects and purposes"; the term "economy" was in common use in international jurisprudence and meant the general structure of the instrument.

42. Sub-paragraph (a) should certainly be followed by sub-paragraph (c), which indicated the element closest to the treaty itself, and then by subparagraph (d), the present sub-paragraph (b) being moved to the end.

43. In sub-paragraph (b) of the new version the attempt at simplification had perhaps been pushed rather far: it was not stated what rules of international law were referred to. It was certainly preferable not to refer to the inter-temporal law, because everything that the Commission had enunciated on that subject was extremely superficial; but it was not possible to do better in the present state of the vocabulary in the various languages. And the rules of international law referred to could not be the rules of international law relating to the interpretation of treaties; that would be absurd. Was the reference to other rules of international law binding on the parties, or to other rules of international law relating to the subject-matter of the treaty? That should be made clear.

44. Paragraph 2 should, of course, remain where it was.

45. In paragraph 3, the Commission defined the context of the treaty, that was to say, what constituted the text of the treaty as a whole. It was necessary to be very precise on that point. The words "in addition to the treaty" might be replaced by the words "in addition to the whole of the text proper, including the preamble and the annexes", as had already been suggested. The paragraph might then go on: "any agreement or instrument which has been made either by the parties or by some of them and which, with the assent of the other parties, has been deemed to be an instrument incorporated in or annexed to the treaty". In point of fact, the term "treaty" was ambiguous: there were groups of instruments which formed a single whole.

46. In dealing with article 69, the Commission would be well-advised to keep very close to the Special Rapporteur's basic idea, which had been to give an explanation of what was the text of a treaty. Article 70 referred to more remote and clearly different elements, and for that reason the division into two articles was justified. Article 69 was a good article; it was methodical and judicious and emphasized the fact that the words were the only thing that counted for the purpose of the interpretation of treaties.

47. Mr. CASTRÉN said he considered that, in general, the new version of article 69 was an improvement on the text—itself quite good—which the Commission had adopted in 1964. More particularly, the transfer of the content of article 71 to article 69 was a sound move.

48. He accepted the amalgamation of paragraphs 1 and 3 of article 69, but was inclined—like other speakers, particularly Mr. Verdross—to think that sub-paragraph (a) had been better drafted in the earlier text.

49. The Special Rapporteur had been right to delete the word "general" in the phrase "rules of international law" in paragraph 1 (b); it had probably been included by mistake in the 1964 text. Regional and local international law must also be taken into consideration for the purpose of interpreting treaties between small groups of States.

50. The second change which the Special Rapporteur had made in that sub-paragraph, namely, the deletion of the phrase "in force at the time of its conclusion", was also acceptable, because the phrase in question expressed only a part of the principle of the inter-

temporal law and might therefore in some cases lead to results not intended by the parties to the treaty. The problem of the temporal element in regard to the interpretation of treaties was too complex to be dealt with satisfactorily in the last stages of the Commission's work. Mr. Briggs's proposal was interesting, but seemed rather too general to facilitate the interpretation of treaties to any marked extent. Moreover, if the Commission adopted the Special Rapporteur's new version, the question arose whether it would not be desirable to make some reference to a similar problem in article 68, sub-paragraph (c), a provision which most members seemed to wish to delete but whose fate had not yet been decided.

51. He could accept the changes to the former paragraph 3 (b) reflected in the new paragraph 1 (d), with one exception. Instead of referring to a practice which established "the common understanding" of "the parties generally", it would be less tautologous and more precise if the words "the parties generally" were replaced by the words "the parties in question", which would designate the parties in dispute over the interpretation of a bilateral or multilateral treaty.

52. The new wording of paragraph 2 was an improvement on the earlier article 71, and he accepted it. In the English text, the word "may" had been replaced by the word "shall" and a corresponding change should be made in the French text. He also welcomed the deletion of the word "conclusively", which was too categorical and was ill-suited to a legal text.

53. One of the ways in which paragraph 3 of the new text differed from paragraph 2 of the former text was that the reference to the preamble and annexes of the treaty had been omitted. Although the preamble and annexes were clearly a part of the treaty, they could not, as a general rule, be placed on the same footing as the main text, the articles of the treaty itself. But precisely for that reason, it seemed desirable to stress their importance for the purpose of interpreting the treaty, as was done, especially in the case of the preamble, by the great majority of authors.

54. The new wording for the concluding part of paragraph 3 did not seem satisfactory, and he proposed that it be recast to read: "... any agreement or instrument related to the treaty which had been made by the parties or by some of them and assented to by the parties in question". It was not sufficient that an agreement or instrument should have been made; the important point was that the parties to the treaty which disagreed over its interpretation should recognize that the agreement or instrument in question formed part of the treaty in the broad sense.

55. Mr. AGO said that, of the two texts under consideration, he greatly preferred the one which the Commission had adopted in 1964. It was clear from their observations that governments had, by and large, found the rules satisfactory and their comments, sometimes contradictory, were far from demonstrating the desirability of changing a text which had been prepared with great care.

56. The expression "ordinary meaning" had been criticized. He agreed that no term had an inherent

meaning, and that the meaning always depended on usage. That was why it was essential to use terms as far as possible in the sense in which they were customarily used, which was what was understood by their "ordinary meaning".

57. As Mr. de Luna had pointed out, a term in isolation had no meaning; terms had no meaning except in a sentence or in a set of sentences and articles, in other words, in their context. In that respect, even the text adopted in 1964 called for improvement: the words relating to the context should be transferred from paragraph 1 (a) to the introductory sentence. It was essential that there should be two clearly-defined stages, and to take into consideration first, the terms in their context, and then the objects and purposes of the treaty—a factor which might throw some light on the matter.

58. The Commission should not allow itself to be confused by the question of inter-temporal law. Interpretation consisted in the attempt to determine what the parties had intended. While the rules of international law might shed light on that point, it was obvious that to ascertain their intention, reference must be made to those rules of international law which the parties had had in mind at the time the treaty was concluded. But to introduce the idea of the evolution of the rules of international law was to give the impression that the meaning of the treaty might change with time. While such changes might occur, they should not be mentioned in a provision concerning the attempt to determine the intention of the parties at the time of the treaty's conclusion. In that respect, therefore, the 1964 text was preferable.

59. The order in which the ideas were expressed was also more satisfactory in the 1964 text. The starting point was the ordinary meaning of the terms in their context and in the light of the objects and purposes of the treaty and of the rules of international law which the parties had had in mind at the time. A subsequent agreement concerning the interpretation of the treaty, or a tacit agreement revealed by the practice of the parties in the application of the treaty, should not be placed on the same footing as the context. Those agreements could be considered at the same time as the context, but they should not be deemed to form part of the context.

60. He hoped, consequently, that the Commission would adopt the 1964 text with only one amendment, namely, the transfer of the reference to the context from sub-paragraph (a) of paragraph 1 to the introductory sentence of that paragraph.

61. Mr. TUNKIN said that, after carefully studying the comments of governments on articles 69-71, he had come to the conclusion that, in some respects, the Special Rapporteur's new text for article 69 was an improvement on the 1964 version, but that certain elements in the latter ought to be retained. The purpose of interpretation was to establish the content of an agreement resulting from a process of co-ordinating the wills of the States taking part in the elaboration of a treaty and embodied in the final text. It had to be assumed that the final text reflected that agreement as accurately as possible.

62. If the Commission were to leave aside certain doctrinal defects in the 1964 texts of articles 69 to 71 and base itself on certain practical considerations, it must distinguish between primary and secondary sources of interpretation, as had rightly been done by the Special Rapporteur in his new draft. Primary sources included the original text of the treaty and any agreement between the parties concerning its interpretation which might be reached at the time the treaty was concluded or at a later date. The legal force of those two primary sources was more or less equal because it derived from an instrument reflecting the will of the parties. Secondary sources which might have to be taken into account, such as preparatory work, did not have the same legal force.

63. Where the actual wording of article 69 was concerned, he had some sympathy for Mr. Ago's point of view. Perhaps the 1964 formula was preferable for the introductory sentence and sub-paragraph (a) of paragraph 1; it would be useful to know the Special Rapporteur's opinion. Generally speaking, it seemed undesirable to separate the context of the treaty from its objects and purposes.

64. With regard to sub-paragraph (b), there were arguments for and against qualifying the rules of international law as "general". Mr. Castrén had rightly pointed out the need to take into account rules of a regional character that were binding on the parties. If the rules of international law were to be mentioned at all, they must be the rules in force at the time when the treaty had to be interpreted. On balance, the sub-paragraph could probably be dropped: the point was covered in paragraph 2 of the Special Rapporteur's new text.

65. Sub-paragraph (c) of the Special Rapporteur's new text was acceptable, as was sub-paragraph (d), provided the latter was worded in similar terms to those which the Drafting Committee had proposed in its new text for article 68, namely, something on the lines of "any subsequent practice in the application of the treaty by the parties which establishes their understanding of the meaning of the terms of the treaty". The Special Rapporteur's wording: "the common understanding of the meaning of the terms as between the parties generally" was too loose and open to misinterpretation.

66. He supported Mr. Rosenne's suggestion that the preamble of the treaty should be mentioned in paragraph 3 of the Special Rapporteur's new text.

67. Mr. JIMÉNEZ de ARÉCHAGA said he congratulated the Special Rapporteur on his analysis of the comments of governments and of the problems arising out of the articles dealing with interpretation, and fully endorsed the substance of his proposals concerning those articles.

68. As he had not been able to take part in the discussions on the section concerning interpretation at the sixteenth session, he wished to express his support for the approach adopted by the Commission at that time, which seemed to have been accepted by governments, namely, that fundamental rules of interpretation should be set out in the form of legal rules, taking as a point of departure the text of the treaty itself rather than the

intentions of those responsible for drafting the original text. He accepted the Special Rapporteur's suggestion that the presumption regarding the intention of the parties should not be introduced into the articles. His general rearrangement of the 1964 text was a great improvement and should be followed. It made for greater flexibility, particularly by combining paragraphs 1 and 3 of the 1964 text.

69. He favoured the Special Rapporteur's suggestion that the context of the treaty should not be divorced from its objects and purposes. If the two were divorced, contextual interpretation might become too rigid and possibly even mechanical. He had in mind the consideration put forward by Judge Jessup in his separate opinion in the preliminary objections stage of the *South West Africa Cases*.¹² Judge Jessup had suggested that the contextual method of interpretation might result in a word being given the same meaning throughout a treaty in a way that might not be appropriate in the case of an instrument, parts of which had been drafted in separate or independent committees of a conference when coordination might have been insufficient.

70. Sub-paragraph 1 (b) in the Special Rapporteur's new text should be maintained, because it set out the important principle that a treaty constituted a new legal element which was additional to the other legal relationships between the parties and should be interpreted within the framework of other rules of international law in force between them. But it should not be qualified by the insertion of the word "general", which would exclude specific or regional rules of international law binding on the parties. That was a particularly important matter where one treaty had to be interpreted in the light of other treaties binding on the parties. Sub-paragraph 1 (b) should be transferred to the end of paragraph 1.

71. The Special Rapporteur had been right to drop the words "in force at the time of its conclusion", which had appeared in paragraph 1 (b) of the 1964 text. As he (Mr. Jiménez de Aréchaga) had said in 1964,¹³ there were two possibilities: either the parties had intended to incorporate in the treaty certain legal concepts that should remain unchanged, or they had had no such intention, in which case the legal concepts might be subject to change and would have to be interpreted not only in the context of the law in force at the time when the instrument had been concluded, but also in the framework of the entire legal order binding between the parties at the time of the interpretation.

72. The words incorporated in that paragraph in 1964 prevented the free operation of the will of the parties by crystallizing every concept as it had existed at the time when the treaty was concluded. He therefore welcomed the elimination of the first branch of the so-called inter-temporal law from the articles on interpretation. The temporal element should be regarded as implicitly covered by the concept of good faith.

73. Sub-paragraph 1 (c) of the Special Rapporteur's new text was acceptable, as was his paragraph 2. Para-

¹² *South West Africa Cases, Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962*, p. 407.

¹³ *Yearbook of the International Law Commission, 1964*, vol. I, p. 34, para. 10.

graph 3 would be acceptable with the deletion of the words "as an instrument related to the treaty", since the assent required was assent to the content of the instrument and not to its relationship with the treaty. Those words were open to misconstruction. He also agreed with other members that an express reference should be made in paragraph 3 to the preamble and annexes of a treaty, which would be of assistance in interpreting its object and purpose.

74. Mr. VERDROSS, replying to the observations of some speakers on paragraph 1 (b) of article 69, said that, in his opinion, the word "general" had been omitted so as to make it clear that the provision in question also covered the rules of local and regional customary law. While he could approve that idea, he felt that, to express it more clearly, reference should be made to the rules of "customary" international law, because every treaty contained rules of international law.

75. Mr. AMADO said that all the guidance set down in writing by Vattel for the use of interpreters, all the principles which in his time had been regarded as essential to the art of interpretation, even the rule of the effectiveness of treaties, were, if adapted as appropriate, pertinent in the present instance. Vattel had already had a respect for the written text—the "context" as it was now called—and had urged that words should be interpreted according to the meaning attached to them at the time of the treaty's conclusion. To that principle the Commission was adding the precision required by contemporary multilateral treaties—the agreement of the parties on the meaning of the terms used.

76. He agreed with the views expressed by Mr. de Luna, who had put the problem of the context back into its proper perspective, and he approved the return, suggested by other members, to the expression "in the light of its objects and purposes".

77. He entirely agreed with Mr. Tunkin and Mr. Reuter that the adjective "general" should be deleted from sub-paragraph 1 (b) of article 69 in relation to the rules of international law. The word was one of those which had both a specific and a general meaning. When the Commission spoke of general international law, it knew that it was not referring to international law in general.

78. He had found no cause to differ with the views expressed by the Special Rapporteur, although his partiality for the text adopted in 1964 was not yet altogether overcome. There were, however, a number of matters on which he had reached a firm conclusion.

79. First of all, with regard to Mr. Briggs's suggestion that the question of further means of interpretation should be dealt with in article 69, he fully endorsed the remarks of Mr. Reuter, because article 69 was essentially concerned with the vast topic of the "context": the other means of interpretation would be treated in separate articles, for, whether the Commission liked it or not, they were further means of securing information.

80. In his opinion, customary law was contained in the rules of international law, and he therefore thought, unlike Mr. Verdross, that it was not necessary to refer to it expressly.

81. He was in favour of restoring the reference to the preamble, which had been included in the 1964 text but had now been deleted. The elements of information which were to be found in the preamble and annexes of a treaty and which might be useful to an interpreter could not be disregarded.

82. In his opinion, the Commission had succeeded in 1964 in correctly defining the juridical realities of the contemporary world. It should not now be led astray by memories of Roman law and other impressive maxims, but should assemble the essential rules in a well-balanced and harmonious text.

83. Mr. BARTOŠ said that, in his sixth report (A/CN.4/186/Add.6), the Special Rapporteur had dealt with a topic which was not only vast, complicated and of great importance, but also highly controversial as to method, if not as to the purpose to be achieved. He particularly congratulated the Special Rapporteur on having produced a text which would ease the Commission's task. With regard to substance, he approved the texts now proposed for articles 69 and 70, and also the proposal to reduce the number of articles on interpretation from three to two.

84. But although the Special Rapporteur had tried to summarize the main ideas on the subject, the discussion was bringing to light a number of other ideas, some of which might at first glance appear to be contradictory. Those new ideas had convinced him of the need for the Drafting Committee and the Special Rapporteur to give the question further consideration with a view to producing a more suitable text.

85. First, with regard to the question of what was to be understood by "ordinary meaning", while he saw no objection to "words" and "terms" being treated as synonyms, many jurists drew a distinction between them and maintained that "terms" were words peculiar to jurists. He would nevertheless prefer to speak of "words", because terms were words, but words were not, if that distinction was accepted, necessarily and always terms.

86. The ordinary meaning varied according to time and circumstances. A case in point was the Annex to the Brussels Agreement of 1948¹⁴ for the settlement of inter-custodial conflicts relating to German enemy assets, which arose out of the Final Act of the 1945 Paris Conference on Reparation. The English and French versions of the Annex were printed side by side and, in the part dealing with property owned by enterprises under German control, the term "German-controlled" was understood by the British as meaning "administered" or "managed", but the term "*sous contrôle allemand*" was understood by the French as implying supervision, however ineffective, at every stage, but supervision nevertheless. The problem of interpretation had arisen at Brussels when the assets of those enterprises were being transferred to the Inter-Allied Reparation Agency.

87. That example illustrated the problem posed at the international level by the "ordinary meaning". But it was hardly possible to do otherwise than speak of the "ordinary meaning", "common meaning", or "general meaning". The expression "ordinary meaning" was used in all civil codes in connection with the inter-

¹⁴ United Nations, *Treaty Series*, vol. 71, p. 216.

pretation of wills, which had to be interpreted according to the will of the testator in the ordinary meaning of the words used.

88. In international law, the problem of the "ordinary meaning" was complicated by the fact that there were multilateral treaties. There might be an "ordinary meaning" for the authors of the preliminary draft—generally national or international civil servants—for the authors of the subsequent drafts, for the most eloquent members of the drafting committees and for certain States which took part in the drafting, while others took none at all. In his view, the "ordinary meaning" was that which was understood *inter partes*—between the parties which had drafted the treaty.

89. Another factor which had to be taken into account was the evolution of language. The "ordinary meaning" might not always continue to be what it had been at the time of the treaty's conclusion. It had been said that diplomats were particularly conservative in the use of words, but the French Academy had recently pointed out that they were sometimes pioneers, since they had just attached a new meaning to the word "*communauté*", which had formerly been an expression in the Civil Code, but which had now passed into international law.

90. In his opinion, "the parties" should be understood as meaning the parties which had participated in the authentication of the treaty, not in its conclusion. That was how he understood article 69, paragraph 2, which was an explanatory passage in which the parties had tried to give a special meaning to certain terms.

91. Next, was any significance to be attached to the order of sub-paragraphs (a), (b), (c) and (d)? Were they four factors which had the same value? Were they cumulative or graduated? The context, of course, must take first place, but where sub-paragraph (c) was concerned, there might be some doubt concerning the value of subsequent treaties of interpretation and the possibility of their having retroactive effect. He was accustomed to drafting protocols of interpretation which came into force on the day of the entry into force of the treaty of interpretation itself.

92. With regard to sub-paragraph (b) and the rules of international law, he was of the opinion that the rules of international law referred to were those in force at the time of the treaty's conclusion, not at the time of its interpretation. True, they might change in the interval, but in that case, being rules of *jus cogens*, they also changed the earlier treaty, since a new rule of *jus cogens* had supervened.

93. He had stated that the parties which should participate in the interpretation of the treaty were those which had participated in its authentication, because it was possible that parties might accede to the treaty subsequently. While such parties would certainly have a voice in any amendments to the treaty, had they the right to decide what had been the meaning of the words used at the time of its conclusion?

94. Moreover, it should be borne in mind that amendments to the treaty might lead to *inter se* interpretations of multilateral treaties valid only between certain parties. That was a question which had not been taken

into account in the text and had not been considered by governments in their comments.

95. He was not in favour of relying on the preparatory work of multilateral treaties, particularly those of a universal character, but there was a problem where reservations might be made during the negotiations and accepted by the other parties as a compromise: did the compromise also cover the notion of the "ordinary meaning" of the words used? All members could think of international conferences convened by the United Nations at which, when it came to voting, compromise amendments had been submitted for the purpose of achieving a majority in order to save the conference and enable the text to be authenticated. Such amendments sometimes came near to rendering the text meaningless by adding phrases which were inconsistent with the rest.

96. That was why, if the preparatory work was taken into consideration for the purpose of discovering the origin of the ideas underlying a treaty, and if last-minute amendments—sometimes forgotten and not recorded—were disregarded, there was a risk of losing sight of the meaning which the majority had considered as the "ordinary meaning", and which had enabled the treaty to be adopted.

The meeting rose at 1 p.m.

871st MEETING

Thursday, 16 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLES 69 TO 71 (Interpretation of treaties) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of articles 69 to 71 on interpretation.
2. Mr. de LUNA said he would supplement his remarks of the previous day by some comments prompted by the statements of other members of the Commission.
3. With regard to the question of "context", he was more convinced than ever of the need to draft paragraph 1

¹ See 869th meeting, preceding para. 52.

of article 69 on the lines he had suggested, namely "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of": followed by sub-paragraphs (a), (b), (c), (d). That method of interpretation was in conformity with a fundamental principle of all philological criticism which had been repeatedly reaffirmed in case-law. To the examples he had given in his previous statement, he would add the Advisory Opinion of the Permanent Court of International Justice, which had stated, in connexion with the Peace Treaty of Versailles, that "it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense".²

4. With regard to the "objects and purposes" of the treaty, some members of the Commission, while recognizing that the terms used should be construed in the context of the treaty, and not in the light of its context, went on to say that the reference to the objects and purposes of the treaty should not be separated from paragraph 1. Anzilotti himself had stated that it was always dangerous to adhere to the literal meaning of words without having determined the objects and purposes of the treaty. That was an unquestionable truth, which had been the basis of article 19 of the Harvard Draft, of article 2, paragraph 2 of the Granada Resolution of the Institute of International Law and of the Advisory Opinion of the Permanent Court of International Justice in the *Exchange of Greek and Turkish Populations* case,³ which affirmed that the Convention must be interpreted in accordance with its spirit.

5. He did not think, however, that the objects and purposes of the treaty should be referred to in the first sentence of paragraph 1 rather than in sub-paragraph (a). The Special Rapporteur had emphasized that the various rules formulated by the Commission were, so to speak, the ingredients of interpretation, and Mr. Reuter had taken the view that it was a question of method. Thus the other three sub-paragraphs might well be incorporated in the first sentence. In his view, there should be no watertight compartments, but only subtle distinctions between the phases, the first of which was the establishment of the will of the parties from the text, with the presumption, *juris tantum*, that it expressed their real will.

6. The objects and purposes of the treaty came immediately after the terms of the treaty, as was shown, for instance, by the Opinion of the Permanent Court of International Justice in the *Minority Schools in Albania* case,⁴ and, earlier, by the award of the Permanent Court of Arbitration in the *Muscat Dhows* case (1905),⁵ in which the Court had relied on the purpose of the treaty to interpret the word "*protégés*" used in the General Act of the Brussels Conference of 1890.

7. In attempting to distinguish between the terms of the treaty and its objects and purposes, care should,

² *P.C.I.J.*, 1922, Series B, No. 2, p. 23.

³ *P.C.I.J.*, 1925, Series B, No. 10, p. 20; 1928, series B, No. 16, p. 19.

⁴ *P.C.I.J.*, 1935, Series A/B, No. 64, p. 20.

⁵ Scott, *The Hague Court Reports* (First Series), Oxford University Press, New York, 1916, p. 97.

however, be taken not to go beyond the declared will of the parties, which constituted the basis of the agreement. The first consequence of teleological interpretation was application of the rule of effectiveness of the treaty; that rule was not erroneous, but it could lead imperceptibly to giving the purposes of the treaty an importance which was not always justified.

8. An example was the Treaty of Utrecht of 1713. By the terms of that treaty, France had been required to raze the fortifications at Dunkirk, which it had done; but immediately afterwards it had built another fortress nearby. England had rightly protested, arguing that France's action, though in accordance with the text of the treaty, was not in accordance with its objects and purposes, which were to prohibit France from possessing fortifications in the immediate vicinity of the English coast.

9. That principle was a delicate one to handle, as was shown by the *Corfu Channel* case. It had been maintained that under the terms of the special agreement between the United Kingdom and Albania the Court would not have jurisdiction to assess the amount of compensation.⁶ In the light of the objects and purposes of the agreement, the Court had declared itself competent to assess the amount, for, as it had stated, "It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect".⁷

10. Accordingly, despite the importance of the objects and purposes of a treaty, it was advisable to keep them separate from the terms of the treaty and to maintain a proper balance, for otherwise it was dangerous to have recourse to them, especially where gaps had to be filled. Consequently, he was still convinced that sub-paragraph (a) should read "(a) the objects and purposes of the treaty".

11. The rules of international law should be mentioned in the article, immediately after the objects and purposes of the treaty. He cited a number of cases, in particular the *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder*, in which the Permanent Court of International Justice had stated that "unless the contrary be clearly shown by the terms of that article, it must be considered that reference was made to a Convention made effective in accordance with the ordinary rules of international law".⁸ He also relied on the dissenting opinion of Judges Basdevant, Winiarski, McNair and Read in the *Conditions of Admission of a State to Membership of the United Nations* case, in which they had maintained that "in case of doubt it is the rule or principle of law which must prevail".⁹

12. With regard to the controversy between Lauterpacht and McNair, it was clear from the case-law that the latter was right in recognizing that there was a presumption *juris tantum* that treaties—even treaties which created rights—were declaratory of international law. The reason was that when a judge wished to clarify the

⁶ *I.C.J. Reports*, 1949, p. 23.

⁷ *Ibid.*, p. 24.

⁸ *P.C.I.J.*, Series A, No. 23, p. 20.

⁹ *I.C.J.*, Reports, 1948, p. 86.

meaning of a contractual provision, he endeavoured to link it with international law, which had the advantage of giving it a single or "univocal" meaning. If the judge started from the presumption that the treaty had been formulated in a legal vacuum and that where the treaty was silent or its meaning doubtful, reference to international law was inadmissible, then the term to be interpreted would be "multivocal", because there were numerous ways of departing from a rule.

13. As to whether it was necessary to state that the rules applicable were those in force at the time when the treaty was concluded, or whether it was sufficient merely to refer to international law without further qualification in case the parties had wished to make the provisions of the treaty subject to the natural development of legal concepts and institutions, he still believed that the neutral text now proposed by the Special Rapporteur was acceptable, provided that it was made quite clear in the commentary that, normally, it would be necessary to follow international law as it had been at the time when the treaty was concluded, not as it was at the time of the interpretation. If the Commission considered that it was not bound to take account of the comments made by governments, he would prefer to revert to the 1964 text (A/CN.4/L.107).

14. He proposed that the reference to the preamble appearing in the 1964 text should be retained. The reason why a government had proposed its deletion was certainly because the preamble to a treaty did not lay down any rights or obligations for the parties; but that government was mistaken if it thought that declarations of principle or of the policy to be followed threw no more light on the objects and purposes of the treaty than did many standard clauses. The Permanent Court of International Justice had relied on the preamble to Part XIII of the Peace Treaty of Versailles, under which the International Labour Organisation had been established, for the purpose of interpreting that Treaty.¹⁰ He also referred to an article on the question by Mr. Reuter in the *Journal du droit international*.¹¹

15. He shared the view that preparatory work should be disregarded. In connexion with the *Interpretation of the Statute of the Memel Territory* (Preliminary Objection), the Permanent Court of International Justice had stated that "As regards the arguments based on the history of the text, the Court must first of all point out that, as it has constantly held, the preparatory work cannot be adduced to interpret a text which is, in itself, sufficiently clear".¹² With regard to the *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, the Permanent Court had adhered to "the rule applied in its previous decisions that there is not occasion to have regard to the protocols of the conference at which a convention was negotiated in order to construe a text which is sufficiently clear in itself".¹³

16. It was also necessary to take into account the methods used in drawing up multilateral treaties within international organizations. Apart from the exceptional

case of the International Labour Conventions, where the authors of the text were not the same as the parties, owing to the participation of workers' and employers' delegates together with government delegates, such multilateral treaties were generally the work of a number of persons, including even international civil servants, and they were the subject of numerous compromises and arrangements. Furthermore, as the Yugoslav Government had pointed out, States which did not belong to the drafting committee, or acceded to the treaty later, did not know all the details of the treaty's preparation. There was also a danger of applying the historical element too rigidly to the situation at the time of the treaty's conclusion, whereas it was necessary to act cautiously, as the Permanent Court of International Justice had done in the *Diversion of water from the Meuse* case.¹⁴

17. Mr. REUTER said he would sum up the points on which statements by other members of the Commission had confirmed his opinion, or might perhaps lead him to modify it. He would not choose between the 1964 text and the new drafting until he had heard what the Special Rapporteur had to say.

18. One thing was certain: if the Commission adopted the new formula, it would be solely because it amounted to a very simple piece of advice, namely, to keep to the text for purposes of interpretation. If that was what the Commission wished—and he was assuming that it was—it should examine each provision of the article in that light.

19. That being so, he was absolutely convinced that the first sentence of article 69, paragraph 1 should not be worded "A treaty shall be interpreted...". In practice, it was never the whole of a treaty that was interpreted; it was a legal rule. The passage should therefore read: "A rule enunciated in a treaty shall be interpreted" or "A provision of a treaty shall be interpreted...". Unless that change was made, the Commission would have the greatest difficulty with the word "context" which it was constantly using, whereas up to the present it only intended to use the basic term "text" in paragraph 3, and even that was not certain.

20. It had also been said with reference to the first sentence that almost as much importance should be attached to the context as to the ordinary meaning of words, and that the context should be mentioned in the first sentence. He would have no objection; so far as he was concerned, interpretation meant the interpretation of a rule, and one worked down from the rule to the words and then up again from the rule to the other rules, in other words to the context.

21. Whatever solution was adopted, it was important to bear in mind that to speak of the "ordinary meaning" of the terms, or of words, in the context, implied that more than one ordinary meaning was possible: a meaning which did not take the context into account and another meaning which did. The Commission could therefore choose between saying "in accordance with the ordinary meaning of the words *and* in the context" or "in accordance with the ordinary meaning of the words in the context". There was a slight difference between those two alternatives that affected paragraph 2, which had

¹⁰ P.C.I.J., Series B, No. 13, p. 14.

¹¹ *Journal du droit international*, 1953, pp. 13 *et seq.*

¹² P.C.I.J., Series A/B, No. 47, p. 249.

¹³ P.C.I.J., Series B, No. 14, p. 28.

¹⁴ P.C.I.J., 1937, Series A/B, No. 70, p. 21.

so much support. If it were suggested that there were meanings other than the ordinary meaning, it followed from what he had said that a meaning other than the ordinary meaning ascribed to a term in a provision would be ascribed to it because it corresponded to the context. When the Commission spoke of "the ordinary meaning in the context", it was choosing between several ordinary meanings in the light of the context, so that paragraph 2 was perhaps no longer necessary. The Drafting Committee should examine that point very carefully.

22. With regard to sub-paragraph (b), he had reconsidered the view he had expressed at the previous meeting, namely, that that sub-paragraph should be placed at the end of the enumeration, after sub-paragraph (d). If the Commission accepted the idea that the whole of article 69 referred to the text of the treaty, the rules of international law mentioned in sub-paragraph (b) could only be the rules of international law to which the text itself referred. There might be cases in which other rules of international law would have to be taken into consideration; for example, if the examination of a rule stated in a treaty led to an interpretation which conflicted with an undertaking given by the parties in another rule, there was no doubt that it would be better to interpret the first rule in such a way that it did not conflict with the second; in other words, it must not be presumed that States were seeking to violate their undertakings. But such a case would come under article 70, which indicated the means to be used if the result was absurd or unreasonable. If sub-paragraph (b) was taken to refer to the rules of international law brought into operation by the application of the treaty, its proper place was immediately after sub-paragraph (a).

23. Furthermore, it would be better not to refer in sub-paragraph (b) to the rules of international law in force at the time of the treaty's conclusion. For instance, a treaty concluded by the United Kingdom in 1912 mentioned the territorial sea; that clearly involved the rules of international law concerning the territorial sea. In order to interpret that treaty in 1966, should reference be made to the territorial sea as defined in 1912 or as defined in 1966? That question had been much discussed in the course of legal proceedings. It was not easy to lay down a general rule on the subject. In some cases the parties had intended to refer to a fixed concept, which could only be that recognized at the time; but in other cases they had intended to refer to a variable concept, as defined at the time of application. It would be dangerous for the Commission to take sides on that question.

24. In sub-paragraph (c) it would be necessary to insert the word "subsequent" before the word "agreement", since concomitant agreements were covered by paragraph 3.

25. Still proceeding on the assumption that the Commission would adopt the system which, in his view, justified the new wording of article 69, he noted that paragraph 3 of that article defined what the "context" of the treaty was understood to comprise. That paragraph should mention the "text" of the treaty itself, and then the annexes and any agreements which were separate but had been incorporated in the treaty or concluded at the same time.

26. Mr. EL-ERIAN said that as he had not taken part in the discussion on the articles concerning interpretation at the sixteenth session, he wished to comment on the problem as a whole, as well as on the new texts of articles 69 and 70 now before the Commission. He entirely agreed with the approach adopted in 1964 and paid a tribute to the Special Rapporteur's scholarly exposition of a controversial subject both in his third report¹⁵ and in his careful analysis of the comments by governments in his sixth report (A/CN.4/186/Add.6). The 1964 commentary on articles 69 to 71 was lucid and clear. It did the Commission great credit to have formulated general legal principles and not merely guide lines for States; they would be of real value for the drafting and application of treaties.

27. A balance had been achieved in the 1964 texts when the Commission had pronounced itself in favour of the contextual approach in the broad sense, which meant interpretation in the light of the context of the treaty as well as its objects and purposes. Those were but two aspects of a single process. The primary sources for interpreting a treaty might have to be listed for purposes of logical presentation, but that did not justify the deduction of a hierarchical order. Interpretation was an intricate process for establishing the meaning of a text within the framework of the surrounding circumstances and in the light of rules of international law, so as to arrive at the most reasonable conclusions about the intention of the parties as to how the object of the treaty could best be attained.

28. He welcomed the distinction being made between primary and secondary means of interpretation. He had some difficulty with the words "further means" in the English text of article 70. The French version was "*moyens complémentaires*" and the Spanish "*otros medios*". He would prefer the words "supplementary means", which would be easier to translate into other languages.

29. The Commission had wisely decided to formulate rules that would be generally applicable to all treaties regardless of their nature instead of attempting to differentiate between law-making instruments and others.

30. Certain provisions in the draft articles concerning the conclusion of treaties might be regarded as a guide for governments, but it would be dangerous so to describe the rules of interpretation, for that might detract from their legal force. He was reminded of the differences of opinion about the relative legal force of the provisions of Chapter XI of the United Nations Charter (Declaration Regarding Non-Self-Governing Territories) compared with that of the provisions of other chapters. The Commission was therefore right in enumerating the principles of interpretation as legal rules and not as guide lines. The very fact that the enumeration in Article 36, paragraph 2, of the Statute of the International Court of Justice, concerning its jurisdiction, started with a sub-paragraph reading "the interpretation of a treaty" confirmed that the Commission was right.

31. In the 1964 text of article 69, paragraph 1 (b), (A/CN.4/L.107) the Commission had taken the inter-

¹⁵ *Yearbook of the International Law Commission, 1964*, vol. II, pp. 52 et seq.

temporal factor into account by inserting the words "in force at the time of its conclusion". Now that it had decided not to deal with the impact of developments in customary law on the provisions of a treaty, it had to go back to the formula "the rules of international law". The examples given in paragraph (11) of the 1964 commentary on article 69¹⁶ showed that a rigid inter-temporal rule would be undesirable, since the scope and meaning of legal concepts used in treaties were subject to evolution and change. It was a question of investigating the intention of the parties. A distinction should be made between the use of a term as a definitive rule or as a legal concept the scope of which was changeable according to changes in the rules of international law. He was opposed to a rule of interpretation that would hamper progressive development by making it impossible to take account of such changes.

32. He agreed with the Special Rapporteur that the scope of sub-paragraph (b) of his new text should not be confined to rules of interpretation, but should also include substantive rules. On the other hand, he differed from the Special Rapporteur's view that the preamble of a treaty should be left out of the definition in paragraph 3. The preamble frequently formed an integral part of the text, particularly when it enunciated the objects and purposes of the treaty. A difference of opinion had arisen in the Sixth Committee of the General Assembly and in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, about the legal force of the principles enunciated in Article 2 of the Charter, those laid down in the Preamble and those in Article 1 relating to self-determination and respect for human rights. Committee I/1 of the San Francisco Conference had stated in its report that "It was very difficult, practically impossible, to draw a sharp and clear-cut distinction between what should be included under 'Purposes', 'Principles' or 'Preamble'";¹⁷ the Committee had concluded that "the distinction between the three parts of the Charter under consideration is not particularly profound".¹⁸

33. In order to maintain the distinction between primary and subsidiary means of interpretation, preparatory work should be dealt with in article 70. Such material should not be used at the outset of an inquiry into the meaning of a text, but it could be resorted to in order to confirm the meaning or elucidate it in case of ambiguity.

34. The rule to be adopted in regard to authentic versions of plurilingual treaties must not be too rigid. Some bilateral treaties were drawn up in two languages, each version being equally authentic, with a third version in yet another language. Allowance should also be made for the possibility that the original draft might have been prepared in one language only.

35. He supported the Special Rapporteur's suggestion that the 1964 text of article 71 should be incorporated in article 69, but it ought to be placed at the end of the article as paragraph 3. Paragraph 3 would then follow

the present paragraph 1, thus linking up the two provisions and giving the appropriate prominence to the definition of the context of the treaty. The place for that definition was in article 69, not in article 1.

36. Mr. TSURUOKA said he wished to associate himself with the tribute paid to the Special Rapporteur for the work he had done on the articles concerning the interpretation of treaties. The ideas expressed in the new text of articles 69 and 70 would certainly be of practical utility; in the first place they would be of assistance to the parties, to ministries of foreign affairs and to other government departments responsible for applying treaties. To some extent, the rules would also ensure uniform interpretation and application by the parties, and they might perhaps reduce the risk of disputes over the application and interpretation of treaties. It would probably be going too far to claim that the rules would facilitate the settlement of disputes between the parties concerning interpretation, but they would certainly not make it any more difficult. In accordance with the general trend of opinion in the Commission, he therefore supported the inclusion of those ideas in the draft.

37. There were a few points which caused him concern, however. The Special Rapporteur had said that the rules were the expression of fundamental principles of international law accepted by almost all countries; moreover, Mr. El-Erian had pointed out that articles 69 and 70 would have binding legal force. But it would be essential to explain in a fairly detailed commentary exactly what that binding legal force meant and what were the consequences of the rules. After all, the freedom of international courts had to be safeguarded; he was particularly glad that judges would not be strictly bound by the two articles drafted by the Special Rapporteur.

38. The new text was an improvement on the old in several respects. It was more condensed, the ideas were better arranged, and it emphasized the exceptional character of paragraph 2 of article 69 as compared with paragraph 1. The omission of any express reference to the inter-temporal law was also an improvement. Lastly, the new text brought out more clearly the relationship between the ideas contained in paragraphs 1 and 3.

39. As to the question of the "ordinary meaning", he shared the view expressed by several members: the terms of a treaty could not have any ordinary meaning independent of the text. The meaning to be given to the terms was the natural and ordinary meaning in the context, within the general structure of the treaty. That idea ought to be very clearly expressed at the outset.

40. The Commission would then enumerate a series of means to be used to determine the natural and ordinary meaning of the terms in the context of the treaty. The enumeration of those means did not imply any order of legal precedence; it merely met the intellectual need to proceed in a certain order. In his opinion, a treaty should be interpreted in good faith, according to the natural and ordinary meaning to be given to each term in the context of the treaty, in the light of (a) the text of the treaty; (b) the objects and purposes of the treaty; (c) the rules of international law; (d) any agreement concluded between the parties regarding interpretation; (e) "any subsequent practice . . ." etc. (sub-paragraph (d) of the new draft) and (f) the preparatory work.

¹⁶ *Ibid.*, p. 202.

¹⁷ *Documents of the United Nations Conference on International Organization*, vol. VI, p. 446.

¹⁸ *Ibid.*, p. 447.

41. In other words, he would like the Special Rapporteur's two articles 69 and 70 to be combined in a single article. That would have the advantage of eliminating any order of legal precedence of the means of interpretation, and avoiding the risk of disputes as to whether the means provided for in the present article 69 were sufficient, or whether it was necessary to apply the "further" means referred to in article 70. The new single article would be entitled "Rule of interpretation". It would leave the parties and international courts the greatest possible freedom to choose the combination of means to be employed.

42. Mr. TABIBI commended the Special Rapporteur for his contribution to the Commission's work on interpretation.

43. The Commission had already discussed the articles on interpretation at length in 1964,¹⁹ and he would not dwell on points which he had raised then; but, in view of the complexity and difficulty of the subject, he would once again urge the Commission to refrain from laying down rigid rules that were likely to create problems rather than to solve them. The adoption of flexible rules would enable States to retain their present freedom of action.

44. It was generally recognized by the writers on the subject that there were three main elements involved in interpretation: the context of the treaty, its objects and purposes and the intention of the parties. It was essential that all three elements should be mentioned. Paragraph 1 of article 69 as reformulated by the Special Rapporteur referred only to the context and to the objects and purposes of the treaty; it made no mention of the intention of the parties, which was the most important factor involved.

45. Experience at the national level showed the extreme difficulty of laying down rules of interpretation. When drafting the Constitution of Afghanistan in 1964, the National Assembly had tried to include an article on the interpretation of the Constitution, but had failed to agree on a text.

46. He found paragraph 1 of the Special Rapporteur's new text of article 69 acceptable, provided that a reference to the intention of the parties was introduced; but he doubted whether the content of paragraph 2 could be regarded as a rule of law.

47. In paragraph 3, an element of weakness was introduced by the words "or has been made by some of them and assented to by the others", referring to a related agreement. Instruments related to the treaty should be drawn up by all the parties and not merely by some of them. In many cases, the annexes to a treaty, such as the maps annexed to a boundary treaty, were more important than the text itself. Being part of the treaty, they should be drawn up in the same way as the text.

48. The CHAIRMAN, speaking as a member of the Commission, said that in his view the Commission had been right in not attempting to go into details and in confining itself to stating a few rules which could be considered the scientific basis of the art of interpretation. Since the purpose of interpretation was to determine the

meaning and effect of the rules embodied in treaties, the Commission was proposing a general method for achieving that purpose, taking into account the nature of the interpretation and the nature of the instrument to be interpreted. The means enumerated were only various aspects of the same operation; they were arranged, not in any order of precedence, but in a practical order, which was self-evident in view of the circumstances.

49. The 1964 wording (A/CN.4/L.107) was preferable because of the way in which it introduced the context; the meaning of the terms should be determined "in the context", not "in the light of the context".

50. Although the word "text" did not appear in article 69, the rules set out gave precedence discreetly to the text of the treaty, which was right. It was better to refer to the text than to the intention or will of the parties as the source of the legal rule. For the rule was the expression of the will, and that expression was to be found in the text. Even if the will was clear, there could be no rule of written law without a text.

51. The reference to the rules of international law was indispensable, for just as a term could only be understood in a sentence, a sentence only in an article, and an article only in the treaty as a whole, it was impossible to understand the treaty except within the whole international legal order of which it formed a part, which it influenced and by which it was influenced. A treaty was an act of will; the parties had reached agreement, but their agreement was not *in vacuo*; it was situated in a legal order. In using certain terms, the parties had in mind concepts and meanings established by the legal order.

52. The omission of the word "general" before the words "international law" was justified, because a treaty concluded between several States should be interpreted in the light of the special international rules applying to those States, whether they were customary rules or rules of written law. It must be emphasized, however, that to be taken into consideration in interpreting the treaty, those rules, although not "general", must be "common" to the parties to the treaty.

53. With regard to the inter-temporal law, it was obvious that the treaty, as an act of will, must be interpreted in the light of the international law in force at the time when it was concluded: it was necessary to ascertain what the will of the parties had been at a given moment. He was not opposed to the idea of evolution or dynamism of rules of law, but he recognized what belonged to interpretation and what belonged to modification. Rules could be changed by a subsequent agreement through various procedures. But the treaty had only one meaning: what the will of the parties had been at the time of its conclusion. In that connexion, he drew attention to the ingenious distinction which had been rightly drawn, by François Gény in particular, between the interpretation of rules, the purpose of which was to discover what existed, and free scientific research, which was concerned with the evolution or modification of rules of law and the creation of rules of law by other sources of the legal order. He was therefore in favour of retaining the words "in force at the time of its conclusion", which had been included in paragraph 1 (b) of article 69 as adopted in 1964.

¹⁹ *Yearbook of the International Law Commission, 1964*, vol. I, 765th and 766th meetings.

54. He had no objection to the proposal that the content of article 71 should become paragraph 2 of article 69.

55. He agreed with Mr. El-Erian that the proper place to define the context of the treaty was paragraph 3 of article 69, since the definition was given "for the purposes of its interpretation" and its scope was therefore very limited.

56. In conclusion, he too wished to pay a tribute to the Special Rapporteur for the clarity and subtlety he had shown in dealing with the articles on interpretation.

The meeting rose at 1.5 p.m.

872nd MEETING

Friday, 17 June 1966, at 11 a.m.

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

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLES 69-71 (Interpretation of treaties) (continued)¹

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 69.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would consider a number of detailed drafting suggestions made during the discussion. He would confine his own remarks at that stage to the observations of members on the main issues.

3. The first of those issues was the structure of articles 69 and 71. The discussion had shown that there was general support for the new arrangement in which the contents of the former paragraph 3 of article 69 were moved to paragraph 1 and those of article 71 were incorporated in article 69 as a new paragraph 2. On that last point, some members had reiterated the perfectly tenable view that any special meaning given by the parties to a term would be an ordinary meaning in the context of the treaty. According to that view, if the "ordinary meaning" was not divorced from the context of the treaty, there would be no need to include in article 69 a paragraph on

special meanings of terms. However, he thought that that proposition was too subtle to be understood by many of those who would be likely to interpret treaties and that there was, therefore, a case for including the substance of article 71 in some form in article 69.

4. With regard to the greater problem of the formulation of paragraph 1 of article 69, he reminded the Commission that the new draft in his sixth report (A/CN.4/186/Add.6) was intended as an illustration of the result of accepting a number of government suggestions. The wording was accordingly based on the thesis that complete parity should be given to all the elements to be taken into account in the process of interpretation. The United States Government, in particular, in its anxiety to avoid any suggestion of hierarchy, had even challenged the primacy of the context of the treaty as being incompatible with the provision that a treaty must be interpreted in the light of any agreement between the parties on interpretation.

5. His own opinion was that the various other elements of interpretation, though possessing no less weight than the context in so far as they were relevant, could not be placed on an absolute parity with the context in a logical formulation of the general rule of interpretation. He agreed with those members who considered it inappropriate to speak of the interpretation of a treaty "in the light" of its context and would be prepared to place the words "in the context of the treaty" in the opening phrase. It could, however, be left to the Drafting Committee to decide whether those words should be included in the opening phrase or left at the beginning of subparagraph (a) in order to stress their strong connexion with the objects and purposes of the treaty. In either case, the words "in the context of the treaty" would immediately follow the reference to the "ordinary meaning" and precede the words "in the light of".

6. It had been suggested that paragraph 1 (c) should be moved to a more prominent position in order to emphasize the importance of an agreement between the parties on the interpretation of the treaty. It should be remembered that an agreement of that type could be made either before or after the conclusion of the treaty. The language used in paragraph 3 (a) in 1964 (A/CN.4/L.107) had been intended to cover both situations.

7. There was a connexion between that problem and that of the relationship between paragraph 1 (c) and paragraph 3 on the definition of the context. He had included the reference to an instrument related to the treaty which had been made by some of the parties and assented to by the others in order to deal with a situation which not infrequently occurred in practice. There were cases in which instruments that were relevant for purposes of interpretation were not expressly agreed to be interpretative instruments, but formed part of the general transactions surrounding the treaty. The transaction at the San Francisco Conference relating to voting procedures in the Security Council was a case in point. The Drafting Committee would have to clarify the relationship between paragraph 1 (c) and paragraph 3. It might perhaps consider the possibility of confining the provisions of paragraph 1 (c) to agreements on interpretation entered into after the conclusion of the treaty.

¹ See 869th meeting, preceding para. 52.

8. With regard to paragraph 1 (b), his own view was that its provisions should follow closely on those relating to the context of the treaty. The legal order formed the framework within which both the context and the terms of the treaty had to be understood.

9. It was his impression that the Commission was generally disinclined to deal with the problem of inter-temporal law in the draft articles. It was a matter of interpretation to determine the precise meaning of a term of international law used in a treaty or of a treaty provision which clearly involved the application of international law. The question whether the terms used were intended to have a fixed content or to change in meaning with the evolution of the law could be decided only by interpreting the intention of the parties. The matter was, strictly speaking, not one of inter-temporal law; the evolution of the law affected the application of the agreement, but not its meaning. That approach was, however, probably too subtle for the purpose of drafting a convention.

10. The text adopted in 1964 appeared to exclude the possibility of enlargement of the legal content of a treaty through the evolution of international law. At the same time, any attempt to give a more complete account of the position would present very great difficulties. In the circumstances, his own reluctant conclusion was that the attempt to solve that problem should be abandoned and that the Commission should confine the text of paragraph 1 (b) to a limited reference to "rules of international law". He could not agree to the insertion of the word "customary" before the words "international law", because that would make the reference too restrictive, or to the re-introduction of the word "general", which had appeared in the 1964 text, but which he did not consider appropriate.

11. He had been impressed by Mr. Reuter's remarks about the context. Though all the elements in paragraph 1 were perhaps related to the context, he believed the Commission should endeavour to express the notion of the context in a way that would be commonly understood. He therefore suggested that the Drafting Committee should maintain the definition of the context in the new paragraph 3, but should try to improve its wording. Despite the attractions of the suggestion made by the Government of Israel (A/CN.4/186/Add.6) that a definition of the term "context" should be included in article 1, he believed that that definition was particularly well placed in article 69, because it was intended for a specific purpose. The definition might perhaps affect other articles of the draft, but only through interpretation.

12. The majority of members also appeared to wish to keep article 70 separate from article 69. The reference to preparatory work would thus remain in article 70.

13. In conclusion, he suggested that articles 69 and 71 should be referred to the Drafting Committee for consideration in the light of the discussion.

14. Mr. AMADO asked the Special Rapporteur to give his views on the question, raised by some members, of the preamble and annexes to a treaty.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that, as would be seen from paragraph 16 of his observations (A/CN.4/186/Add.6) he had had no inten-

tion of suggesting that the preamble and annexes of a treaty should be excluded from the definition of its context. In the definition in the new paragraph 3 of article 69, the words "including the preamble and annexes" had been dropped only because they embodied a self-evident statement, included in the 1964 text *ex abundanti cautela*. Those words could certainly be reinstated in paragraph 3.

16. Mr. ROSENNE said that, in his view, the opening words of paragraph 1: "A treaty shall be interpreted..." were too strong. Throughout the draft articles, that kind of language was employed in the statement of imperative rules. In view of the Special Rapporteur's statement in paragraph 1 of his observations that the Commission had been "fully conscious in 1964 of the undesirability—if not impossibility—of confining the process of interpretation within rigid rules" the Drafting Committee should consider the possibility of using a less categorical formulation.

17. On the other hand, the Drafting Committee should consider making the new paragraph 3 of article 69 more categorical by replacing the words "shall be understood as comprising" by the words "shall comprise". At the 769th meeting, the Special Rapporteur had accepted a suggestion to that effect,² but the matter had subsequently been overlooked.

18. He had no objection to article 69 being referred to the Drafting Committee, but he had strong reservations concerning the Special Rapporteur's observations on the question of preparatory work, a subject to which he would revert when article 70 came under consideration. He also wished to speak at a later stage on the question of the comparison of the various authentic versions of a multilingual treaty.

19. The CHAIRMAN, speaking as a member of the Commission, said that the opening words of paragraph 1 did not mean that interpretation was obligatory, but that if a treaty was interpreted, it must be done in good faith; the obligation to act in good faith should certainly be imposed.

20. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the Chairman's remarks on the question of good faith; but in English the "shall" form was used in statute law to denote imperative rules. The point raised by Mr. Rosenne could perhaps be met by means of a form of words such as "a treaty is to be interpreted..."

21. Mr. ROSENNE said he fully shared the Chairman's views on the question of good faith. But he still considered that the expression "shall be interpreted" was too strong in so far as it applied to the words "in accordance with the ordinary meaning". The point was essentially one of drafting and could be left to the Drafting Committee.

22. Mr. EL-ERIAN suggested that it would be desirable not to refer article 69 to the Drafting Committee until the Commission had completed its consideration of article 70.

23. Sir Humphrey WALDOCK, Special Rapporteur, said there should be no difficulty in referring article 69

² *Yearbook of the International Law Commission, 1964*, vol. I, p. 313, paras. 45 and 46.

to the Drafting Committee, because that Committee would in any case only consider it in conjunction with article 70.

24. The CHAIRMAN invited the Commission to vote on the Special Rapporteur's proposal that article 69 should be referred to the Drafting Committee for consideration in the light of the discussion. That proposal also covered article 71, the contents of which had been incorporated in the new version of article 69.

*The proposal was adopted by 14 votes to none, with 2 abstentions.*³

25. Mr. TSURUOKA said that he had voted in favour of referring article 69 to the Drafting Committee on the understanding that the Commission could reconsider articles 69 and 70 together at a later stage.

26. The CHAIRMAN agreed that the articles concerning interpretation must be treated as a whole. He asked the Special Rapporteur whether he wished to make any introductory remarks before the Commission began its discussion of article 70 (A/CN.4/L.107).

27. Sir Humphrey WALDOCK, Special Rapporteur, said he had little to add to the introductory remarks he had made on articles 69-71 at the 869th meeting.⁴ In the light of the prolonged discussion in 1964⁵ and the agreement which had then been reached, he had felt that the general structure of article 70 should be maintained unless some very powerful arguments to the contrary emerged from the government comments. Those comments had not revealed any strong weight of opinion against the 1964 arrangement of the article, so he had made no new proposals on the matter.

28. Mr. TSURUOKA said that there was a certain lack of cohesion and logical sequence in articles 69 and 70. If an interpretation had been made in conformity with the provisions of article 69, that was to say in the light of the objects and purposes of the treaty, it was difficult to see how it could lead to a result which was "manifestly absurd or unreasonable in the light of the objects and purposes of the treaty". Consequently, he still thought that, as he had suggested at the previous meeting, the two articles should be combined so as to make it clear that the preparatory work was one of the means that could be used to ascertain the natural and ordinary meaning of the terms in the context of, or within the general structure of, the treaty.

29. Mr. ROSENNE said that, on the question of the preparatory work, he adhered to the position of principle he had outlined at the 766th meeting.⁶ He also maintained the reservation on article 71 which he had made at the 770th meeting, a reservation which the Special Rapporteur had rightly pointed out applied more to article 70 than to article 71.⁷

30. It was appropriate to approach the question of the preparatory work from the point of view of the Commission's own articles. Many of the draft articles on the law

of treaties seemed to him to require some examination of the preparatory work for a given treaty if they were to be properly applied. Examples were articles 4 and 11, in which the expression "it appears from the circumstances" was used, and article 12, in which the same expression was used in one sub-paragraph and the phrase "was expressed during the negotiations" in another. The preparatory work might be relevant in the case of articles 31, 33, 34, 34 (*bis*) and 35; its examination was essential in the case of article 32. Article 39 was probably predicated on what had occurred during the negotiations phase—a point which was clearer in the 1963 version of the article (A/CN.4/L.107).

31. The preparatory work might also be relevant in the case of articles 39 (*bis*) and 41 (A/CN.4/L.115). He failed to see how the provisions of articles 44 and 46 (A/CN.4/L.115) could operate without reference to the preparatory work. Indeed, those provisions seemed to require more than an examination of the preparatory work since the reference to what constituted "an essential basis of the consent of the parties" in article 44, and to the consent of even one of the parties in article 46, might necessitate the investigation of highly subjective factors influencing the State's consent to be bound by a treaty.

32. All the articles he had just mentioned had been adopted in their existing form at the second reading, after the Commission's adoption in 1964 of article 70 with its reference to the circumstances of the conclusion of a treaty as a further means of interpretation. In his view, the Commission's own articles completely contradicted the thought underlying the subtle differentiation between articles 69 and 70.

33. He believed that the average practitioner would look at the preparatory work as a matter of routine. It might well be true, as Mr. Bartoš had pointed out at the 766th meeting,⁸ that the examination could prove quite inconclusive; for example, the discussions on the question of flags of convenience at the United Nations Conference on the Law of the Sea, held at Geneva in 1958,⁹ were certainly anything but helpful for interpreting the provisions of the Convention on the High Seas.¹⁰ However, that was not sufficient reason for moving the preparatory work from its normal position among the material which the interpreter should have at his disposal from the outset.

34. With regard to multilateral treaties, his own experience suggested that States subsequently acceding to a treaty did not show any hesitation in making use of the preparatory work done at a conference in which they had not participated. Outstanding examples were to be found in some recent proceedings in the International Court of Justice relating to the interpretation of Article 36 (5) and Article 37 of its Statute, as revised at the San Francisco Conference; in one case both parties, and in another one party, had not been present at the Conference, but that fact had not prevented extensive reliance on the preparatory work both in the pleadings of the parties and in the judgment of the Court. The question should probably be solved in the light of the

³ For resumption of discussion, see 883rd meeting, paras. 90-102, and 884th meeting, paras. 1-31.

⁴ Paras. 53-59 and 67-69.

⁵ *Yearbook of the International Law Commission, 1964*, vol. I, 765th and 766th meetings.

⁶ *Ibid.*, vol. I, p. 283, para. 17.

⁷ *Ibid.*, p. 317, paras. 38 and 39.

⁸ *Ibid.*, p. 287, para. 57.

⁹ United Nations Conference on the Law of the Sea, *Official Records*, vol. IV, general debate and pp. 61-67.

¹⁰ *Op. cit.*, vol. II, p. 135.

particular circumstances of each case, so that it would not be opportune to lay down a general rule in the matter. He stressed, however, that he was referring to published and available preparatory work and not to other material not made available before the State concerned became a party to the treaty. Confidential material of that type would give rise to the question whether it could be invoked against third States.

35. The question also arose what constituted preparatory work. The Commission had been wise not to enter into that question, the answer to which depended on the circumstances of each case. He doubted whether the records of the Commission itself could properly be regarded as preparatory work for the conventions concluded by States on the basis of the drafts it had prepared. He had two reasons for such doubt: the first was that the Commission's drafts were rather remote from diplomatic conferences and the second that the members of the Commission did not represent States, but acted in their personal capacities. The records of the Commission were important for an understanding of the development of its collective thought as expressed in its reports, but States might well have a different understanding when they came to adopt any particular article. He had wished to make that general reservation, because it was sometimes said that the Commission's proceedings had the status of preparatory work. In so doing, however, he did not wish to prejudge in any way the status those proceedings might have in a concrete situation.

36. In conclusion, he stressed that the preparatory work ought to be available to the interpreter without the artificial limitations placed upon its use by article 70. Further, he believed that article 70 should not be retained as a separate article.

37. Mr. VERDROSS said he thought that, generally speaking, the Commission should not, at the second reading, alter articles approved at the first reading unless serious objections had been raised by governments.

38. He could agree to the rules on interpretation being split into two separate articles despite the fact that, in practice, interpretation by reference to the context and by reference to the preparatory work was often combined. However, recourse should only be had to the preparatory work in order to verify the result obtained by interpretation of the text or to elucidate the meaning of a provision that was not entirely clear. A text could only be corrected in the light of the preparatory work in the case contemplated in article 70, sub-paragraph (b). He doubted whether it would be possible to improve the wording of that article any further.

39. Mr. CASTRÉN said he agreed with the Special Rapporteur that the wording of article 70 should not be changed, although it had been criticized by some governments. The present text was well balanced, for it allowed recourse to further means of interpretation under certain conditions that had been aptly defined. There seemed to be good reason to refer to the preparatory work, but it should not be given too much weight. In short, article 70 should remain as it stood and be kept separate from article 69.

40. Mr. TABIBI said he was strongly in favour of maintaining article 70 as a separate article, because the

“further” means of interpretation were vitally important for establishing the meaning of the text and the intention of the parties if the means listed in article 69 proved insufficient.

41. Mr. JIMÉNEZ de ARÉCHAGA said that the basic and the complementary means of interpretation should be dealt with in separate articles. As to the preparatory work, it was not always easy to draw the line between confirming a view previously reached and forming a view, but that depended on the inner mental processes of the interpreter. However, the distinction was necessary and would reinforce the Commission's 1964 thesis that the terms of a treaty might possess an objective meaning of their own which was independent of the psychological intention of the authors.

42. Mr. Rosenne had called attention to a possible difficulty, namely, that the fairly strict formulation of article 70 might lead to the inference that the preparatory work of a treaty could not be used to establish terms or provisions implied in a treaty. The Drafting Committee should be asked to review the relationship between the new text of article 70 and the articles mentioned by Mr. Rosenne, so as to decide whether a safeguarding clause was needed to obviate misunderstanding.

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

43. Mr. TUNKIN said that article 70 should certainly constitute a separate article; little would be gained by dealing with primary and secondary means of interpretation in a single provision. The distinction between the two categories was of great importance. The revised arrangement of articles 69 and 70 suggested by the Special Rapporteur was sound, and essential for the general requirements of a codification of treaty law. It brought out the important fact that the primary means of interpretation were those on which there was agreement between the parties.

44. The further means of interpretation dealt with in article 70 were not authentic means of interpretation because they did not reflect an established agreement between the parties, but they could, and often did, throw light on the origin or nature of ambiguities in the text. If the meaning of the text could not be established by the processes set out in paragraph 69, the further means of interpretation could be of use.

45. Mr. de LUNA said that the words “in the light of the objects and purposes of the treaty” in sub-paragraph (b) were unnecessary and should be dropped, as the point was already covered in article 69. Though it was preferable to set out the Commission's rules of interpretation in two separate articles, they must nevertheless be applied together.

46. Mr. REUTER said he accepted the Special Rapporteur's text for the same reasons as Mr. Tunkin.

47. There was, however, a point of drafting, which perhaps also affected the substance: he wondered whether the word “means” used in the title and in the text of article 70, was the most appropriate, or whether a more general term, such as “elements”, would be preferable. In any case, it was difficult to regard the circumstances of the conclusion of a treaty as a “means” of interpretation.

48. Furthermore, there were means of interpretation other than examination of the preparatory work and the circumstances of the conclusion of a treaty, so that the article was perhaps a little too reticent. At the previous meeting he had mentioned, by way of example, the possibility that a provision of a treaty interpreted in accordance with article 69 might lead to the conclusion that the parties had violated international law.¹¹ Would such an interpretation be "unreasonable" and accordingly fall under article 70, sub-paragraph (b)? In other words did the Commission consider that a treaty should be understood as not engaging the international responsibility of the parties?

49. Mr. AGO said that, on the whole, he was very much in favour of article 70 and hoped it would be kept as a separate article.

50. The word "means" had the merit of being in fairly common use where interpretation was concerned and the word "including" made it clear that recourse could be had to means other than the preparatory work or the circumstances of the conclusion of a treaty, though it probably would be wiser not to mention them expressly. As had already been pointed out, interpretation was an art and it was obvious that a variety of means might be found useful in a specific case. In its draft articles, however, the Commission had sought to single out the means most often used, and he knew of no others that could be placed on the same footing as the preparatory work and the circumstances of the conclusion of a treaty. As it was, the preparatory work did not appear among the primary means in the draft, and if additional means were listed, that might detract from its importance, which would be undesirable.

51. He supported Mr. de Luna's proposal that the words "in the light of the objects and purposes of the treaty" should be deleted from sub-paragraph (b), as the point was already covered in article 69. Moreover, the result obtained might be "absurd or unreasonable" in itself, quite apart from the teleological aspect of the matter.

52. Mr. BARTOŠ said that he was far from being a fanatical partisan of preparatory work as a means of interpretation and had doubts about its legal value, but he recognized that it must be taken into account and sometimes even given a primary role. There were cases, particularly of bilateral treaties, in which the preparatory work brought to light what was sought by interpretation, for it provided an objective expression of the subjective element of the parties' intention. Hence, he might perhaps be among those who were averse to separating the means of interpretation set out in article 70 from article 69. In any case, the preparatory work must be taken into account, but without giving it too much importance.

53. Other elements more directly linked with the context, the meaning and even the purpose of the treaty should also be taken into account for interpretation: there were non-legal and political factors that explained and clarified a treaty. As François Gény had shown, words should not be construed solely in the light of legal, logical and linguistic data, but also by reference to psychological data. Certain dangers, threats and aspira-

tions might compel the use or avoidance of certain words. For example, treaties concluded during the Second World War between the coalition of States fighting the Nazis contained many optimistic and idealistic terms, because at the time the ideas could not have been expressed differently. At a conference held in London in March-April 1946, some of those texts had been taken as a basis for arrangements for the repatriation of displaced persons, and although their validity had not been disputed, it had been necessary to interpret the obligations laid down in them in a more realistic manner. In seeking the meaning of terms, the time at which the text had been drawn up and the atmosphere in which the treaty had been concluded must always be taken into account.

54. A tendency to modify or to depart from the original meaning was inherent in any process of interpretation, unless, on the contrary, it was an effort to preserve that meaning and resist departures from it.

55. The Commission could not achieve perfection, but must lay down rules which took account of what was possible. The content of article 70 was necessary and should be retained, but it could not be entirely divorced from article 69. The art of interpretation consisted sometimes in combining the two means of interpretation referred to in those articles and sometimes in separating them.

The meeting rose at 12.45 p.m.

873rd MEETING

Monday, 20 June 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Tabibi, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 70 (Further means of interpretation) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 70 (A/CN.4/L.107) which could, of course, be discussed in conjunction with article 69, referred to the Drafting Committee at the previous meeting.

2. Mr. BRIGGS said that although the majority of the Commission appeared to be in favour of keeping article 70

¹¹ Para. 22.

¹ For text see 869th meeting, preceding para. 52.

separate, he had not been convinced by the arguments put forward in support of that view. His own conviction that the contents of article 70 should not be separated from those of article 69 did not proceed mainly from substantive considerations; it was largely a question of method of expression and of emphasis.

3. He did not accept Sir Hersch Lauterpacht's view that the preparatory work should come into the process of interpretation at an early stage because the interpreter was seeking the intention of the parties as a subjective element distinct from the text. As he had stated at the 870th meeting, he fully accepted the text as the basic and authentic expression of the intention of the parties. His criticism related to the rigid hierarchical distinction between the primary and subsidiary means of determining the meaning of the text. He had also pointed out that if the distinction between articles 69 and 70 was supposed to be based on the degree to which the means of interpretation were linked with the text, it was neither logical nor sound, since the elements listed in paragraph 1 (*b*), (*c*) and (*d*) of article 69 were not confined to the text any more than was the preparatory work or the circumstances surrounding the conclusion of the treaty.²

4. Mr. Tunkin had expressed the view that article 69 was confined to evidence of agreement between the parties, and article 70 to other elements throwing light on the meaning of the treaty.³ It was certainly wise to look first at the evidence of what had been agreed between the parties, but the entire process of interpretation involved doing precisely that, in other words searching for evidence that would throw light on the meaning.

5. He had been impressed by Mr. Rosenne's remarks on preparatory work at the previous meeting.⁴ In the case of certain treaties, it was almost essential to resort to the preparatory work at some stage, in order to elucidate, not the subjective intention of the parties, but the meaning of the text.

6. By the use of the word "further" in the English text and of somewhat different terms in the French and Spanish texts, article 70 definitely precluded the interpreter from using the preparatory work and the circumstances surrounding the conclusion of a treaty until after he had attempted to ascertain the meaning by the criteria laid down in article 69.

7. Even if it were admitted that the normal method of interpretation was to start by applying the methods or criteria listed in article 69, he saw no advantage in thus tying the interpreter's hands. Reference might be made in that connexion to Article 38, paragraph 1, *d*, of the Statute of the International Court of Justice, which specified that judicial decisions were "subsidiary" sources of international law. In practice, the Court had not thought it necessary to restrict the application of that sub-paragraph to cases in which no evidence of the law had been found by applying the preceding sub-paragraphs. If an attempt were made to impose a restriction with regard to interpretation it would be similarly disregarded, because it could not always be rigidly applied.

8. If the other members of the Commission were prepared to accept a less rigid hierarchical distinction between the contents of articles 69 and 70, he submitted that it would be less artificial and restrictive to convert article 70 into a separate paragraph 4 of article 69, drafted on the following lines:

"4. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion in order to verify, confirm, or, where needed, to determine the meaning of the text".

Such a formulation would eliminate the unduly rigid provisions of sub-paragraphs (*a*) and (*b*) of the present article 70.

9. The CHAIRMAN, speaking as a member of the Commission, said it was both logical and reasonable to separate the two aspects of interpretation. In interpreting a written rule, the normal procedure was to refer first to the text and then, if its exact meaning could not be ascertained, to refer to extrinsic elements such as preparatory work and the circumstances in which the rule had been formulated.

10. Where recourse to preparatory work was concerned, members of the Commission were familiar with the controversy between the different schools of law and legal systems. English and American lawyers had always rather distrusted that method. In England, a law had to be sufficient in itself and a judge could not take the preparatory work into account; that was a mark of respect for the will of Parliament as expressed in the law. On the Continent the attitude to preparatory work was much more liberal. It was a striking fact that both views had been defended by eminent jurists, some of whom criticized recourse to preparatory work and tried to prove that it was ineffective in practice, while others regarded it as essential. There was much to be said on both sides.

11. The text of article 70 adopted at the first reading was a reasonable compromise between the two conflicting views. The Commission had given a certain primacy to the text of the treaty, without excluding the possibility of recourse to further means of interpretation such as the circumstances of the conclusion of the treaty and the preparatory work.

12. He would, however, be opposed to giving greater prominence to the preparatory work. Even if it was desired to ascertain the exact meaning of a legal rule by reference to the intention of the parties, it would be a serious mistake to attempt to make that intention override the text. Written law was an intention expressed in a certain formal manner and it was to that characteristic that it owed one of its advantages, namely, its stability; to disregard the formal expression would deprive it of that advantage.

13. The rule laid down for recourse to preparatory work was a reasonable one: reference was to be made to it in order to verify or confirm the apparent meaning of the text, so as to make sure that that meaning was in fact what the parties had intended. In sub-paragraph (*b*), the Commission had even gone a little further—a course of which he approved—by providing that if textual interpretation led to a result which was absurd or unreasonable it was justifiable to assume that the

² See 870th meeting, paras. 29-37.

³ 872nd meeting, paras. 43-44.

⁴ Paras. 30-36.

wording was defective and to rely on the statements of those who had formulated the text. Such a case was very similar to that of material error, and no one denied that an error could be corrected. There was no reason to believe that an examination of the preparatory work and of the circumstances in which the text had been drawn up would not make it possible to arrive at a reasonable meaning.

14. With regard to the structure of the draft, it would be better to keep the further means of interpretation separate; for although very important, they were not quite so important as the text itself. The value of the text as a formal expression of the will of the parties must not be diminished; in principle, it was the text which should be law between the parties. Consequently, like Mr. El-Erian, he fully approved of the title "*Moyens complémentaires d'interprétation*", and he hoped that similar expressions would be used in the English and Spanish texts.

15. In short, he was in favour of keeping articles 69 and 70 separate, and of allowing recourse to preparatory work to the extent and under the conditions laid down in article 70.

16. Mr. EL-ERIAN said he would first deal with the general question of the place of subsidiary means—especially the preparatory work—in the process of interpretation, a question which some writers considered to be one of the admissibility of certain evidence rather than of substantive law.

17. He congratulated the Special Rapporteur on not showing the bias of most English lawyers against preparatory work. As Lord McNair had said, an English lawyer approached the question "with a bias against resort to preparatory work, as that is, in general, contrary to his legal tradition and instinct in dealing with legislation and contracts".⁵ In 1964, the Commission had wisely adopted a balanced formulation with regard to the place of subsidiary means in the process of interpretation. That remark applied in particular to preparatory work.

18. He still had some doubts about the relationship of article 70 to article 69 and those doubts had been strengthened by Mr. Briggs' remarks. The Commission was in general agreement that there were certain principal or original means of interpretation and certain subsidiary means. The whole interpretative process was, however, very intricate; it was accumulative, not consecutive. In the circumstances, and having regard to the somewhat divergent suggestions made by governments, he believed that the Commission's general approach had been sound and was not unduly restrictive. At the same time, the Drafting Committee should give careful consideration to Mr. Briggs' suggestion that articles 69 and 70 should be combined. A useful parallel was provided by Article 38, paragraph 1, of the Statute of the International Court of Justice.

19. In the commentary which the Commission had included in its 1964 report,⁶ a number of judicial and arbitral decisions were cited in support of the proposition

that there was no occasion to resort to the preparatory work if the text was sufficiently clear. All the members of the Commission agreed that the preparatory work was not an original means of determining the text of a treaty, but merely a means of confirming or elucidating its meaning. The essential principle was the primacy of the text as the authentic expression of the intention of the parties.

20. The contextual approach, however, did not dispose of the problem of preparatory work, as the Special Rapporteur had pointed out. The context of the treaty included such materials as the preamble and the annexes, but did not include previous drafts or other preparatory work. The term preparatory work was somewhat ambiguous; as Lord McNair had pointed out, it was "an omnibus expression which is used rather loosely to indicate all the documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation".⁷ In some cases, the preparatory work would include a declaration made prior to the commencement of the negotiations; sometimes "heads of agreement" were subscribed to in advance and could serve to shed light on ambiguities in the treaty.

21. From his own experience, he could cite the example of the Anglo-Egyptian Agreement of 1954.⁸ During the negotiations, it had been agreed by both parties that there would be no agreed minutes; that type of preparatory work was accordingly ruled out. However, the two parties had exchanged no less than nineteen letters, some of them dealing with the meaning of terms used in the text; those exchanges of letters formed an integral part of the Agreement. One of the problems thus dealt with was the fate of the Anglo-Egyptian Treaty of 1936. The British draft of article 2 had stated that the 1954 Agreement superseded the 1936 Treaty in case of conflict; but that provision had not been acceptable to Egypt, which had abrogated the 1936 Treaty in 1951. The Egyptian draft of article 2 had stated that the United Kingdom Government recognized the abrogation of the 1936 Treaty in 1951; but that provision had not been acceptable to the United Kingdom, which had not recognized the abrogation. As a compromise, a text had been adopted stating that the 1936 Treaty "is terminated", thus leaving the Egyptian Government free to maintain that it had terminated in 1951 and the United Kingdom Government free to maintain that it had terminated on 19 October 1954, the date of signature of the 1954 Agreement. The practical problem of the legal situation between 1951 and 1954 had been settled by an exchange of letters. The two Governments had waived all financial claims against each other and had established a mixed commission to deal with claims by private persons arising out of the situation during that period.

22. To sum up, he considered that the rule on preparatory work should be flexible and that the 1964 text of article 70 (A/CN.4/L.107) fulfilled that condition. He therefore supported the decision taken by the Special Rapporteur, after a thorough examination of government comments, not to propose any change in the text of the article.

⁵ McNair, *The Law of Treaties* (1961), p. 411.

⁶ *Yearbook of the International Law Commission, 1964*, vol. II, pp. 204-205.

⁷ McNair, *The Law of Treaties* (1961), p. 411.

⁸ United Nations, *Treaty Series*, vol. 210, p. 24.

23. Mr. AGO said that, after listening to Mr. Briggs' statement, he thought it necessary to explain that his reasons for advocating the separation of articles 69 and 70 were based on logic: for the two articles dealt with two distinct and logically successive phases in the operation of interpretation. During the first phase, an attempt was made to ascertain the will of the parties from what they had said, first in the text and then in the ancillary elements of that text, namely, the context, the documents accompanying the treaty, agreements on the meaning of the text, and subsequent practice showing agreement on the meaning given to the text. If, after that, some doubt still remained, a different system was adopted: recourse was had to the history of the formulation of the text, in other words, the inquiry no longer centred on what the text said, but on how it had been arrived at. To that end, an examination was made of the preparatory work in the widest sense and of the circumstances of the treaty's conclusion. The separation of articles 69 and 70 made it clear that those two phases of interpretation succeeded each other; it did not in any way imply that the Commission was taking a position in favour of one theory rather than another. In particular, it did not mean that the Commission disapproved of recourse to the history of the conclusion of a treaty, which was often indispensable.

24. He was in some doubt about article 69, paragraph 2, in the Special Rapporteur's new text (A/CN.4/186/Add.6). How could it be established that the parties intended a term to have a special meaning, unless recourse was had to the further means of interpretation? That provision had perhaps been given a more suitable place in the 1964 text, where it followed article 70 as article 71. That was a point of detail which could be settled by the Drafting Committee.

25. The CHAIRMAN, speaking as a member of the Commission, said he wished to state his opinion on an important question raised at the previous meeting, namely, whether the work of the International Law Commission should be regarded as part of the preparatory work for the international conventions evolved from the drafts it prepared. When reference was made to preparatory work it was to find evidence of the intention of the parties. Obviously, the members of the Commission were not the parties to a convention concluded by the plenipotentiary representatives of States. But the very nature of a convention as an act of will made it essential to take into account all the work which had led to the formation of that will—all the material which the parties had had before them when drafting the final text. The text of a convention of the kind in question was adopted by a conference of plenipotentiaries which took the Commission's draft as a basis for discussion. The articles and the accompanying commentaries were discussed at some length and it quite often happened that one of the Commission's articles was adopted as it stood; in such cases, the plenipotentiaries had the Commission's commentary before them and adopted the article with the meaning given to it by the Commission. That was the usual attitude. He was therefore unable to agree with those who held that the Commission's work did not form part of the preparatory work for conventions concluded on the basis of its drafts.

26. Mr. TUNKIN said that great caution should be exercised in introducing into international law certain processes familiar to municipal law. The work of a parliament adopting legislation could not be compared with that of an international conference of sovereign States adopting the text of a treaty; in the latter case, the agreement of the sovereign States formed the basis of the treaty.

27. With regard to the work of the International Law Commission itself, although he agreed in principle that it formed part of the preparatory work, he could not go so far as the Chairman; in his view, the documents of the conference itself constituted the first order of preparatory work. It was true that the Commission prepared a commentary on each of its drafts, but that commentary was not always taken into account by diplomatic conferences. A conference might adopt one of the Commission's draft articles without change, but might place a somewhat different construction on it from that which was reflected in the Commission's commentary. It was necessary to adopt a realistic approach and to refer in the first place to the documents of the conference itself; the Commission's documents could serve as further preparatory work where appropriate.

28. Mr. ROSENNE said he agreed with Mr. Tunkin's views on the use of the Commission's proceedings as part of the preparatory work.

29. He was attracted by the suggestion made by Mr. Briggs, and supported by a number of other members, that article 70 should be incorporated in article 69 in a shortened form. That arrangement would do much to solve the problem.

30. The real difficulty in article 70 arose from the provisions of sub-paragraph (b). He had reflected on those provisions in the light of the Chairman's remarks at the previous meeting on the opening words of article 69, paragraph 1: "A treaty shall be interpreted in good faith . . .",⁹ and he failed to see how, if a treaty was so interpreted, honestly using all the various methods to elucidate its text set forth in article 69, it was possible to reach a result that was "manifestly absurd or unreasonable". It was true that that phrase appeared from time to time in international jurisprudence. But if that jurisprudence was examined closely, it would be found that the absurd results in question were not the outcome of an interpretation in good faith; in every case, the interpretation had been extremely narrow and literal and had been arrived at otherwise than by making use of the various elements mentioned in article 69.

31. At the previous meeting, he had raised the question whether many of the Commission's substantive articles could be applied without fairly free recourse to the preparatory work.¹⁰ That concern appeared to be shared by Mr. Jiménez de Aréchaga. It would be very difficult to reconsider the text of the substantive articles at that stage, and he therefore thought it would be more correct for the provision on preparatory work to be drafted taking full account of the substantive rules already adopted by the Commission.

⁹ Para. 19.

¹⁰ Paras. 31-33.

32. Lastly, he fully shared the view of the majority of members that the preparatory work and the circumstances of the conclusion of the treaty, as elements to be considered by the interpreter, were of a different order from the elements set forth in article 69, in which the text was the main factor. At the same time, he thought that the sharp differentiation established by articles 69 and 70 was not justified in practice and was not the best way of expressing what was only a difference in degree.

33. Mr. JIMÉNEZ de ARÉCHAGA said he thought the Special Rapporteur and the Drafting Committee should study the interaction of article 70 and the substantive articles. He had not suggested that the substantive articles should be altered; perhaps the simplest course would be to add to article 70 a proviso to the effect that its provisions were without prejudice to the use of preparatory work in the interpretation of certain articles of the draft, such as article 39.

34. Mr. EL-ERIAN said that the position of the work of the International Law Commission as preparatory work for a diplomatic conference could be illustrated by the United Nations Conference on the Law of the Sea, held at Geneva in 1958. When that Conference had voted on the text of the 1958 Convention on the Territorial Sea and the Contiguous Zone, it had had before it the Commission's draft articles on the regime of the territorial sea, which had included an article 25 on the right of passage of warships through the territorial sea.¹¹ That article, adopted as article 24 by the First Committee of the Conference, had provided for the right of coastal States to make such passage "subject to previous authorization or notification". A separate vote had been requested on the crucial words "authorization or", which had been rejected; the article, thus amended, had failed to obtain the required majority, so that it had not been adopted.¹² The omission from the Convention of an article on the right of passage of warships had been interpreted by some writers as meaning that there were no restrictions on such passage. He himself considered that that interpretation was not consistent with the preparatory work, in view of the fact that the Conference had had the Commission's draft article 25 before it.

35. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion on article 70, said that the main point to be decided was whether or not the Commission wished to maintain the structure of articles 69 and 70 suggested in his sixth report (A/CN.4/186/Add.6). He had understood the trend of opinion at the sixteenth session to be in favour of incorporating in article 69 those elements of interpretation that were binding on the parties and of covering certain other elements in article 70. He agreed with Mr. Tunkin on the nature of the former.

36. The circumstances of the conclusion of a treaty were important and it was not always easy to draw a sharp distinction between them and the context, but those two elements of interpretation were of a different legal character; he personally preferred to discuss the

problem, not in terms of a hierarchy, but in the light of legal and logical considerations. He could not subscribe to Mr. Ago's theory of successive phases of interpretation if that meant succession in time: the process of interpretation was essentially a simultaneous one, though logic might dictate a certain order of thought.

37. He doubted whether the majority of the Commission was in favour of transferring the contents of article 70 to article 69 to form a new paragraph 4. The point could be considered by the Drafting Committee, but he could see no compelling reason for such a change. Moreover, if the Commission wished to maintain the principle it had adopted at the sixteenth session that the starting point of interpretation was the text of the treaty itself, that principle would be undermined if more prominence were given to the preparatory work by incorporating article 70 in article 69. While he had never underestimated the importance of recourse to the preparatory work for the purpose of verification and confirmation, it was essential to discourage attempts by a party to resort to that means of interpretation in order to dispute the result of an interpretation by the means set out in article 69.

38. The criticism that sub-paragraph (a) of article 70 was too stringent seemed to him to be without foundation; surely that sub-paragraph reflected the existing rule that interpretation by reference to the preparatory work and the circumstances of a treaty's conclusion could be decisive only when the processes set out in article 69 failed to eliminate ambiguity or obscurity.

39. Too much had been made of the difficulties that sub-paragraph (b) might cause. In practice, cases in which interpretation in the light of the objects and purposes of the treaty led to a manifestly absurd or unreasonable result were rare, but they could occur and should be covered. He had in mind, for instance, a drafting error which might give, as a matter of language, a perfectly possible interpretation, but one which was "absurd" in the light of the object of the particular treaty. The phrase "in the light of the objects and purposes of the treaty" had been inserted as an objective criterion in order to discourage disingenuous recourse to the notion of an "absurd" interpretation.

40. Mr. Ago had had second thoughts about the desirability of transferring article 71 of the 1964 text to article 69 to form a new paragraph 2, because a meaning other than the ordinary meaning of a term could often be discovered only in the preparatory work or from the circumstances of the conclusion of a treaty. That was another matter that the Drafting Committee could consider but, in defence of the change he had suggested, he would point out that articles 69 and 71 of the 1964 text could be construed as excluding article 71 from the application of the provisions of article 70.

41. The Drafting Committee should discuss the points of drafting brought up in the Commission, such as the comparative merits of the phrases "elements of interpretation" and "means of interpretation". The word "further" had been used in article 70 in order to avoid the word "subsidiary", which in Article 38, paragraph 1.d. of the Statute of the International Court placed an emphasis on the subordinate character of

¹¹ *Yearbook of the International Law Commission, 1955*, vol. II, p. 41.

¹² United Nations Conference on the Law of the Sea, *Official Records*, vol. II, pp. 66-68.

those means that would not perhaps be appropriate in the draft articles on interpretation.

42. The observations made about the status of the Commission's own documents as part of the preparatory work for the conclusion of an international instrument had been of great interest, but, for lack of time, he would not touch on that subject.

43. He agreed with Mr. Rosenne that it would be necessary to consider whether the phrase "the circumstances of its conclusion" in article 70 necessitated any change in substantive articles.

44. Mr. AMADO said that the discussion, which had been of an exceptionally high standard, and the Special Rapporteur's reply had confirmed him in his view that, where interpretation was concerned, the Commission's first duty was to safeguard the text of the treaty. Owing to the influence of municipal law, there was always a tendency to look for "the intention of the parties", and that expression sprang to the lips of speakers almost automatically. But the essential, the fundamental matter was the text of the treaty, the context, the express statement of the will of the parties. The treaty existed and all its provisions had to be carried out in good faith. If the text failed to convey the purpose of the States concerned, if it did not enable States to exercise their authority as States in performing the treaty, then the meaning of the text must be sought by every available scientific means.

45. He had at first been attracted by the argument advanced by Mr. Ago, who had presented recourse to preparatory work as a second phase of interpretation; but then he had been convinced by the Special Rapporteur's reply, which had shown that the various means of interpretation could be employed simultaneously. There was nothing to prevent the interpreter from even considering the preparatory work. He was not enthusiastic about preparatory work; he knew what happened at conferences and how States sometimes avoided expressing their real opinion or arranged for it to be expressed by a friendly State, so that the preparatory work must be used with great caution. Nevertheless, distrust of preparatory work should not be carried to the point of despising it or refusing to take it into consideration.

46. Mr. Briggs's proposal to combine articles 69 and 70 had merit; since there was no hierarchy and no precedence of one means of interpretation over another, and since they could all be useful, why not put them together? But he would like to put the converse question: why should they not be separated?

47. The CHAIRMAN suggested that article 70 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹³

Organization of Work

48. The CHAIRMAN announced that the officers of the Commission had met to consider the progress of the Commission's work. They had proposed that members of the Commission should prepare to examine part of the report on Special Missions (A/CN.4/189), namely

the introduction and chapter II, omitting chapter I which dealt with the history of the topic.

49. Mr. BARTOŠ said that he had handed his report to the Secretariat twenty days previously, but the Languages Division had been unable to translate it any sooner.

50. Difficulties had also arisen because certain Governments—those of Austria, Malta, the United Kingdom and the USSR—had not submitted their comments within the prescribed time limit. The comments of the two last-mentioned governments related to the substance; he had prepared summaries of them (A/CN.4/188/Add.1 and Add.2), but the text was not yet available in all three languages and the Commission could not begin its examination of the draft articles until it had the corresponding sections of those documents before it. It could discuss general questions of a preliminary nature. Once the Commission had settled the eight general questions raised in chapter II of his report, it could apply its decisions to the articles affected.

51. Mr. WATTLES, Deputy Secretary to the Commission, said he wished to explain the position in regard to the translation of the third report on special missions (A/CN.4/189 and Add.1). Through force of circumstances, the reports of the special rapporteurs were having to be translated by the Languages Division of the United Nations Office at Geneva during the session, instead of at Headquarters before the session. Consequently, the workload of the Office had been much heavier than usual, perhaps heavier than during any of the Commission's sessions at Geneva. The Languages Division also had to handle a considerable amount of other work. The secretariat of the Legal Division was grateful to the Languages Division for having done everything possible to ensure that the documents needed by the Commission were issued in time. Priority had been given, first, to the Special Rapporteur's reports on the law of treaties and his proposals for the Drafting Committee and, secondly, to the material on special missions. As it had been impossible to recruit additional translators qualified to do the Commission's difficult and complex work, there had been unavoidable delay in the issue of summary records.

52. The CHAIRMAN, referring to the delay in the appearance of the summary records, said he thought the Commission could accept the situation, as it was due to exceptional circumstances. The Secretariat should however, allow members of the Commission reasonable time to send in their corrections, even after the end of the session.

53. Mr. WATTLES, Deputy Secretary to the Commission, said the Secretariat was aware that it would take time for the summary records of the last meetings of the session to reach members after their departure from Geneva, but it must be borne in mind that delay in the submission of corrections would hold up the publication of the 1966 *Yearbook*. As governments would presumably again be asked for their comments on the Commission's final report on the law of treaties, to be submitted to the next session of the General Assembly, and as many of them found the *Yearbook* indispensable for preparing their comments, it was important to avoid any delay.

¹³ For resumption of discussion, see 884th meeting, paras. 32-41.

He hoped that members would send in their corrections as early as possible.

54. The CHAIRMAN said that the officers of the Commission had considered a further question: the duration of the current session. On the basis of the information provided by the Secretariat, they had found that the Commission would not be able to conclude its session on 8 July and that it was difficult to say yet whether it would be able to do so on 15 July. The officers therefore proposed that the session should be provisionally extended until 15 July. It could then be decided, in the light of the progress made during the next two or three weeks, whether that date was final or whether any further extension was necessary.

55. After a discussion in which Mr. JIMÉNEZ de ARÉCHAGA, Mr. TUNKIN, Mr. AGO, Mr. BARTOŠ, Sir Humphrey WALDOCK, Mr. AMADO, Mr. VERDROSS and Mr. ROSENNE took part, the CHAIRMAN proposed that, since it was uncertain whether the Commission could in fact complete its work by 15 July, it should decide to conclude its session on 19 July at the latest. He hoped that members of the Commission would try to make their statements shorter.

It was so agreed.

The meeting rose at 6.5 p.m.

874th MEETING

Tuesday, 21 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

(A/CN.4/186 and Add.1-7; A/CN.4/L.107, L.115 and Corr.1)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 72 (Treaties drawn up in two or more languages)

ARTICLE 73 (Interpretation of treaties having two or more texts)

1. The CHAIRMAN invited the Commission to consider articles 72 and 73 (A/CN.4/L.107), for which the Special Rapporteur proposed a new combined text, reading:

Article 72 [29]

Interpretation of treaties drawn up in two or more languages

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two

or more languages, the text is authoritative in each language, unless the treaty otherwise provides.

2. A version of the treaty drawn up in a language other than one of those in which the text was authenticated shall also be considered as an authentic text and authoritative if the treaty so provides or the parties so agree.

3. Authentic texts are equally authoritative in each language unless the treaty provides that, in the event of divergence, a particular text shall prevail.

4. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 3, when a comparison of the texts discloses a difference in the expression of the treaty and any resulting ambiguity or obscurity is not removed by the application of article 69-70, a meaning which as far as possible reconciles the texts shall be adopted.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, in his sixth report (A/CN.4/186/Add.7), he had suggested that articles 72 and 73 should be combined into a single article of four paragraphs which preserved the substance of the two original articles.

3. There had been few government comments on articles 72 and 73. One of the questions raised had been whether the term "text" or "version" should be used. On that point, he referred the Commission to paragraphs 2-5 of his observations. The United States Government had pointed to the need to stress the unity of the treaty and he had taken that point into account in redrafting articles 72 and 73.

4. The reference in paragraph 2(b) of the former article 72 to "the established rules of an international organization" had been dropped in order to take into account the general provisions on the subject of international organizations adopted by the Commission in article 3 (*bis*) (A/CN.4/L.115).

5. Mr. VERDROSS said he approved of the new wording proposed by the Special Rapporteur. However, it might perhaps be necessary to add at the end of paragraph 4 a provision to the effect that, if it was impossible to find a meaning which reconciled the texts, the language to be considered should be that in which the treaty had been drawn up.

6. Mr. TSURUOKA said he accepted the whole of the article proposed by the Special Rapporteur. The reservation in the second sentence of paragraph 4 regarding the case mentioned in paragraph 3 was important, because that case was fairly common. For example, if Japan and Thailand concluded a treaty, it would normally be drafted in Japanese and in Thai; an English text might also be drawn up, however, and the treaty might stipulate that the three texts were equally authentic, but that in the event of a dispute over interpretation, the English text would prevail.

7. Mr. ROSENNE said he was in general agreement with the Special Rapporteur's proposal combining articles 72 and 73. He was satisfied by the arguments for the use of the word "text" in preference to "version" given in paragraphs 3 and 4 of the Special Rapporteur's observations.

8. The emphasis placed on the equality of authentic texts raised the question whether comparison of authentic texts should be included among the elements of interpretation listed in article 69. The Special Rapporteur had dealt with that question in paragraph 23 of his observations on articles 69 to 71 (A/CN.4/186/Add.6) and had reached a negative conclusion. The point was, however, a new one which had not been fully discussed in 1964 and which should now be given careful consideration. His own position, which was based on doctrine, normal practice and principle, was that it was essential to refer to the comparison of authentic texts, or at least of those texts in which the treaty had been drawn up by the parties at the negotiating stage. It was aptly said in the comment on article 19 of the Harvard research draft that "the versions in all languages must be considered together".¹ In that same connexion, Rousseau had written:

"Dans le cas où un traité est rédigé en deux ou plusieurs langues, il est difficile *a priori* pour l'interprète de s'attacher à une version plutôt qu'à une autre."²

Lord McNair had pointed out that "when the treaty does not indicate which text is authentic or which in case of divergence should prevail, there is ample authority for the view that the two or more texts should help one another, so that it is permissible to interpret one text by reference to another."³

The following statement had been made by Kiss on the same subject:

"Lorsque des textes en plusieurs langues font également foi, il convient d'utiliser l'ensemble des textes pour déterminer le sens véritable du traité. Par conséquent, lorsqu'un des textes faisant foi est clair et que l'autre ne l'est pas, le sens de ce dernier doit être dégagé par l'interprétation du premier. Cependant, lorsqu'il y a divergence entre deux textes ayant tous les deux le même caractère officiel, il est impossible de tirer un argument définitif de leur comparaison."⁴

Speaking for the French delegation at the 355th meeting of the Sixth Committee, Mme Bastid had said:

"In international relations, States should in good faith rely on all the texts in order to determine the true meaning of a convention."⁵

In the American Law Institute's Restatement it was pointed out that the factors to be considered included "comparison of the texts in the different languages in which the agreement was concluded, taking into account any provision in the agreement as to the authoritativeness of the different texts."⁶ The comment went on to say:

"If an international agreement is concluded in two or more languages, each of which is equally authentic,

ambiguities in the text in one language may be clarified by reference to a more precise formulation in another language."⁷

9. A good illustration of the situation he had in mind was provided by the Commission's own discussion on article 44 at its 842nd meeting, when the Special Rapporteur had said that the French-speaking members of the Drafting Committee were probably more satisfied with the French version than the English-speaking members with the English.⁸

10. It was of interest to note that, at the San Francisco Conference, the Advisory Committee of Jurists had expressed the view that "the Charter must be signed as an entity, including all five texts", and had pointed to the fact that Article 111 "makes each text an integral part of the Charter".⁹ That view ran counter to some of the arguments put forward in paragraph 23 of the Special Rapporteur's observations (A/CN.4/186/Add.6).

11. A good practitioner would almost automatically compare the different language versions before commencing any process of interpretation. In view of that practice, which was familiar to all members of the Commission, it would be misleading to place the comparison of different language texts in a secondary position in article 73.

12. It could be argued that the expression "A treaty" in article 69, paragraph 1, necessarily implied all the language versions taken as a unit. It was preferable, however, not to leave that point to be decided by interpretation and to discourage any tendency to base the interpretation of a treaty on a single language version only; such a tendency would seriously impair the basic concept of the treaty as a single unit.

13. The difficulties encountered by the Drafting Committee in formulating the Commission's own draft articles provided the best illustration of the practical need for comparison of the different language versions of a multilingual instrument. He therefore endorsed Mr. Pessou's remarks at the 766th meeting regarding the difficulty, and in some cases the impossibility, of finding equivalent words in different languages and he was unable to agree with the reply given by the Chairman that the matter would be dealt with in another article.¹⁰

14. The expression "lack of concordance" used in article 26, paragraph 3 (A/CN.4/L.115) also implied a process of comparison.

15. Lastly, the reasons given by the Special Rapporteur in paragraph 22 of his observations for transferring the contents of article 71 to article 69 (A/CN.4/186/Add.6) were equally applicable to the present discussion, because the arrangement now proposed for articles 72 and 73 failed to make clear the extent to which preparatory work could be employed in the interpretation of a multilingual instrument.

¹ *Research in International Law*, "III, Law of Treaties"; Supplement to the American Journal of International Law, vol. 29, 1935, p. 971.

² Rousseau, *Principes généraux du droit international public*, vol. I (1944), p. 721.

³ McNair, *The Law of Treaties* (1961), p. 433.

⁴ A. C. Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. I, p. 465.

⁵ *Official Records of the General Assembly, Seventh Session, Sixth Committee, 355th meeting, paragraph 15.*

⁶ American Law Institute, *Restatement of the Law, Second: Foreign Relations Law of the United States* (1965), §147, p. 451.

⁷ *Ibid.*, p. 454.

⁸ *Yearbook of the International Law Commission, 1966*, vol. I, part I, 842nd meeting, para. 41.

⁹ *Documents of the United Nations Conference on International Organization*, vol. XVII, p. 452, cited in the Secretariat memorandum "Preparation of Multilingual treaties" (A/CN.4/187, para. 5).

¹⁰ *Yearbook of International Law Commission, 1964*, vol. I, p. 287, paras. 59 and 60.

16. He therefore concluded that article 69 would be deficient if it made no reference to the comparison of texts as a means of interpretation. Articles 72 and 73 as combined by the Special Rapporteur were adequate for the matters with which they were concerned, but it was essential to introduce into article 69 a reference to the comparison of different authentic texts as one of the means available to the interpreter of multilingual treaties.
17. Mr. CASTRÉN said that on the whole he supported the new text submitted by the Special Rapporteur. He thought, however, that it might be advisable to supplement the proviso in paragraph 1 by adding the words "or the parties have otherwise agreed" after the words "otherwise provides"; since a double proviso—relating both to the provisions of the treaty and to the agreement of the parties—appeared in paragraph 2, a similar one could be included in paragraph 1.
18. Moreover, in paragraph 2, it would be sufficient to say that a version drawn up in a language other than one of those in which the text had been authenticated would also be considered an authentic text if the treaty so provided or the parties so agreed; the words "and authoritative" could be deleted.
19. Lastly, in the French text of paragraph 4, the words "*autant que possible*" should be placed after the word "*concilier*"; that order would be closer to the original English text.
20. Mr. AGO said he found the new text submitted by the Special Rapporteur acceptable so far as the substance was concerned, but thought that it could be simplified and clarified.
21. For instance, paragraph 3 was not really necessary; the particular case contemplated in that paragraph was adequately covered by the proviso "unless the treaty otherwise provides" in paragraph 1.
22. Mr. Verdross' comment on paragraph 4 was justified; but if reference was made to the preparatory work and to the circumstances of the conclusion of the treaty in accordance with article 70, it would inevitably be found that the treaty had originally been drawn up in a particular language and that fact was bound to be taken into account. That was quite sufficient; the Commission should not go so far as to place a premium on the version drafted in a language which might have been used for purely fortuitous reasons.
23. Paragraph 2 dealt with a separate question and should therefore be transferred to the end of the article. In addition, the positive form in which that paragraph had been drafted was not very felicitous; it would be better to use the customary form: "A version . . . shall not be considered as an authentic text unless the treaty otherwise provides or the parties have otherwise agreed".
24. Mr. BRIGGS said that the Special Rapporteur's observations on articles 72 and 73 were an eloquent defence of the incorrect practice of States in referring to different "texts" instead of to different language "versions" of a treaty. He hoped that the Commission would not encourage that practice.
25. He approved of the Special Rapporteur's proposal for the combination of articles 72 and 73, as that change was a drafting improvement.
26. He had been impressed by Mr. Ago's argument that paragraph 1 contained by implication the substance of paragraph 3. In order to make the position clear, the word "equally" might be inserted between the words "the text is" and the words "authoritative in each language". Paragraph 3 could then be eliminated as redundant.
27. He further suggested that in the text of paragraph 2 proposed by the Special Rapporteur, the words "be considered as an authentic text and authoritative" should be replaced by the words "be considered as authentic and authoritative". Alternatively, the phrase could be amended to read "be considered an authentic part of the text and authoritative".
28. He questioned the need for paragraph 4 of the Special Rapporteur's new text. The statement in the first sentence that "The terms of the treaty are presumed to have the same meaning in each authentic text" was already implicit in the provisions of paragraph 1 and that fact would be even clearer if the word "equally" was inserted before the word "authentic" in paragraph 1, as he had just proposed.
29. With regard to paragraph 2, he doubted whether a version of the treaty could be placed on a basis of complete equality with the authentic text and urged that the question should be re-examined.
30. Sir Humphrey WALDOCK, Special Rapporteur, said he could not accept the last suggestion made by Mr. Briggs. The Commission could not adopt any provision that would disregard the express will of the parties. If a treaty specifically laid down that a version drawn up in a language other than those in which the text had been authenticated would also be considered as an authentic text, the intention of the parties must prevail on that point. The case envisaged in paragraph 2, moreover, reflected a common practice, which should be taken into account.
31. Consideration could be given to the suggestion by Mr. Ago that paragraph 2 should be stated in negative terms. The basic proposition would, however, remain unchanged.
32. He was prepared to agree that, subject to a modification of paragraph 1, paragraph 3 should be dropped as redundant. He had taken its provisions from paragraph 1 of the former article 73, where they had served as a link between paragraph 2 of that article and article 72.
33. The point made by Mr. Verdross had been considered by the Commission in 1964, but the conclusion had been reached that it was not acceptable to go any further than was done in article 73. It was inadvisable to try to lay down a general rule providing an automatic solution for the case in which two or more authentic texts could not be reconciled. If, after resort to all the means of interpretation set out in article 69 and the further means set out in article 70, it was found impossible to determine the meaning of a treaty provision, then, according to paragraph 4 of the new article 72, an attempt must be made to find a meaning which as far as possible reconciled the various authentic texts. Beyond that it was inadvisable to go, and if no reconciliation of the texts was possible, the interpretation should be left to be determined in the light of all the circumstances. It was

impossible to say in advance that the text in which the treaty had been drafted should necessarily prevail, for the defects of that text might be the source of the difficulty.

34. Consequently, although he appreciated the point raised by Mr. Verdross, he did not feel able to accept his suggestion. The question of comparison of the authentic texts in the various languages was covered by the provisions of articles 69 and 70, particularly those on preparatory work and on the circumstances of the conclusion of the treaty.

35. With regard to the larger question raised by Mr. Rosenne, he was reluctant to introduce into article 69 a reference to the comparison of texts as one of the principal means of interpreting a treaty. While it was true that the interpreter normally undertook such a comparison, it would be going too far to give that process the status of a criterion for the determination of an interpretation according to law. To erect comparison into one of the means of legal interpretation set out in article 69 would imply that it was no longer possible to rely on a single text as an expression of the will of the parties until a difficulty arose and that it was necessary to consult all the authentic texts for that purpose; such a procedure would have a number of drawbacks and would, in particular, involve practical difficulties for the legal advisers of the newly independent States, who did not always have staff familiar with the many languages used in drafting international treaties.

36. In conclusion, he proposed that articles 72 and 73 should be referred to the Drafting Committee for consideration in the light of the discussion; that Committee would take into account the drafting suggestions which had been made and to which he had not referred in detail.

37. Mr. VERDROSS said that if the Commission did not accept his proposal, anyone reading the second sentence of paragraph 4 would wonder what would happen if it was not possible to adopt a meaning which reconciled the texts. While agreeing with Mr. Rosenne and Mr. Ago that the language in which the treaty had been drawn up would be taken into account in application of the rule laid down in article 70, he proposed, in order to overcome the difficulty, that the words "as far as possible" should be deleted.

38. Mr. CASTRÉN observed that if the words "*autant que possible*" were placed after the word "*concilier*" in the French text, as he had proposed in his first statement, the difficulty referred to by Mr. Verdross would be greatly reduced.

39. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would examine the problems arising from the use of the words "as far as possible".

40. Mr. EL-ERIAN said he agreed with the Special Rapporteur's proposal that articles 72 and 73 should be combined.

41. For the reasons given by the Special Rapporteur, he preferred the term "text" to "version". The former term was that used in the Charter and in the conventions adopted by diplomatic conferences on the basis of the Commission's drafts. Moreover, he was convinced that its use did not detract from the unity of the treaty.

42. He agreed with the Special Rapporteur that it would be going too far to treat comparison of the authentic texts in different languages as a general rule of interpretation. Much depended on the circumstances of each individual case. The texts in the various languages could be examined as part of the preparatory work and, in case of ambiguity, it would be possible, under the provisions of paragraph 4 as proposed by the Special Rapporteur, to attempt to remove the ambiguity by reconciling the various texts.

43. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to refer articles 72 and 73 to the Drafting Committee for consideration in the light of the discussion, as proposed by the Special Rapporteur.

*It was so decided.*¹¹

44. The CHAIRMAN said that having learned that Mr. Lachs had been detained in Warsaw by illness, he had requested the Secretariat to send him a letter expressing the Commission's best wishes for his quick recovery.

The meeting rose at 12 noon.

¹¹ For resumption of the discussion of the combined article, see 884th meeting, paras. 42-49.

875th MEETING

Wednesday, 22 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to consider the text of articles submitted by the Drafting Committee.

ARTICLE 63 (Application of successive treaties relating to the same subject-matter) [26]¹

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed that the title and text of article 63 should be revised to read:

¹ For earlier discussion, see 857th meeting, paras. 1-95, and 858th meeting, paras. 1-35.

“ *Application of successive treaties relating to the same subject-matter* ”

“ 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

“ 2. When a treaty specifies that it is subject to, or that it is not to be considered as inconsistent with, an earlier or later treaty, the provisions of that other treaty prevail.

“ 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 41, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

“ 4. When the parties to the later treaty do not include all the parties to the earlier one :

(a) As between States parties to both treaties the same rule applies as in paragraph 3;

(b) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty governs their mutual rights and obligations;

(c) As between a State party to both treaties and a State party only to the later treaty, the later treaty governs their mutual rights and obligations.

“ 5. Paragraph 4 is without prejudice to article 67, or to any question of the termination or suspension of the operation of a treaty under article 42 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty. ”

3. Comparing the new text with that approved in 1964² he said the Commission would note that the phrase “ of treaties having incompatible provisions ” had been replaced by the phrase “ of successive treaties relating to the same subject-matter ” in the title. Similar phraseology was used in the new paragraph 1. In paragraph 2, apart from drafting changes, the principal modification was the substitution of the words “ or that it is not to be considered as inconsistent with ” for the words “ or is not inconsistent with ”. Paragraph 3 had been recast in positive form and some drafting changes introduced.

4. In the course of the discussion at the 857th and 858th meetings, the question had been raised of transferring sub-paragraph (a) of paragraph 4 to paragraph 3, but the Drafting Committee had rejected the suggestion on the ground that the provisions of paragraph 5 should be applicable to the situation covered in paragraph 4 (a), namely, that in which all the parties to the earlier treaty were also parties to the later treaty.

5. No change had been made in the fundamental rules set out in sub-paragraphs (b) and (c), though some changes of phraseology had been introduced in the interests of precision.

6. Paragraph 5 had been recast so as to indicate clearly that questions of State responsibility, of termination or

suspension by reason of breach, or *inter se* agreements on modification were completely reserved.

7. The CHAIRMAN put to the vote the Drafting Committee’s text of article 63.

Article 63 was adopted by 18 votes to none.

8. Mr. ROSENNE, speaking in explanation of his vote, said that, in 1964,³ he had voted in favour of the article on the application of incompatible treaty provisions, then article 65, while maintaining the reservation he had expressed earlier⁴ concerning the relationship of that article with article 41. He had to maintain that reservation in the light of the comments he had made at the second part of the seventeenth session⁵ concerning article 41 (Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty).

ARTICLE 64 (The effect of severance of diplomatic relations on treaties) [60]⁶

9. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed that the title and text of article 64 be revised to read :

“ *The effect of severance of diplomatic relations on treaties* ”

“ The severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations established between them by the treaty. ”

10. The new text consisted of the rule originally set out in paragraph 1 but with the insertion of the words “ in itself ” before the words “ affect the legal relations ”. The Drafting Committee considered that paragraph 2 of the 1964 text, which had dealt with the disappearance of the means necessary for the application of the treaty, should be dropped, as should paragraph 3, which had dealt with the question of the separability of treaty provisions.

11. Sir Humphrey WALDOCK, Special Rapporteur, amplifying the explanations given by the Chairman of the Drafting Committee, reminded members of the discussion that had taken place on article 64 at the 858th meeting in the light of the observations made by governments and analysed in his sixth report (A/CN.4/186/Add.3). Following that discussion, the Drafting Committee had sought to frame a simple rule which, instead of making a specific reference to the impossibility of performance resulting from the severance of diplomatic relations, a reference which would have unduly enlarged the scope of the article, laid down that, in principle, severance did not affect the legal relations established between the parties by a treaty. A State wishing to invoke supervening impossibility of performance would have to make out a case in accordance with the conditions laid down in article 43. The Drafting Committee considered that the new text reflected the general point of view in the Commission.

² *Yearbook of the International Law Commission, 1964, vol. I, 755th meeting, para. 20.*

³ *Ibid.*, 742nd meeting, para. 56.

⁴ *Yearbook of the International Law Commission, 1966, vol. I, part I, 841st meeting, para. 95.*

⁵ For earlier discussion, see 858th meeting, paras. 36-111.

² A/CN.4/L.107; see also 857th meeting, preceding para. 1.

12. Mr. EL-ERIAN said he had accepted the new text in the Drafting Committee on condition that the words "in itself" were inserted. He had indicated during the discussion in the Commission itself that the severance of diplomatic relations, while not in itself or *ipso facto* affecting the legal relations established by the treaty, might lead to the suspension of the application of the treaty or of certain of its provisions if it resulted in the disappearance of the means necessary for the application of the treaty, or if the treaty in question was of such a nature as to make its continued implementation incompatible with the severance of diplomatic relations. He still adhered to that view, but as it had proved impossible to devise a text that would put the matter in the proper perspective, he would support the general statement of the rule in the form now proposed.
13. Mr. BARTOŠ said that he would vote for article 64 because he favoured the principle enunciated in the Drafting Committee's text. He wished to point out, however, that the severance of diplomatic relations sometimes occurred under conditions which precluded the performance of treaties. He considered that in such a case the treaty was in force, but not applicable.
14. The CHAIRMAN, speaking as a member of the Commission, said that he would not vote in favour of the text, but would abstain. He was not, in fact, sure of the correctness of the rule stated in article 63, and still had some doubts regarding its scope. Certain treaties were undeniably affected by the severance of diplomatic relations and their performance was inherently incompatible with a state of severance.
15. Mr. AMADO said he would have thought that the expression "in itself" would have satisfied Mr. Yasseen.
16. The CHAIRMAN, speaking as a member of the Commission, said that that expression was certainly an improvement, but it did not altogether satisfy him.
17. Mr. RUDA said that, in view of the subject-matter of the draft articles, article 64 was not logically necessary, but he considered it useful and would vote for the Drafting Committee's text.
18. He pointed out that in the Spanish title of the article, the words "*en los tratados*" should be replaced by "*sobre los tratados*".
19. Mr. de LUNA supported Mr. Ruda's observation concerning the Spanish title.
20. Mr. TSURUOKA pointed out that the English expression "does not affect" had been translated in the French text of article 64 as "*est sans effet*", although the verb "to affect" was translated differently in other articles. The expression "*être sans effet*" was certainly elegant, but would it not be possible to say "*n'affecte pas*"?
21. Mr. BARTOŠ said he thought that there was a difference between "to have a legal effect" and "to affect". The severance of diplomatic relations might affect friendly relations between States, but legal relations, as such, continued to be in force, even if hampered by certain difficulties. What the Drafting Committee had tried to do was to make it clear that the severance of diplomatic relations did not have any legal effect.
22. Mr. REUTER said that the English verb "to affect" did not exactly correspond to the French verb "*affecter*"; the French verb had a pejorative shade of meaning, whereas the English was purely causal. In the present case, the situation was simpler, since the negative form "does not affect" corresponded perfectly to the French expression "*est sans effet*".
23. With respect to the observation of Mr. Bartoš, if the text was viewed in the context of the draft articles, the phrase "*être sans effet*" undoubtedly meant "to have no legal effect on legal relations". The Commission had not taken any decision on the question whether a *de facto* situation had legal implications.
24. Sir Humphrey WALDOCK, Special Rapporteur, said he was satisfied with Mr. Reuter's explanation, and considered that the Drafting Committee's text of article 64 could now be put to the vote.
25. Mr. AGO pointed out that the expression "*n'affecte pas*" had been used in the French text of other articles. Care should be taken to ensure that the same terms were used throughout, since otherwise problems of interpretation might later arise.
26. Mr. TSURUOKA explained that he had raised the question of translation not so much with reference to that particular article, as because of his concern that a uniform vocabulary should be used throughout the draft.
27. The CHAIRMAN put article 64 to the vote.
- Article 64 was adopted by 17 votes to none, with 1 abstention.*
28. Mr. PESSOU said that although he had voted with the majority, he did not find the text completely satisfactory, since it called for superhuman self-restraint on the part of the parties, who would be required to refrain from breaking off their legal relations despite the fact that they had terminated their diplomatic relations.
- ARTICLE 65 (General rule regarding the amendment of treaties) [35]⁷
29. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed that the title and text of article 65 should be revised to read:
- "General rule regarding the amendment of treaties"*
- "A treaty may be amended by agreement between the parties. The rules laid down in part I apply to such agreement except in so far as the treaty may otherwise provide."*
30. The first sentence of the English text was identical with that of 1964, but the word "*amendé*" had been substituted for the word "*modifié*" in the French text.
31. The words "If it is in writing" had been eliminated from the second sentence as well as the reference to the established rules of an international organization. Those changes resulted from the decisions already taken on those two points.
32. Mr. de LUNA said that the Spanish text would be more idiomatic if the words "*a menos que el tratado disponga otra cosa*" were placed at the beginning of the second sentence.

⁷ For earlier discussion, see 859th meeting, paras. 1-50.

33. Mr. RUDA said that, while he agreed that that arrangement would be more elegant, it might create difficulties both in that particular article and in others. It would be better, therefore, to follow the English original so as to keep the three languages uniform.

34. Mr. AGO drew attention to a discrepancy between the French and English texts: where the French read "*à moins que*", an expression which was usually translated in the Commission's text by "unless", the English read "except in so far as".

35. The CHAIRMAN, speaking as a member of the Commission, agreed that there was a slight difference in meaning which ought to be eliminated.

36. Mr. de LUNA said that in his opinion elegance should be sacrificed for the sake of using the same expression as in English.

37. Mr. REUTER proposed the formula: "*sauf dans la mesure où le traité en dispose autrement*".

38. Mr. de LUNA said that the phrase "*excepto en la medida en que el tratado disponga otra cosa*" would be acceptable for the Spanish text.

39. Sir Humphrey WALDOCK, Special Rapporteur, referring to the point of substance raised by previous speakers, said that the English text was correct and exactly expressed the Commission's intention that, in general, the rules laid down in part I would apply unless the treaty provided otherwise.

40. Mr. BRIGGS said that the divergence between the English and French texts had not been noticed by the Drafting Committee at the sixteenth session. He agreed with the Special Rapporteur that the expression "except in so far as" was the right one.

41. The CHAIRMAN put to the vote the Drafting Committee's text for article 65, as amended in the French and Spanish texts.

*Article 65 was adopted by 18 votes to none.*⁸

ARTICLE 66 (Amendment of multilateral treaties) [36]⁹

42. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text:

"Amendment of multilateral treaties"

"1. Unless the treaty otherwise provides, any proposal to amend a multilateral treaty as between all the parties must be notified to every party, each one of which shall have the right to take part in:

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

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

"2. Every State entitled to become a party to the treaty shall also have the right referred to in paragraph 1 (b).

"3. Unless the treaty otherwise provides, the amending agreement does not bind any State already

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

"4. Unless the treaty or the amending agreement otherwise provide, any State which becomes a party to the treaty after the entry into force of the amending agreement shall:

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

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

43. Changes of both substance and drafting were proposed. The text of paragraph 1 of the Special Rapporteur's revised text (A/CN.4/186/Add.4) had been modified to make it clear that it related only to the parties and that every party was entitled to be notified of any proposal to amend a multilateral treaty and to participate in the decision on the action to be taken. The reference to the established rules of an international organization that had appeared in the 1964 text had been dropped because of the Commission's decision not to deal with that subject in its draft articles. In paragraph 1 (a) the words "if any", which appeared in the Special Rapporteur's revised version, had been deleted. Paragraph 1 (b) now referred to the negotiation as well as to the conclusion of any agreement for the amendment of the treaty because it was thought that every party should be entitled to take part in that process.

44. Paragraph 2 of the Drafting Committee's text was entirely new. It had been inserted because, under paragraph 1, the right to take part in the negotiation and conclusion of an amending agreement was restricted to the parties. When, however, a large number of States had taken part in an international conference convened to draw up a multilateral treaty which might provide for its entry into force on the deposit of a relatively small number of ratifications, it was desirable that every State entitled to become a party to that treaty should also have the right to participate in the negotiation and conclusion of an amending agreement.

45. The Drafting Committee had not attempted to define the phrase "entitled to become a party", a point that would have to be considered by the Commission when it reviewed the whole draft.

46. Paragraph 3 (formerly paragraph 2) had been reworded, and it would be noted that there was now a specific reference to paragraph 4 (b) of article 63.¹⁰

47. The new text of paragraph 4 had been particularly difficult to formulate. In the course of its work, the Drafting Committee had consulted the Secretariat on United Nations practice in regard to the amendment of multilateral treaties. The essential element in the new text was that unless the treaty or the amending agreement otherwise provided, any State becoming a party to the former after the entry into force of the amending agreement would be deemed a party to the treaty as amended except in relation to any State party to the treaty that was not bound by the amending agreement.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that the new text for article 66 contained some

⁸ For later amendments to the text of article 65, see 893rd meeting, paras. 49 (French text only) and 53.

⁹ For earlier discussion, see 859th meeting, paras. 51-100, and 860th meeting, paras. 1-32.

¹⁰ For the text of article 63, see above, para. 2.

important changes resulting from the discussion at the 859th and 860th meetings and more particularly from his own concern about the restrictive character of the 1964 text of paragraph 1 (A/CN.4/L.107). That text seemed to place the amendment of a multilateral treaty entirely in the hands of the parties, although it was a well-known fact that that was contrary to modern practice, especially in the case of multilateral treaties drawn up by a large number of States. It was more usual to invite the States which had taken part in the adoption of the text or which were entitled to become parties to participate in the negotiation and conclusion of an amending agreement. After carefully examining the matter, the Drafting Committee had come to the conclusion that the formula now being proposed in paragraphs 3 and 4 should meet the kind of problems which were constantly arising in practice and of which the United Nations had had considerable experience in connexion with the amendment of League of Nations treaties. The Drafting Committee considered that the Commission ought to try and fill the gaps in its 1964 text in that regard. Insufficient consideration had hitherto been given to the very real problems involved.

49. Mr. AGO pointed out with reference to paragraph 2 that the English word "entitled" had been translated into French by "*qui peut*". In other words, the French text referred to a physical possibility, whereas the English referred to a legal title. Would it not be possible in French to use the expression "*ayant qualité*"?

50. In paragraph 3 of the English text, he doubted whether the word "also" was really necessary.

51. With regard to paragraph 4 of the French text, the Commission had always used the phrase "*amendant ce dernier*", not "*l'amendant*", and it ought to adhere to that formula.

52. Mr. REUTER proposed, in reply to Mr. Ago's first observation, that the French text should read "*Tout Etat habilité . . .*".

53. Mr. JIMÉNEZ de ARÉCHAGA said that a further point of substance had occurred to him since the text now before the Commission had been prepared in the Drafting Committee, of which he was a member. That point concerned the relationship between article 66, paragraph 2, and the provisions of article 6, paragraph 2 (A/CN.4/L.115), under which a two-thirds majority might be required for the adoption of a text. If States which had signed but not ratified the treaty or States not parties to the original treaty were to be given the right of participating in the negotiation and conclusion of an amending agreement, a situation might occur in which the parties to the original treaty were prevented from amending an instrument binding upon them owing to lack of support by States not bound by the original treaty. The point called for examination because it was in view of that possibility that the Commission had decided during the second part of its seventeenth session¹¹ not to include a parallel right in article 40, which dealt with termination or suspension of the operation of treaties by agreement.

¹¹ See *Yearbook of the International Law Commission, 1966*, vol. I, part I, 829th meeting, para. 62, and 841st meeting, para. 58.

54. Mr. TUNKIN said that he appreciated the point raised by Mr. Jiménez de Aréchaga but did not see how those States which had attended the first conference and had participated in the formulation of the treaty to be amended could be excluded from the second, or amending, conference. Those States to which the treaty was open were interested in the negotiation and conclusion of a new treaty, to which they might become parties.

55. Mr. de LUNA said that the question raised by Mr. Jiménez de Aréchaga was extremely interesting from the standpoint of principle. From the practical standpoint, however, he fully shared the opinion of Mr. Tunkin. He knew from experience that a conference to amend a treaty was often convened precisely for the purpose of making certain adjustments in the text of the treaty in order to attract the ratification of States which had participated in the first conference but which had not become parties to the original treaty.

56. He favoured the Special Rapporteur's approach, although it might involve occasional difficulties arising out of the two-thirds majority rule laid down in article 6, paragraph 2. In the case of a multilateral treaty of general interest, it was of importance to the international community that the treaty should not remain confined to a small group of States but should attract the accession of the largest possible number of States entitled to participate in it.

57. Mr. BARTOŠ said that there were certain points in the Drafting Committee's text which seemed to him obscure.

58. Paragraph 3 stated a general principle applicable in international law: States which had not approved the amendment to a treaty were bound by the earlier treaty, unless the treaty otherwise provided. It also stipulated, however, that article 63, paragraph 4 (b), would apply in relation to such States.

59. Further, under article 66, paragraph 4 (b), a State which became a party to the treaty after the entry into force of the amending agreement, was considered as bound by the unamended treaty in relation to any party to the treaty not bound by the amending agreement. But the initial phrase in paragraph 4, namely: "Unless the treaty or the amending agreement otherwise provide" had to be taken into account. In other words, subparagraph (b) had to be interpreted in the light of that introductory phrase. There was therefore a conflict between the two provisions, which had certainly not been the Drafting Committee's intention.

60. It was in fact stipulated that article 63, paragraph 4 (b), applied as between the States in question, without reference to the provisions of the amending agreement. If, however, article 66, paragraph 4 (b) was to be applied, that had to be done within the context of paragraph 4 as a whole. The Commission was therefore faced with an interpretation of a situation which it had not intended and which was inconsistent with the principle stated in the first part of paragraph 3.

61. A question then arose: what was the situation between the parties which had participated in the amending agreement but which had not become parties to the treaty after its entry into force? What were their relations with States which had not accepted the amendment, according

to the text of the unamended treaty, and with those which had accepted that amendment?

62. In his opinion, paragraphs 3 and 4 did not deal with situations which gave rise to frequent difficulties of interpretation.

63. Mr. TSURUOKA said that he had intended to draw the Commission's attention to one of the points just raised by Mr. Bartoš. Paragraph 4 (b) was rather difficult to understand in the context of article 66 and even in the over-all context of the articles relating to the amendment of multilateral treaties. Assuming that a country accepted the amended treaty without accepting the original treaty, it would find itself, as a result of that sub-paragraph, bound against its will by the original treaty; that was obviously unacceptable. It should at least be made clear that the consent of the State in question was necessary for paragraph 4 (b) to produce its effect.

64. Mr. JIMÉNEZ de ARÉCHAGA said that, although the situation he had mentioned would not occur frequently in practice, the Commission should recognize that it was manifestly illogical. To take the example of a treaty signed by fifteen States but ratified by only two of them, if the two latter States found the provisions of the treaty intolerable and decided to amend them, it would be absurd to allow States not parties to the treaty to block the amendment. In the hypothetical case he had mentioned, a two-thirds majority of the States participating in the second conference could consist entirely of States which were not parties to the treaty. It would be inadmissible for the only two States which were actually bound by the treaty to be prevented from amending it by States not so bound.

65. He had no objection to the adoption of paragraph 2, but thought it essential to include a proviso to the effect that the votes of the States mentioned in that paragraph would not be taken into account in determining the two-thirds majority stipulated in article 6, paragraph 2.

66. With regard to the point raised by Mr. Bartoš and Mr. Tsuruoka, one solution would be to delete paragraph 4 (b) and to leave the whole matter to be governed by article 63 (Application of successive treaties relating to the same subject-matter). The question whether the ratification of the amending agreement affected the original treaty would depend on the circumstances, as stated in article 63.

67. Mr. TUNKIN said that situations of the type mentioned by Mr. Jiménez de Aréchaga were theoretically possible, but could in practice be solved by means of other provisions of the draft articles, such as those on termination and on *inter se* agreements. The overriding principle, however, should be recognition of the right of all States interested in the treaty to participate in any negotiations for the conclusion of an amending agreement.

68. The fact that certain States had participated in the formulation of the original treaty, or that the treaty was open to them, clearly indicated that such States had an interest in the matter. The only acceptable rule, therefore, was that set forth in paragraph 2, despite any complications which might arise from the operation of other provisions and which could be solved by means of the rules embodied in other draft articles.

69. Mr. Bartoš had raised a valid point with regard to paragraph 4. The words "or the amending agreement" in the opening clause were not logically relevant to sub-paragraph (b). He therefore suggested that those words should be deleted from that clause and that the words "unless the amending agreement otherwise provides" should be added to the end of sub-paragraph (a).

70. Consideration should also be given to the point raised by Mr. Bartoš and Mr. Tsuruoka regarding paragraph 4 (b). A State which became a party to the treaty after its amendment should not necessarily be bound vis-à-vis States which were not parties to the amending agreement.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that he shared Mr. Tunkin's views on paragraph 2. The difficulties mentioned by Mr. Jiménez de Aréchaga should not be exaggerated. In normal circumstances, all States which were parties to the original treaty would wish to have treaty relations with States which were entitled to become parties but which had not yet ratified the treaty. In the vast majority of cases, it could only be advantageous for the second conference to be attended by the largest possible number of the States entitled to participate in the treaty. In such cases, it could safely be assumed that the proposed amendments were intended precisely for the purpose of attracting a wider participation in the treaty.

72. The dangers which Mr. Jiménez de Aréchaga had mentioned could be met by the parties terminating the treaty and concluding a new treaty to their own liking. If the Commission were to fail to adopt a provision on the lines of paragraph 2, it would be flying in the face of existing practice. The provisions in question accurately reflected the existing practice in respect of the large majority of multilateral treaties.

73. It was not possible to delete sub-paragraph 4 (b), because sub-paragraph 4 (a), if left on its own, would imply that a State which became a party to the treaty after the entry into force of the amending agreement had no treaty relations with those parties which had not accepted the amending agreement. The only point which had not been covered in sub-paragraph (b) was the possibility of giving such a State a choice in the matter; provision should perhaps be made for the State to say whether or not it wished to be a party to the unamended treaty in relation to those parties which had not accepted the amending agreement. The Drafting Committee should consider that problem.

74. Paragraph 4 was intended to deal with difficulties which occurred frequently in practice and which raised delicate problems for depositaries. The Secretariat had informed the Drafting Committee that it was quite common for a State to deposit an instrument of ratification without specifying clearly whether the ratification also covered the amending agreement.

75. He suggested that that paragraph should be referred back to the Drafting Committee for consideration in the light of the discussion.

76. Mr. JIMÉNEZ de ARÉCHAGA suggested that paragraph 2 should also be referred back to the Drafting Committee. He favoured the idea, embodied in that paragraph, of protecting the rights of signatories to the

treaty, provided that the rights of the parties were not affected. The point was an important one and the other escape clauses in the draft articles were not sufficient. Termination could not provide a solution in those cases where the States parties to the treaty did not wish to terminate it. Nor could an *inter se* agreement provide a solution, because, under article 67, such agreements were subject to certain stringent conditions which might not be fulfilled in a particular case.

77. Unless the point were given due consideration, he believed the article would attract criticism.

78. The CHAIRMAN suggested that, since the various paragraphs of article 66 were interconnected, the whole article should be referred back to the Drafting Committee.

*It was so decided.*¹²

ARTICLE 67 (Agreements to modify multilateral treaties between certain of the parties only) [37]¹³

79. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 67:

“ *Agreements to modify multilateral treaties between certain of the parties only* ”

“ 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such an agreement is provided for by the treaty; or

(b) the modification in question:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole; and

(iii) is not prohibited by the treaty.

“ 2. Except in a case falling under paragraph 1 (a), the parties in question shall notify the other parties of their intention to conclude the agreement and of the modifications to the treaty for which it provides.”

80. Paragraph 1 was identical with the 1964 text (A/CN.4/L.107), except for two minor drafting changes in the English text of paragraph 1, in which the words “enter into” had been replaced by the word “conclude” and the words “such agreements” in sub-paragraph (a) had been replaced by “such an agreement”, thus bringing that text into line with the French. In the French text of sub-paragraph (b) (ii), the words “*une dérogation serait incompatible*” had been replaced by “*il ne peut être dérogé sans qu'il y ait incompatibilité*”.

81. Paragraph 2 had been discussed at length by the Drafting Committee and the text now proposed included two important changes: first, the parties to the *inter se* agreement were required to notify the other parties of their intention to conclude the amending agreement, instead of making the notification after the conclusion of

such agreement; secondly, it was laid down that the notification must not only indicate the intention to enter into an amending agreement but must also specify “the modifications to the treaty for which it provides”.

82. Sir Humphrey WALDOCK, Special Rapporteur, explained that the purpose of that last provision was to indicate that notification should be made at a time when the proposals for *inter se* amendment had reached an advanced stage, since those proposals had to be formulated as provisions.

83. Mr. AGO said that he apologized for having to raise at that stage a point of substance he had been unable to make during the general discussion. The purpose of article 67, paragraph 1, was to lay down the conditions which had to be fulfilled in order to conclude an *inter se* agreement modifying a multilateral treaty where the treaty itself made no reference to the possibility of such agreements. While it was reasonable to deal separately with the case in which that possibility was provided for in the treaty, it would be strange if, because such provision was made in the treaty, the modification could go so far as to prevent the other parties from enjoying their rights or performing their obligations under the treaty, or if it would render impossible the effective execution of the objects and purposes of the treaty. In his opinion, the conditions laid down in sub-paragraphs (b), (i) and (ii) should also be fulfilled when the treaty provided for the possibility of an *inter se* amending agreement.

84. Mr. AMADO said that he was awaiting with interest the reactions to the important point just made by Mr. Ago.

85. He noted that in sub-paragraph (b) (i) the French expression “*porte atteinte*” had been used to translate the English “affect”; that expression would also be appropriate in article 64.

86. Sir Humphrey WALDOCK, Special Rapporteur, said that the point raised by Mr. Ago had been discussed in 1964¹⁴ but the Commission had taken the view that it was not possible to introduce into the draft articles, as it were, statutory conditions which would have the effect of altering the agreement of the parties. Bearing in mind the sovereignty of the States parties to the treaty, the provisions of paragraph 1 should remain as they were.

87. Mr. AGO said he appreciated the Special Rapporteur's concern that the will of the parties should be respected where they had included provisions regarding *inter se* agreements in the treaty. Normally, however, the parties would not include any specific provision in the treaty concerning the limits within which the right to conclude such agreements could be exercised; in such a case, the agreements in question should be subject to the conditions laid down in sub-paragraphs (b) (i) and (ii).

88. Sir Humphrey WALDOCK, Special Rapporteur, said that the French text clearly had to be adjusted to bring it into line with the English. Where the substance of paragraph 1 was concerned, he remained unconvinced by the arguments put forward by Mr. Ago. If the parties had made express provision for *inter se* agreements in the original treaty, it could safely be assumed that such

¹² For resumption of discussion and decision on article 66, see 883rd meeting, paras. 24-71.

¹³ For earlier discussion, see 860th meeting, paras. 33-93.

¹⁴ See *Yearbook of the International Law Commission, 1964*, vol. I, 764th meeting, particularly para. 78.

agreements would not be prejudicial to the parties. In any event, and regardless of any possible effect on the rights of the parties, the express provisions of the treaty must prevail. If the parties had not laid down any conditions for the conclusion of *inter se* agreements and had expressly given licence for the conclusion of such agreements, he failed to see why the Commission should make mandatory the conditions set forth in sub-paragraphs (i) and (ii) of paragraph 1 (b).

89. The Commission's object in including article 67 had been to prevent arbitrary and illegitimate *inter se* agreements, by dealing with those cases in which the parties had not made any provision for such agreements.

90. Mr. AGO proposed that the words "the possibility of such an agreement" in paragraph 1 (a) should be replaced by "the possibility of such a modification", which would be rather more precise and more in keeping with the wording of sub-paragraph (b): "the modification in question . . .".

91. Mr. BRIGGS said he agreed with the Special Rapporteur and supported the retention of article 67 as proposed by the Drafting Committee; paragraph 1 of that article provided a satisfactory answer to an important practical problem which had caused great difficulties in the past. There could be no justification for imposing rigid conditions on the conclusion of *inter se* agreements when that possibility had been considered by the parties themselves.

92. He would be prepared to accept Mr. Ago's suggestion that the words "such an agreement" in paragraph 1 (a) should be replaced by "such a modification".

93. Mr. de LUNA said he supported Mr. Ago's proposal. If the Commission did not accept that proposal, another solution would be to drop sub-paragraph (a) and insert the words "Unless the treaty otherwise provides" at the beginning of paragraph 1. But he would prefer the solution proposed by Mr. Ago.

94. Mr. AMADO pointed out that from a practical standpoint there was a certain time-lag, a stage that had to be completed between the agreement to modify the treaty and the modification itself.

95. Mr. REUTER said it was his understanding that Mr. Ago had wished to draw attention to the fact that article 67 made agreements to modify a multilateral treaty *inter se* subject to stricter conditions when the possibility of concluding such agreements was not envisaged in the treaty than when it was. Two problems arose in that connexion, that of the possibility of concluding such agreements and that of the conditions to be met by such agreements. Under article 67, if the possibility was provided for in the treaty, the Commission did not stipulate any conditions, whereas if that possibility was not so provided for, the Commission laid down certain conditions. That anomaly could perhaps be remedied by adding to sub-paragraph (a) some such words as "in which case the modification is made in accordance with the conditions laid down in the treaty, or, if the treaty does not prescribe any conditions, in accordance with those laid down in sub-paragraphs (b) (i) and (ii); or".

96. The CHAIRMAN, speaking as a member of the Commission, said that his view of paragraph 1 was the same as Mr. Ago's. The fact that the treaty provided for the possibility of such an agreement was not sufficient to exempt that agreement from all limitations or conditions.

97. In paragraph 2, the words "*qu'il apporte*" in the French text should be replaced by "*qu'elles envisagent d'apporter*".

98. Mr. VERDROSS said that he appreciated Mr. Ago's concern. The point was, however, already covered by article 59, which stated that a treaty could not create any obligations for a third State without that State's consent.

99. Sir Humphrey WALDOCK, Special Rapporteur, emphasized that the case under consideration was one in which the States parties to the treaty had dealt with the question of *inter se* agreements and had expressly authorized the conclusion of such agreements. If the parties wished to lay down conditions for the conclusion of such *inter se* agreements, they could do so in the treaty. The treaty provisions on the subject would have to be applied and interpreted in good faith in accordance with articles 55 and 69 of the draft articles. It was out of the question for the Commission to write into the treaty the stringent conditions set forth in sub-paragraphs (i) and (ii) of paragraph 1 (b), which might well be inconsistent with the terms of the treaty.

100. Mr. TSURUOKA said that he doubted whether the rule enunciated in paragraph 2 conformed to current international practice and whether it was correct. The other parties might be interested in the conclusion of any *inter se* agreement, whatever its nature; it was in their interest to know what was happening, even if the treaty authorized the conclusion of such agreements. Was it really the Commission's intention to state a rule which afforded such inadequate protection of the interests of the other parties? The initial reservation "Except in a case falling under paragraph 1 (a)", should be replaced by "Unless the treaty otherwise provides". Parties desirous of concluding an *inter se* agreement modifying the treaty would thus not be exempted from notifying the other parties of their intention unless the treaty authorized the conclusion of such agreements without notification of the other parties.

101. Mr. BARTOŠ said that he was opposed to article 67, particularly because of the conflict between paragraphs 1 and 2. Even if the possibility of concluding *inter se* agreements was provided for in the treaty, it should not be left to the parties availing themselves of that possibility to decide whether they should notify the other parties of their intention or not. By making an exception of the case provided for in paragraph 1 (a), paragraph 2 laid down a rule which might prejudice the interests of the other parties.

The meeting rose at 1.5 p.m.

876th MEETING

Thursday, 23 June 1966, at 10 a.m.

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

Present: Mr. Amado, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 67 (Agreements to modify multilateral treaties between certain of the parties only) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of the Drafting Committee's proposed text of article 67.
2. Mr. CASTRÉN said that he found the text of paragraph 1 very satisfactory. He understood the concern expressed at the preceding meeting by Mr. Ago and Mr. Reuter with regard to sub-paragraph (a) and agreed that the words "such an agreement" should be replaced by the words "such a modification", a change which did not alter the substance. From a practical standpoint, however, it was scarcely conceivable that a multilateral treaty could give the parties an unlimited right to conclude *inter se* agreements which might even be incompatible with the objects and purposes of the treaty. On the contrary, if the treaty provided for the possibility of such agreements, it would undoubtedly make it clear—as had been done hitherto—on what points and under what conditions a derogation was permissible; otherwise, States which had concluded the treaty without taking the necessary precautions in that respect would have only themselves to blame. Besides, as had already been pointed out, the rule of good faith was also applicable in that case.
3. With regard to paragraph 2, the proposal made at the preceding meeting by Mr. Tsuruoka was very sound and might also dispel the misgivings of Mr. Bartoš. He himself considered that when certain parties intended to conclude an *inter se* agreement, the other parties should be notified, even if the treaty provided for the possibility of such agreements. He therefore supported Mr. Tsuruoka's proposal that the initial phrase in paragraph 2 should be replaced by the words "Unless the treaty otherwise provides".

4. The CHAIRMAN, speaking as a member of the Commission, said that even if the treaty provided for the possibility of *inter se* modifications, that did not mean that States which availed themselves of that possibility were given unlimited licence. In paragraph 1 (a), the modification should be made subject to certain conditions: it would be reasonable to require that it should take into account the objects and purposes of the treaty, that it should not affect the enjoyment by the other parties of their rights and that it should not interfere with the performance of their obligations.

5. Consequently, the notification provided for in paragraph 2 should be given to the other parties in all cases, including cases where the treaty provided for the possibility of *inter se* modifications.

6. Sir Humphrey WALDOCK, Special Rapporteur, suggested that, in order to meet the point raised by Mr. Ago, the word "agreement" in paragraph 1 (a) should be replaced by "modification". He understood that that solution would be acceptable to Mr. Ago.

7. He also suggested that the opening words of paragraph 2: "Except in a case falling under paragraph 1 (a)" should be replaced by "Unless in a case falling under paragraph 1 (a) the treaty otherwise provides". With that change of wording, notification would be required in cases falling under paragraph 1 (a), unless the treaty contained specific provisions on the subject of notification. Such provisions would, of course, prevail.

8. The CHAIRMAN put to the vote article 67 with the two amendments suggested by the Special Rapporteur.

Article 67, as amended, was adopted by 12 votes to 1, with 1 abstention.²

9. Mr. REUTER said that he had abstained in the vote on article 67 and intended to abstain on article 66 as well, although those two articles were acceptable to him in substance. In those articles, the Commission had reached an ingenious compromise between two needs: the need to recognize the rights of the parties to a treaty in its initial form and the need to permit the modification of the treaty in order to take account of certain international requirements. But care should be taken to maintain flexibility so as to meet the requirements of the international community. The words "any proposal" in article 66, paragraph 1, should be understood to cover a collective proposal also. International relations at the present day were not dominated solely by the principle of the equality of States but also by the exceptional responsibility of two great States, as well as by the existence of interests common to certain groups of States which needed to be defended. In future, groups of States would often act collectively. Article 66 did not exclude that possibility. His purpose in abstaining was to indicate that articles 66 and 67 should be interpreted very freely.

10. Mr. BARTOŠ said that he had voted against article 67 because, while recognizing that it had been improved by the amendments made, he was not sure that the text, as amended, adequately safeguarded the interests of all the States concerned.

¹ See 875th meeting, para. 79.

² For a later amendment to the text of article 67, see 893rd meeting, para. 55.

ARTICLE 68 (Modification of treaties by subsequent practice) [38]³

11. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following new title and text for article 68:

“Modification of treaties by subsequent practice”

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

12. The discussion in the Commission had shown that sub-paragraphs (a) and (c) of the former article 68 were not in their proper place in the article. The Drafting Committee had therefore confined article 68 to modification by subsequent practice.

13. During the discussion in the Drafting Committee, the Special Rapporteur had raised the question whether the provision on the modification of a treaty by subsequent practice could not be placed in article 65 as a second paragraph, to follow the existing one on the amendment of treaties. The Drafting Committee had, however, taken the view that modification by subsequent practice should be dealt with in a separate article, in order to emphasize the distinction between that modification and the formal amendment of a treaty.

14. The new wording, unlike the corresponding 1964 text (A/CN.4/L.107), referred to the modification of a treaty instead of the “operation of a treaty”. The reference to “an alteration or extension” of the provisions of the treaty had also been dropped; the text now proposed spoke of a subsequent practice which established the agreement of the parties to modify the provisions of the treaty.

15. Mr. TSURUOKA said it was not clear to him what distinction the Drafting Committee had wished to draw between the amendment and the modification of a treaty. In the French text, the word “*celle-ci*” was somewhat ambiguous: grammatically, it referred to the application of the treaty, whereas, according to the meaning of the article, it should refer to practice.

16. Mr. BRIGGS, referring to Mr. Tsuruoka’s second point, said that the final clause of the article was clear in the English text.

17. With regard to his first point, the intention had been to refer to a modification of a treaty by subsequent practice in its application rather than by resort to the formal procedure for altering its text. Such a modification would have the effect of stretching the literal meaning of the text.

18. Sir Humphrey WALDOCK, Special Rapporteur, said he did not think that the question was, strictly speaking, one of stretching the meaning of the text by subsequent practice.

19. In the Drafting Committee, he had raised the question of the advisability of transferring the provision under discussion to article 65, but the Drafting Committee had decided against that course. The use of the term “modification” was intended precisely to dis-

tinguish the case envisaged in article 68 from that of the amendment of the actual text of the treaty.

20. Mr. de LUNA agreed. The term “modification” had mainly been used in order to show that, in the case covered by article 68, the formal amendment procedure had not been followed.

21. Mr. TUNKIN said he agreed with the Special Rapporteur and Mr. de Luna regarding the meaning of the article and especially of the word “modification”.

22. He stressed that article 68 did not deal with a problem of interpretation but with one of modification. The final outcome was the same as in the case of formal amendment: a change was brought about in the instrument, although by less formal means.

23. Mr. ROSENNE recalled that, at the 866th meeting,⁴ he had reserved his position with regard to article 68 until the Commission had considered article 69. As he had then said, he believed that the subsequent practice should be that of “all” the parties. Since article 69 had not yet been examined by the Drafting Committee, he would not participate in the vote on the text of article 68 before the Commission.

24. Mr. TUNKIN said that the modification of a treaty by subsequent practice meant the customary way of modifying treaties. It was not essential that all States parties should follow the practice, but it was essential that the practice should be accepted by all the parties as a rule of law modifying the treaty.

25. It was certainly not possible that the requirements for purposes of modification by subsequent practice should be less stringent than those established by the treaty for formal amendments. For example, the Charter of the United Nations specified that a majority of two-thirds was required for the adoption of amendments to its text and that such amendments became effective upon ratification by two-thirds of the Members, including all the permanent members of the Security Council. Where a treaty contained an amendment clause of that type, it was hardly possible to lay down a rule requiring a smaller number of parties in the case of modification by way of custom.

26. As he saw it, the “subsequent practice of the parties” meant in principle the practice accepted by all the parties, but did not necessarily exclude the possibility that the practice might not be universally accepted.

27. Mr. de LUNA said that two cases might arise in practice. The first was that of a subsequent practice by some of the parties to which the other parties had made no objection. The second was that of a subsequent practice by some of the parties which was not accepted by other parties. He saw no reason why the limitations laid down in article 67 should not be imposed in the second case.

28. Mr. ROSENNE pointed out that the Commission had agreed that article 68 was not intended to deal with the relationship between customary and treaty law.⁵

29. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Rosenne on that point.

³ For earlier discussion, see 865th meeting, paras. 100-107, and 866th meeting, paras. 1-70.

⁴ Paras. 13 and 14.

⁵ See 866th meeting, para. 67.

30. In the event of an *inter se* modification by subsequent practice, the safeguards laid down in article 67, paragraphs 1 (b) (i) and (ii) would apply, since they were implicit in the *Pacta sunt servanda* rule. Perhaps the point could be made clear in the commentary.
31. Mr. BRIGGS said that article 68 did not raise any questions of customary law. The modification with which it was concerned was not a formal amendment, but was to some extent formalized, as indicated by the requirement that the subsequent practice should establish the agreement of the parties to modify the provisions of the treaty.
32. His personal view was that it would be preferable to refer to modification through the operation of the treaty.
33. Mr. TUNKIN said that it should be clearly understood that article 68 did not deal with *inter se* modification by way of subsequent practice. The possibility of dealing with the point had been raised by the Special Rapporteur, but the Drafting Committee had decided against including a provision on the subject in article 68.
34. The language used in the proposed text, in so far as it referred to the agreement of the parties, was similar to that used in article 65. It was therefore clear that the subsequent practice should, in principle, be approved by all the parties.
35. He did not wish to embark on a theoretical discussion on the relationship between customary and treaty law, but in his opinion the process of modification by subsequent practice was a customary process.
36. The CHAIRMAN, speaking as a member of the Commission, said he did not think that article 68 envisaged an *inter se* agreement. It referred to a practice followed by the parties, perhaps not necessarily by all the parties, but at least one followed by some of the parties and accepted or tolerated by the others.
37. Nor was article 68 concerned with the modification of a treaty by custom. A practice which was followed by some parties and accepted by others was not a custom; the formation of custom called for rather more than that. Such a practice, however, could be sufficient to modify a treaty because it established a tacit agreement of the parties.
38. Subject to those comments, he had no objection to the wording proposed by the Drafting Committee.
39. Mr. REUTER said he shared the Chairman's view that article 68 was not concerned with the relationship between a treaty and custom.
40. The article could not have any connexion with *inter se* agreements. He did not see how the rules laid down in article 67, and particularly the rule concerning notification on which that article hinged, could be extended to a practice. In article 68, the modification was made by tacit agreement resulting from a practice. It was essential, however, to stipulate in the text that that practice should be "followed or accepted by all the parties".
41. If the article was amended along those lines, he would vote for it; if not, he would have to abstain, for he had been deeply impressed by some of the comments which had been made, particularly by Mr. Tunkin.
42. Mr. de LUNA said he welcomed Mr. Reuter's proposal. In the Drafting Committee, he himself had accepted the expression "the parties" instead of "all the parties", because it had been pointed out that some of the parties, although not participating in the subsequent practice, might nevertheless accept it.
43. Sir Humphrey WALDOCK, Special Rapporteur, said that it would be unduly strict to stipulate that the subsequent practice must be that of "all" the parties.
44. He agreed that the Commission should not become involved in a discussion of the relationship between customary and treaty law, but there was a similarity between the formation of custom and the implied agreement contemplated in article 68.
45. He hoped that, subject to the explanations given by Mr. Tunkin and himself, it would be possible for the Commission to accept the text of article 68 proposed by the Drafting Committee.
46. Mr. TUNKIN said that the difficulties of some members could perhaps be met by adopting a text along the following lines:
- "A treaty may be modified by subsequent practice in its application establishing the agreement of the parties to modify its provisions."
47. As an alternative, the words "of all the parties" might be substituted for the words "of the parties".
48. Sir Humphrey WALDOCK, Special Rapporteur said that he would accept the first alternative suggested by Mr. Tunkin.
49. Mr. ROSENNE and Mr. REUTER said that they could only accept the second alternative, i.e. with the words "all the parties".
50. Mr. JIMÉNEZ de ARÉCHAGA said he supported the Special Rapporteur's view. If the word "all" were included, a single State would be given a veto. There had been a case in which one State had been the only Member of the United Nations to raise an objection to a Security Council practice concerning voluntary abstention. It was inadmissible that a single State should stand in the way of the rest of the international community, any more than it could prevent a "general practice" from becoming a rule of customary law, in conformity with Article 38 of the Statute of the Court.
51. The CHAIRMAN, speaking as a member of the Commission, pointed out that the example mentioned by Mr. Jiménez de Aréchaga related to the interpretation rather than to the modification of treaties.
52. Mr. de LUNA said that his misgivings had been increased by the discussion. His own acceptance of the omission of the word "all" was based on the assumption that there was no objection on the part of any of the parties to the subsequent practice in question, in other words that the case was one of tacit agreement. He therefore urged that provision should be made for at least the tacit agreement of all the parties.
53. Mr. CASTRÉN said that if the Commission agreed that article 68 did not concern *inter se* agreements, it would be better to make the text quite clear and to specify that the consent of all the parties was necessary. Such a clarification might be given in the commentary, but he would prefer it to be included in the article itself.

54. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the case mentioned by Mr. Jiménez de Aréchaga would be excluded from article 68 by the provisions of article 3 (*bis*).

55. To require the consent of all the parties would be to go beyond existing practice in the case of a large number of multilateral treaties. It would also involve considerable difficulties in the event of a new State acceding to a treaty after its modification by subsequent practice; the question would arise whether such a State was affected by that practice. The introduction of a provision requiring the consent of all the parties would give article 68 a rigidity that was quite uncharacteristic of contemporary international law in the matter.

56. The CHAIRMAN, speaking as a member of the Commission, said that while it was perhaps unnecessary to specify that the practice in question must be followed by all the parties, the idea of acceptance must certainly be introduced into the article. In reality, it was enough if the practice was followed by certain States and accepted by the others.

57. Mr. TSURUOKA said that the effect, scope and legal meaning of the modification ought perhaps to be clarified. If the majority of the parties to a multilateral treaty followed a certain practice, there was a good chance that that practice would also be accepted by most of the other countries and actual disputes were rare in such cases. It might also happen that a very small number of States followed a practice deviating slightly from the "ordinary meaning" in the context of the treaty, a meaning defined in conformity with the rule contained in article 69. Could such States invoke that practice against the other parties? In the case to which Mr. Jiménez de Aréchaga had referred, if ninety-nine States followed a certain practice and only one refused to accept it, could the practice followed by the ninety-nine States be invoked against the one State? He himself was inclined to think that in such a case a "veto" was untenable. That case also raised the following problem: was a practice which slightly modified the original meaning of a treaty illegal? He rather thought not. But those points ought to be studied and elucidated.

58. Mr. REUTER said that if he remembered rightly, article 68 had been originally based on the proposal of one member of the Commission who, as chairman of an arbitral tribunal, had been called upon to analyse a rather confused practice, which had led him to distinguish between the practice for interpreting a treaty and the practice for modifying a treaty.

59. Like the Chairman, he thought that the practice referred to in article 68 was not practice from the point of view of interpretation but practice involving a genuine tacit agreement to modify the treaty. The distinction between interpretation and modification was what gave flexibility to article 68. If, however, the article was not concerned with interpretation, then the deliberately vague wording was unacceptable. Above all, in the light of the examples which had been given, which included a reference to the Charter of the United Nations, it was necessary to avoid giving the impression in the article that it was possible to do something by tacit agreement which was not permissible by formal agreement. The article concerning modification by formal agreement and

the article concerning modification by tacit agreement should follow a similar pattern; for that purpose, it should be made clear in article 68 that practice "established the agreement of the competent parties to amend the treaty".

60. Mr. ROSENNE thanked Mr. Reuter for having drawn attention to the origin of the provision now under discussion. The arbitration in question was in the case between France and the United States regarding the interpretation of an Air Transport Services Agreement, mentioned in paragraph (2) of the 1964 commentary to article 68.⁶ Since that arbitration had related to a bilateral agreement, the reference in the award to "the parties" meant "all the parties".

61. Sir Humphrey WALDOCK, Special Rapporteur, said that the introduction into article 68 of a reference to questions of possible competence would involve great difficulties.

62. The choice before the Commission was between a general provision, such as that proposed by the Drafting Committee, and a provision which made modification by subsequent practice subject to the same conditions as amendment by formal agreement. In his view, the text of article 68 proposed by the Drafting Committee adequately reflected the existing practice.

63. The CHAIRMAN, speaking as a member of the Commission, said he endorsed that view.

64. Mr. TUNKIN, supported by Mr. de LUNA, suggested that article 68 should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*⁷

NEW ARTICLE Z (Reservation regarding the case of an aggressor State) [70]⁸

65. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new article Z which read as follows:

"Reservation regarding the case of an aggressor State"

"The present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

66. The Drafting Committee had prepared that text following the Commission's discussion of article 59 which specified that an obligation could not arise under a treaty for a State not a party to that treaty unless the obligation was expressly accepted by that State. The question had been raised during that discussion of the possible imposition of an obligation on an aggressor State,⁹ and the Drafting Committee had considered a number of proposals for a provision to deal with that question. As a result of its deliberations, it had adopted

⁶ *Yearbook of the International Law Commission, 1964*, vol. II, p. 198.

⁷ For resumption of discussion, see 883rd meeting, paras. 72-89.

⁸ For earlier discussion, see 869th meeting, paras. 1-51.

⁹ See 852nd meeting, para. 57.

a provision in the form of a general reservation which did not specify whether or not the aggressor State would be a party to the treaty creating the obligation. The question of the position of the proposed new article would remain open.

67. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's text was designed to meet the view of those members who wished to insert in the draft articles a reservation regarding the case of an aggressor State and of those who considered that if anything were to be inserted on the subject at all, it should be in as general a form as possible. The Drafting Committee believed that the neutral and cautious language used in its text should make it acceptable to the majority in the Commission.

68. Mr. JIMÉNEZ de ARÉCHAGA said he could accept the presentation proposed by the Drafting Committee under which the article constituted a general reservation instead of an exception to certain provisions in the draft. The new text also took into consideration the fact that the imposition of a treaty might be one possible measure taken against aggression, and it required that those measures must be in conformity with the Charter of the United Nations.

69. The CHAIRMAN, speaking as a member of the Commission, said he thought that the rule contained in that article was a useful one and that its formulation was acceptable.

70. Mr. TSURUOKA said he regretted that he was not entirely in agreement with the two preceding speakers. As he had already explained,¹⁰ he was not in favour of the idea underlying that article. In the proposed new version, he was concerned about the expression "in conformity with", which was rather vague and would be interpreted in different ways. Such a provision was not at all desirable in the context of the draft which the Commission was preparing.

71. Mr. RUDA said that the word "*ninguna*" in the Spanish text should be replaced by the word "*la*"; otherwise the article was meaningless.

72. Moreover, the title of the article in the three languages began with the words "Reservation regarding the case". The word "reservation" appeared to have been used in a different sense from that which the Commission had given it in the definitions in article 1; it would therefore be preferable to delete it and shorten the title to "Case of an aggressor State".

73. Mr. ROSENNE said that the Drafting Committee's text was satisfactory as far as it went but, for the reasons he had given at the 869th meeting,¹¹ it did not go far enough. He still adhered to the view he had expressed at the 853rd meeting¹² concerning the case of an aggressor State and would be compelled to abstain in the vote on the Drafting Committee's text.

74. Mr. REUTER said that he regarded the article as a compromise which would satisfy those who wanted an imprecise text.

75. From the point of view of language, the French version was not satisfactory. The expression "in relation to" was not exactly "*au regard de*". Since the English text was a model of flexibility, it was admittedly difficult to translate.

76. Sir Humphrey WALDOCK, Special Rapporteur, said it had not been easy to devise a formula that would cover both the situation in which a State accepted, or appeared to accept, an obligation by expressing consent to become a party to a treaty, and that in which a treaty merely contained a provision relating to an aggressor State. The article had therefore had to be drafted in fairly general terms. He did not, however, consider that the wording could be criticized as being too loose.

77. Mr. BRIGGS, speaking as a member of the Commission, said that he would have to vote against the Drafting Committee's text, which was both unnecessary and irrelevant to draft articles on the law of treaties. If an aggressor State were a Member of the United Nations, there was no need for such a reservation. If it were not a party to the Charter or to the treaty containing the obligation, he doubted whether the situation could be regulated by rules of treaty law. A group of States simply imposed an obligation on an aggressor: even if they agreed among themselves by treaty, it was not a question of the aggressor being a party to the treaty nor was there any question of imposing the treaty obligation, as such, on the non-party.

78. Mr. TUNKIN said that, as he had already indicated, an article on the case of an aggressor State was indispensable. The text put forward by the Drafting Committee was satisfactory and would meet the point made by several members of the Commission that certain provisions in its draft articles could be invoked by such a State in support of a claim that obligations imposed upon it violated the provisions of those articles. The question of the obligations which an aggressor State might incur as a result of its aggression under the rules of State responsibility was left completely open. Obligations imposed by a treaty—to which an aggressor State might or might not be a party—must be valid because they would be in conformity with the Charter and nothing in the Commission's draft articles could entitle such a State to refuse to comply with the obligations.

79. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Tunkin had explained the purpose of article Z, which was to prevent an interpretation in bad faith of provisions in the draft articles by an aggressor State seeking to escape obligations legitimately imposed upon it in conformity with the Charter. The wording of the Drafting Committee's text left the origin and nature of such obligations entirely open.

80. The English text seemed to him to express as much as the Commission wished to say. If the French version did not completely correspond to the English, perhaps Mr. Reuter might have some suggestions to offer.

81. Mr. TSURUOKA said that if he understood some of the statements correctly, article Z said no more than Article 103 of the Charter of the United Nations, which read as follows: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under

¹⁰ See 853rd meeting, paras. 32-36; 869th meeting, paras. 20-22.

¹¹ Para. 19.

¹² Paras. 64-67.

any other international agreement, their obligations under the present Charter shall prevail". That being so, was there any reason why the wording of article Z should not follow that of Article 103 as closely as possible?

82. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's text was not intended to apply exclusively to States Members of the United Nations, so that it might not be wholly satisfactory to rely solely on Article 103 of the Charter.

83. He personally had never been strongly in favour of including in the draft articles a provision regarding the case of an aggressor State, but, as Special Rapporteur, he had felt bound to try to meet the views of some governments and members of the Commission on that point. The Drafting Committee's text was surely innocuous and would provide the desired safeguard.

84. Mr. REUTER proposed that the beginning of the article should read as follows: "*Les présents articles ne préjudicient pas à toute obligation établie dans un traité et découlant, pour un Etat agresseur, . . .*".

85. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee could be asked to take another look at the French text of its proposal, but a decision ought to be taken forthwith on whether or not a reservation regarding the case of an aggressor State was to be included in the draft at all. The English text had not been criticized and expressed the Commission's intention as accurately as he believed was possible.

86. Mr. TSURUOKA said he did not object to the article being put to the vote. However, if, as the Special Rapporteur had pointed out, the present formula was justified on the ground that that article was not intended to apply solely to Members of the United Nations but might be applicable to non-member States, the question would immediately arise of whether it was necessary to refer to the Charter of the United Nations at all.

87. Mr. TUNKIN pointed out that Article 103 of the Charter dealt with an entirely different subject. The reservation proposed by the Drafting Committee stated that an aggressor State was precluded from claiming that obligations resulting from the rules of State responsibility had been imposed illegally, even if their imposition were in contradiction with the present articles.

88. The CHAIRMAN put to the vote the Drafting Committee's text for the reservation regarding the case of an aggressor State, subject to a review of the drafting of the French and Spanish versions.

*The article was adopted by 10 votes to 2, with 2 abstentions.*¹³

89. Mr. BARTOŠ said that, although he was in favour of the substance of the article, he considered that the text of an article of such importance and delicacy should have been finally established before it was put to the vote. It had been for that reason alone that he had abstained.

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

¹³ For a later amendment to the title of article Z, see 893rd meeting, para. 119.

ARTICLE 38 (Termination of or withdrawal from a treaty by consent of the parties),¹⁴

ARTICLE 40 (Suspension of the operation of a treaty by consent of the parties)¹⁵

NEW ARTICLE. ARTICLE 40 (*bis*) (Suspension of the operation of a multilateral treaty between certain of the parties only)

90. The CHAIRMAN, speaking as Chairman of the Drafting Committee, introduced the Drafting Committee's texts for articles 38, 40 and 40 (*bis*). The Special Rapporteur had suggested some rearrangement of those articles which the Drafting Committee had found acceptable. The texts proposed read as follows:

Article 38 [51]

"Termination of or withdrawal from a treaty by consent of the parties"

"A treaty may be terminated or a party may withdraw from a treaty:

- (a) in conformity with a provision of the treaty allowing such termination or withdrawal; or
- (b) at any time by consent of all the parties."

Article 40 [54]

"Suspension of the operation of a treaty by consent of the parties"

"The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- (a) in conformity with a provision of the treaty allowing such suspension;
- (b) at any time by consent of all the parties."

Article 40 (bis) [55]

"Suspension of the operation of a multilateral treaty between certain of the parties only"

"When a multilateral treaty contains no provision regarding the suspension of its operation, two or more parties may conclude an agreement to suspend the operation of provisions of the treaty temporarily and as between themselves alone if such suspension:

- (a) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and
- (b) is not incompatible with the effective execution as between the parties as a whole of the objects and purposes of the treaty."

91. The reason for the rearrangement was that article 38 of the 1963 text had been deleted during the second part of the seventeenth session. The Special Rapporteur had pointed out to the Drafting Committee that the article on termination of or withdrawal from a treaty by agreement between the parties should logically precede

¹⁴ For discussion of the former article 38, see *Yearbook of the International Law Commission, 1966, vol. I, part I, 828th meeting, paras. 65-91, and 841st meeting, paras. 5-11.* The decision to delete the article was taken at the 841st meeting.

¹⁵ For earlier discussion of article 40, see 861st meeting, paras. 1-57.

article 39 and that it would be preferable to make a new article 38 out of paragraph 1 of the text which had been proposed for article 40 by the Drafting Committee during the second part of the seventeenth session but discussion of which had been postponed.¹⁶ The new article 40 would then be confined to suspension of the operation of a treaty by agreement between the parties and would thus form a logical link between the new article 38 and article 39 (Denunciation of a treaty containing no provision regarding termination).

92. Article 39 (*bis*) concerning the reduction of the parties to a multilateral treaty below the number necessary for its entry into force and articles 41, 42 and 43 would deal with grounds for invoking both termination and suspension.

93. Sir Humphrey WALDOCK, Special Rapporteur, amplifying the explanation given by the Chairman of the Drafting Committee, said that the proposed rearrangement had the merit of introducing a reference to termination in conformity with the provisions of a treaty without labouring the point unduly. That method was one of the most common methods of termination or withdrawal from a treaty and was one on which the draft articles would otherwise have been entirely silent as a result of the deletion of article 38 of the 1963 text.

94. The new wording of article 38, sub-paragraph (*b*), had been chosen deliberately and the phrase “by consent of all the parties”, which had been substituted for “by agreement of all the parties”, was intended to take account of tacit consent to terminate—one of the main causes of obsolescence and desuetude. If the Drafting Committee’s proposal regarding article 38, sub-paragraph (*b*), were accepted, all the grounds of termination coming within the law of treaties would have been covered in the draft articles. There could be other cases where treaties were in effect brought to an end but they did not come within the scope of the draft now under consideration.

95. The CHAIRMAN invited the Commission to consider article 38 of the Drafting Committee’s new text.

96. Mr. REUTER said that he was prepared to vote for article 38 on the understanding that nothing in the draft articles submitted to the Commission applied to treaties establishing international organizations. If such treaties had been in question, the principles enunciated in article 38 would have required very thorough and meticulous revision.

97. Mr. ROSENNE said that in view of his concern lest the Commission had failed to take account of all possible grounds of termination, particularly in regard to article 30 and article 51, he welcomed the Special Rapporteur’s assurance that that possible defect would in all probability be remedied if the Drafting Committee’s text were accepted.

Mr. Yasseen resumed the Chair.

98. Mr. BARTOŠ said that he would vote for the Drafting Committee’s text of article 38 with a purely

mental reservation. As he understood sub-paragraph (*b*), a treaty could be terminated or a party could withdraw from a treaty at any time by consent of all the parties, but only under the conditions to which that consent was subject. Consent was not always given outright—it might be accompanied by conditions: the parties might be required to comply with certain time limits or to take certain action.

99. For instance, the Council of the European Organization for Nuclear Research (CERN), contrary to one of the provisions of the Convention¹⁷ by which it had been established, and at the request of certain States, had agreed that withdrawal from the organization was permissible if arrears of contributions had been paid and arrangements made to refund debts incurred up to that date by annual instalments.

100. If the Special Rapporteur agreed with him that the notion of consent embraced such conditions, he would vote for article 38 without proposing an amendment.

101. Sir Humphrey WALDOCK, Special Rapporteur, said it went without saying that if consent were given on certain conditions, those conditions would govern the effect of the consent. Such a proposition was in conformity with fundamental legal principles and the obligation to interpret in good faith.

102. The CHAIRMAN put to the vote the Drafting Committee’s new text of article 38.

Article 38 was adopted by 16 votes to none.

103. The CHAIRMAN invited the Commission to consider article 40 of the Drafting Committee’s new text.

104. Mr. BRIGGS, Chairman of the Drafting Committee, explained that the new wording of article 40 derived from paragraph 2 of the text proposed by the Drafting Committee during the second part of the seventeenth session (A/CN.4/L.115, footnote 2).

105. Sir Humphrey WALDOCK, Special Rapporteur, said that the new text of article 40 was a provision concerning suspension parallel to the provision concerning termination appearing in the new article 38.

106. Mr. BARTOŠ noted that article 40 laid down certain general principles of public international law. From time to time, however, the question arose of the course to be followed when a State was unable to apply a treaty and announced that it would suspend its operation for a certain time, so long as the grounds for suspension remained: it stated that it was acting in good faith and that it was ready to comply with the terms of the treaty, but subject to certain conditions for which no provision had been made anywhere in the treaty. When the Commission had discussed that question, it had been pointed out that there was a difference between suspension “in regard to all the parties” and suspension in regard to a particular party. If a State was unable to apply a treaty and announced that it was compelled to suspend its operation, it could not wait for the consent of all the parties.

¹⁶ A/CN.4/L.115, footnote 2. See also *Yearbook of the International Law Commission, 1966*, vol. I, part I, 841st meeting, paras. 57-90.

¹⁷ Article XII of the Convention for the establishment of a European Organization for Nuclear Research; United Nations, *Treaty Series*, vol. 200, p. 164.

107. He would like to see a reference to that idea included in the commentary, for situations did from time to time arise which made suspension necessary. Was it a case where members of the Commission should act first and foremost as jurists and therefore mention the matter in the commentary? Or should they adopt a very cautious approach and omit any reference to it, so as not to encourage States to make such a situation a pretext for not applying a treaty?

108. It might be argued that even if no provision was made for them in the draft articles, in cases of absolute necessity it would be possible to apply the other principles of international law governing cases of necessity and that, whether or not the possibility of suspension was mentioned, it would take place by force of circumstances. His only query concerned the procedure to be adopted in such a case.

109. Mr. JIMÉNEZ de ARÉCHAGA said that it would be wiser not to touch on the questions mentioned by Mr. Bartoš even in the commentary, in case that should prejudice the way in which they were ultimately dealt with when the Commission took up the topic of State responsibility. The questions of "state of necessity" and of conditions beyond the control of a State belonged to the topic of State responsibility rather than to the law of treaties.

110. Mr. AMADO agreed with Mr. Jiménez de Aréchaga. The point at issue was whether States which decided to suspend the operation of a treaty could do so—it was not a question of *force majeure*.

111. Mr. BARTOŠ said he was convinced that the Commission ought to establish the principle that such a case was one of necessity and *force majeure*, not of responsibility. He would have liked to exclude responsibility from the outset, because it was essential to provide some security for States which found themselves in a situation of that kind.

112. He could agree to no mention being made of the question, in order not to provide a loophole for States that might seek to take advantage of such a situation, but he could not agree that it should be dealt with in connexion with the problem of State responsibility.

113. Mr. JIMÉNEZ de ARÉCHAGA pointed out that the Commission itself had decided that the problems of "state of necessity" and *force majeure* ought to be treated as belonging to the topic of State responsibility. At its fifteenth session, when approving the recommendations of the Sub-Committee on State responsibility,¹⁸ it had decided to study the problem of state of necessity and other circumstances in which an act would not be wrongful.

114. Mr. CASTRÉN said that in his view it was inadvisable—and might even be dangerous—to introduce the theory of necessity into the draft or to mention it in the commentary, as that theory had given rise to so many abuses in State practice.

115. Mr. Bartoš had also mentioned the case of *force majeure*; but that was not quite the same thing, as it came very close to the case of impossibility of performance referred to in article 43.

116. Mr. REUTER said that article 40, like article 38, had been drafted very carefully and in purely positive terms. The text mentioned two cases in which the termination or suspension of the treaty was possible, but it was careful not to say that a treaty could be terminated only in those cases or that suspension was possible only in those cases. What the Commission probably meant was that, when the consent of the parties was invoked, those were the only two possible cases. Personally, he was not quite sure that that was so. He was not certain that there were no cases in which the consent of the parties was implicit, although it had not been expressly stated, in the light of the object or the circumstances of the treaty.

117. It was for that reason that he had made a special reservation with regard to the treaties establishing international organizations, which had given rise to so many difficulties in the past since, where no provision was made for withdrawal, some States had nevertheless affirmed that, in view of the object of the treaty, they had the right to withdraw from it. Despite that reservation, he believed that, with the positive wording used by the Drafting Committee, no one could have any difficulty in accepting articles 38 and 40.

118. Sir Humphrey WALDOCK, Special Rapporteur, said that, at various stages of its work on the law of treaties, the Commission had considered the problem of what, for lack of a better term might be called cases of *force majeure*, particularly in connexion with subsequent impossibility of performance. Its conclusion had been that it would be wiser not to go beyond the provisions of the rule now incorporated in article 43, which had been deliberately framed in fairly strict terms. The Commission's decision to reject any attempt on his part to enlarge the scope of that article had probably been the right one. It was not taking any premature decision about the content of a draft which it might elaborate on the law of State responsibility, but it had been guided by the assumption that, under rules belonging to other branches of international law, there might be grounds for invoking impossibility of performance as a defence against a claim but that the rules governing such cases fell outside the scope of the draft now under consideration. Article 40 as proposed by the Drafting Committee was framed in sufficiently general, yet positive, terms not to preclude recourse to such a defence in cases of that kind.

119. The CHAIRMAN put to the vote the Drafting Committee's text for article 40.

Article 40 was adopted by 16 votes to none.

120. The CHAIRMAN invited the Commission to consider the Drafting Committee's proposed new article 40 (*bis*).

121. Mr. BRIGGS, Chairman of the Drafting Committee, said that article 40 (*bis*) had its origin in paragraph 3 of the text for article 40 proposed by the Drafting Committee during the second part of the seventeenth session (A/CN.4/L.115, footnote 2). The cross reference to article 67 had been dropped in order to specify the limitations being imposed on the right of two or more parties to suspend the operation of a multilateral treaty. Sub-paragraph (*a*) reproduced, word for word, the text

¹⁸ *Yearbook of the International Law Commission, 1963, vol. II, p. 228.*

of article 67, paragraph 1 (b) (i), as approved by the Commission. The two French texts were not completely identical but that was possibly unintentional.

122. The wording of sub-paragraph (b) differed slightly from that of article 67, paragraph 1 (b) (ii), but was intended to reflect the same idea.

123. Mr. TSURUOKA said that he had already drawn attention to the difficulty of translating the English verb "to affect" into French. The expression "*porter atteinte*" used in article 40 (bis) was a correct and neat rendering; but, for the sake of uniformity, the whole of the Commission's draft should be re-examined with reference to that point.

124. Further, article 40 (bis) referred to suspension "between", or "as between", the parties, whereas article 40 provided for suspension "in regard to" all the parties. In both provisions the meaning was no doubt the same, despite the different expression used; but uniform wording should be aimed at. His own preference was for "between" (or "as between").

125. Mr. CASTRÉN noted that in the French text of sub-paragraph (b) there was a reference to "*l'objet et le but du traité*" in the singular, whereas in article 67—from which the phrase had been taken—the plural form "*des objets et des buts*" had been used. For the sake of uniformity, one of the two texts should be amended.

126. Mr. BARTOŠ pointed out that the purpose of the agreement envisaged in article 40 (bis) was to suspend the treaty temporarily and as between the parties concerned—in other words, partially. The title of the article, on the other hand, referred only to suspension between certain of the parties and thus to partial suspension without any notion of time. Accordingly, either the word "Temporary" should be inserted at the beginning of the title, or the words "temporarily and" should be deleted from the text of the article.

127. Mr. TUNKIN, referring to the difference in the wording of the titles of articles 40 and 40 (bis), said that it might be necessary to adjust the latter, or to insert an explanation in the commentary in regard to the situation covered in article 42. Under the provisions of article 42, a party specially affected by the breach of a treaty could invoke the breach as a ground for suspension and the agreement of the other parties was not required. In such a situation, if two or three of the parties agreed to suspend the operation of a treaty in consequence of a breach, something tantamount to an *inter se* suspension would occur.

128. Mr. BRIGGS said that, in the commentary on article 40 (bis), mention should be made of the fact that there was at least one other case when unilateral suspension might take place in accordance with the provisions contained in the Commission's draft articles.

129. Mr. REUTER, referring to Mr. Castrén's comment, pointed out that, while the plural form "objects and purposes" was used in the English text of article 40 (bis), the singular form was used in the English text of other articles. The Commission should perhaps make the English text uniform. If it decided that the singular form should sometimes be used, the French text would follow suit.

130. With regard to Mr. Tsuruoka's remarks on the translation of the English verb "to affect", he had no strong views on the matter. The word "*affecter*" in French had two general meanings. In the first place, it meant "to assign to a specific use" or "to place at the disposal". Etymologically, it merely meant "to produce an effect on", as in English. In French usage, the verb had acquired a slightly pejorative connotation, and it was in that sense that someone could be described as speaking with "affectation". Accordingly, to translate the verb "to affect" by "*affecter*" was correct etymologically and from the standpoint of current usage, but the rendering "*porter atteinte*" was also satisfactory.

131. Mr. JIMÉNEZ de ARÉCHAGA said that the Drafting Committee's new text of article 40 (bis) contained some important additional guarantees; thus, the article would not apply if the treaty itself contained any provision concerning suspension. The second improvement introduced in the article was that the suspension had to be temporary; furthermore, the provision was a little more stringent than that contained in article 67, paragraph 1 (b) (ii). More stress was also being laid on the fact that the suspension must apply to certain provisions and not to the treaty as a whole. The safeguards were nevertheless still insufficient and he remained unable to vote in favour of such a rule, since he regarded it as a dangerous innovation and one likely to encourage States to have recourse to *inter se* suspension.

132. Sir Humphrey WALDOCK, Special Rapporteur, agreed that some reference should be made in the commentary on article 40 (bis) to the rather similar situation that could arise in connexion with termination or suspension as a consequence of breach, though the circumstances would be different.

133. The points made by Mr. Bartoš and Mr. Tunkin respectively might be met by revising the title of the article to read "Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only".

134. The CHAIRMAN put to the vote the Drafting Committee's text of article 40 (bis) with the amendments to the title proposed by the Special Rapporteur.

Article 40 (bis) and the title as thus amended were adopted by 15 votes to 1.¹⁹

The meeting rose at 12.50 p.m.

¹⁹ For a later amendment to the text of article 40 (bis), see 893rd meeting, para. 81; and para. 82 (French text only).

877th MEETING

Friday, 24 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Herbert W. BRIGGS

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Special Missions

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

(resumed from the 845th meeting)

[Item 2 of the agenda]

1. The CHAIRMAN invited the Commission to consider the third report on special missions submitted by the Special Rapporteur (A/CN.4/189 and Add.1).
2. Mr. BARTOŠ, Special Rapporteur, reminded the Commission that at its previous session it had decided to submit to the General Assembly a report in which it would request States to give their opinion on certain questions about which it had doubts and to indicate the lines along which certain articles should be drafted.¹
3. At the twentieth session of the General Assembly, the Sixth Committee had considered the report and many delegations had taken part in the debate. He was not particularly satisfied with the results, however, for although all delegations had said that they welcomed codification of the question of special missions, they had confined themselves to very general comments, without going into detail.
4. Although a few governments had announced their intention of sending him their comments in writing, others had informed him that the statements made by their delegations in the General Assembly should be regarded as official comments and that their chancelleries, already overburdened by requests for information from the United Nations Secretariat, were too busy to reply.
5. The comments made in the Sixth Committee were reproduced in chapter II of document A/CN.4/188. He had received written comments from twelve governments, not counting the reply from Malawi, which merely congratulated the Special Rapporteur and expressed approval of the text. He had found himself in a quandary, having been unable to prepare his report on the basis of governments' comments before the beginning of the current session because those comments had arrived too late. Governments could hardly be blamed for that, since they had received the Commission's draft rather late and, moreover, the Commission, with the approval of the General Assembly, had reduced the time limit for the submission of comments from two years to one.
6. The officers of the Commission, in consultation with him, had selected the questions which could be considered pending circulation of all the addenda to his third report, namely, the general questions discussed in chapter II. Those questions were far from theoretical or doctrinal—their settlement would have the practical effect of enabling the Commission to lay down guidelines for its subsequent work and for his own revision of the text.
7. The first of those questions concerned the nature of the provisions relating to special missions—whether they had the character of *jus dispositivum* or of *jus cogens*. His views on that question differed from those of Mr. Ago, who had stressed *jus dispositivum*; he himself had explained that there were undoubtedly some rules which must be binding on the signatories of the instrument on special missions. On the other hand, the Swedish delegation in the Sixth Committee and the Belgian Government in its written comment (A/CN.4/188) had stressed the dispositive character of the whole draft.
8. If the Commission wished to give him more general instructions, it should decide how it proposed to settle the question. That could be done in two ways: the Commission might decide in advance that the whole draft would consist of rules of *jus dispositivum* or of rules of *jus cogens*, or that the draft would be *jus cogens* except for rules left to be agreed on between the States concerned, which would be *jus dispositivum*. Alternatively, the Commission might decide not to seek a general solution for the time being. When it had examined the draft article by article, it could decide whether certain rules should be *jus cogens* because a general custom was involved, and it might qualify the other rules by the phrase "except as otherwise agreed" thus allowing States to reach agreement in some other manner.
9. Mr. BRIGGS asked in what sense the Special Rapporteur was using the term *jus cogens*. The discussion on rules of *jus cogens* in the context of the law of treaties had been focussed on certain fundamental principles such as *pacta sunt servanda* and those which some lawyers perceived in Article 2, paragraph 4, of the United Nations Charter. His own view was that there were probably very few rules of *jus cogens* in international law and he feared that the Swedish Government might have been using the term in a different sense in its comments. If so, the Commission might run into the danger of trying to formulate rules of *jus cogens* of two different categories.
10. Mr. BARTOŠ, Special Rapporteur, explained that he had not wished to employ the expression "*jus cogens*" used by the Swedish delegation, either in his report or in the commentary. He had said that States would be free to derogate only from articles of the convention which expressly allowed such derogations. In other words, he did not consider that the draft partook of *jus cogens* in the sense in which the Commission had used the term in the law of treaties, where it had postulated the existence of general rules of international law which were binding on States, whether or not they were presented in contractual form, and which could even derogate from conventions.
11. On the contrary, he believed that the convention the Commission was drafting was such that the Commission could decide in advance whether its provisions were residuary rules from which the parties could agree to derogate if they deemed it possible and convenient to reach agreement in some other manner.
12. He was convinced that only a few of the rules of law on special missions were *jus cogens*, but some might possibly be regarded as mandatory customary rules. That was why he had not wished to employ the term "*jus cogens*" and had used the expression "except as otherwise agreed" as often as possible, so as to stress that the provisions in question had an expressly residuary character.
13. Mr. EL-ERIAN said it was important to distinguish between general rules of international law applicable

¹ Official Records of the General Assembly, Twentieth Session, Supplement No. 9, p. 12, para. 45.

unless the parties decided otherwise and particular rules of public or private international law. A State might extradite a criminal in the interests of justice; but it was under no compulsion to do so by virtue of any general customary rule of international law, although it might be bound by an express treaty obligation on the subject.

14. The reports on the law of treaties by Sir Humphrey Waldock had provoked lively discussion of the concept of rules of *jus cogens* in legal circles, but it might be dangerous to extend that concept in case it weakened the force of certain fundamental rules such as those deriving from the provisions of Chapter VII of the Charter concerning the determination of aggression and the machinery and procedure laid down in that Chapter.

15. In modern times the number and variety of special missions had increased so greatly that it was impracticable for the sending and receiving States to draw up agreements on privileges and immunities in each case. It was important, therefore, for the Commission to consider whether there were any general rules of customary international law that were applicable in the absence of express agreement between the parties. Perhaps there were a few rules in the nature of *jus cogens*, such as the traditional rule of immunity from criminal jurisdiction for heads of diplomatic missions, from which no State would consider derogating by agreement with another State. The Commission should carefully examine the implications of the Swedish Government's comment.

16. Mr. AGO said he was very grateful to the Special Rapporteur and to Mr. El-Erian for the points they had made in order to clarify a question which he regarded as crucial. In his opinion, if the concept of *jus cogens* were to be widened to that extent, it would be lost for ever and there would never be an article in the law of treaties on preemptory rules of international law.

17. Nothing would be more dangerous than to confuse *jus cogens* with all the general rules of customary law. Normally, those rules could be derogated from by agreement between the parties. The sanction inherent in the preemptory character of a rule of *jus cogens* must always be borne in mind: any convention derogating from such a rule was null and void between the parties. That sanction was so grave that the case was limited to certain principles vital to the international community. For his part, he would rather hesitate to say that there were rules of that kind in such a sphere as that of special missions. There might be such rules, but the Commission could not answer that question before it had examined the whole report.

18. In any case, it was the Commission's duty to react immediately against a presumption such as that of the Swedish Government, which revealed a certain confusion of ideas on the subject. There could be no question of making the provisions on privileges and immunities mandatory: if there was any matter in which there was no need for preemptory rules, it was surely that of privileges.

19. The Commission should also refrain from inserting the phrase "except as otherwise agreed" as a precaution at every step. The formula was a very useful one and Mr. Bartoš, with his usual caution, had used it as often as possible. But it should not be concluded

that, in the absence of that phrase—which did not appear, for instance, in the Convention on Diplomatic Relations—none of the rules could be derogated from by agreements concluded between the parties and that all agreements derogating from those rules would become null and void.

20. He therefore hoped that the Commission would leave the question pending for the time being, as the Special Rapporteur had suggested. It should prepare the draft as though that question did not exist; on re-reading the draft, it would be able to see if it really contained a few rules of *jus cogens* and whether it was necessary to state that no derogation from them by special agreement was permissible.

21. The Commission should proceed on the assumption that all the rules in the draft were dispositive—not even residuary, for that was yet another concept. If it subsequently found some rules which it deemed to be preemptory, it should say so expressly.

22. Mr. CASTRÉN congratulated the Special Rapporteur on his excellent report. He recognized that there was a great deal of truth in the comments made by the Swedish Government, which stressed the right of the States concerned, namely the sending State and the receiving State, to agree on the sending, task and status of special missions. Nevertheless, he agreed with the Special Rapporteur that the Swedish Government had gone too far in suggesting that the draft should contain only residuary rules to cover cases in which the States concerned had omitted to settle matters by agreement. As the Special Rapporteur had pointed out, there were probably already a few binding customary rules in the law of *ad hoc* diplomacy; even if that were not so, the Commission could, if it saw fit, include provisions in its draft from which no derogation was allowed.

23. Moreover, the Commission had already noted that there were few inflexible rules on special missions. He therefore considered that each provision of the draft should be carefully examined on second reading, in order to determine its character and define it in such a way that the possibility of individual arrangements between the States concerned was not needlessly excluded. To cover that point, the Special Rapporteur had already proposed a general reservation in part II of the draft; he would revert to that reservation later.

24. Mr. TUNKIN said that the question of rules of *jus cogens*, which the Commission was responsible for bringing to the fore, was one on which further research was needed. Several articles had already been written on the subject and a number of further studies were in preparation. A few well-known examples of such rules had been given during the discussion, but he believed that they were more numerous than had been suggested by some members.

25. The rules in question were fundamental rules of contemporary international law from which States could not derogate by agreement. For example, the rules bearing directly on the maintenance of international peace constituted rules of *jus cogens*, since they had been established in the interests of the international community as a whole.

26. A somewhat similar situation could arise under a multilateral treaty. Even a multilateral treaty concluded among a small number of States could contain clauses from which no derogation was permitted.

27. Most rules of general international law did not have the character of *jus cogens*. In the rules codified by the Commission, the fact that the proviso "unless otherwise agreed by the parties" did not appear in the formulation of a rule did not necessarily mean that it was a rule of *jus cogens*. That applied in particular to the draft articles on special missions. In that connexion, he agreed with Mr. Ago that those articles should be drafted on the assumption that derogation by special agreement was permitted. If the Commission intended any particular rule to have the character of *jus cogens*, it should say so expressly.

28. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on his excellent report.

29. He assumed that the draft on special missions would comprise three categories of rules. The first and largest category would consist of new rules of international law on the subject. Indeed, many of the rules which the Commission was trying to formulate were not yet rules of law in the strict sense of the term and had not yet acquired the force of rules of customary law. In formulating them, the Commission was engaged in the progressive development of international law; it was trying to create a practice, or to enunciate rules which would be mandatory under a convention. Existing rules which already belonged to general international customary law would form another category, while the third category would consist of general rules of law having the character of *jus cogens*.

30. Thus the vast majority of the rules to be included in the draft could be regarded as dispositive rules, whether they already had legal force or not. But he would be opposed to the Commission's deciding forthwith that there would be no rules of *jus cogens* in that limited field. In his opinion, there would certainly be some such rules, for instance, the rule of inviolability of the archives of a special mission, for it was hardly conceivable that two States would agree to derogate from that rule and to regard those archives as violable. However, the draft would certainly contain very few rules of *jus cogens*.

31. He agreed with Mr. Ago and Mr. Tunkin that the absence of the proviso "unless otherwise agreed by the parties" did not necessarily mean that an article stated a rule of *jus cogens*; but he urged the Commission to adopt a method which would not mislead States concerning the nature of the rules laid down in the draft. He supported the Special Rapporteur's suggestion that the Commission should first examine the draft article by article and then decide upon a general method of indicating unequivocally which rules were peremptory and which were dispositive.

32. Mr. TABIBI paid a tribute to the skill with which the Special Rapporteur had dealt with a difficult subject.

33. The question of special missions, which were becoming increasingly numerous, was one which was receiving very serious consideration from governments. So far, the subject had been regulated very flexibly, the

functions and privileges of each special mission having been settled on an *ad hoc* basis. In view of the diversity of special missions with respect to both functions and composition, governments hesitated to tie their hands by adopting general rules. Customary rules of international law relating to special missions were emerging from the daily practice in the matter, but he did not believe that the Commission would be able to find any which could be regarded as having the character of *jus cogens*.

34. The question of the privileges and immunities of members of special missions was causing considerable concern to the legal advisers of small countries. There was a genuine fear of granting extensive privileges and immunities to a class of persons which was becoming daily more numerous. It was therefore understandable that many governments should be reluctant to express a definite view on special missions until they knew the exact nature of the privileges and immunities to be extended to members of those missions.

35. In conclusion, he urged the Commission to codify those customary rules relating to special missions which had emerged and, by way of progressive development, to draft any further rules which might be of assistance in maintaining satisfactory international relations.

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

36. Mr. RUDA said he wished to associate himself with the tributes paid to the Special Rapporteur.

37. The question whether the rules embodied in the draft articles on special missions included any which had the character of *jus cogens* could be answered only by examining each article separately.

38. In article 37 of the draft on the law of treaties, rules of *jus cogens* were defined as rules from which no derogation was permitted. That criterion related to the effects of the rule; but the reason for giving the character of *jus cogens* to a rule of international law was that stated by Mr. Tunkin, namely, that the rule in question safeguarded values of vital importance to all mankind. The prohibition of the use of force in international relations was a case in point.

39. An examination of the rules on special missions with a view to determining whether any of them had the character of *jus cogens* would give the Commission an excellent opportunity of testing the provisions of article 37 of the draft on the law of treaties.

40. Mr. de LUNA congratulated the Special Rapporteur on his third report. The Commission should react strongly against the confusion which had appeared in the Swedish Government's comments.

41. The rules of *jus cogens* represented a minimum requirement for safeguarding the existence of the international community. Any agreement which violated one of those rules was null and void.

42. The Swedish Government's comments showed some confusion between peremptory norms of international law (rules of *jus cogens*) and mandatory rules. All rules of general international law were mandatory to some extent. The fact that a rule required the subjects of the law to act in a certain way did not necessarily give it the character of *jus cogens*. No derogation was possible from the most-favoured-nation clause, but it would be

absurd to suggest that there was a rule of *jus cogens* in the matter.

43. Peremptory norms of international law could not be created by treaty, although treaties could play a part in the emergence of such rules. A famous example was the Pact of Paris of 1928² and the subsequent emergence of a rule of *jus cogens* banning aggressive war as an international crime, a development that had constituted a radical departure from the traditional concept of the sovereign right of States to wage war.

44. The diplomatic conference which examined the Commission's draft articles on special missions would not create any new rules of *jus cogens*. Any such rules that might exist on the subject would not derive their character from their incorporation in the articles or from their adoption by the conference.

45. Lastly, he did not believe it necessary to include the proviso "except as otherwise agreed" in every draft article embodying a rule from which it was possible to derogate by agreement.

46. Mr. ROSENNE congratulated the Special Rapporteur on his scholarly report.

47. The question of possible rules of *jus cogens* on special missions had been discussed by the Commission at its sixteenth session, when the Special Rapporteur had said that the draft on special missions "should not contain *jus cogens* rules, except perhaps a few broad substantive rules concerning, for instance, the need for a State's consent to receive a mission and the freedom of a mission to perform its functions".³

48. The Special Rapporteur had thus stated the position very clearly, and had mentioned the only cases in which the application of a rule of *jus cogens* to the matter of special missions might require special treatment. The requirement of a State's consent to receive a mission, for example, was based on the fundamental and cogent rule of the equality of States, a rule which had its origin in customary international law.

49. The Commission should be extremely careful not to introduce into its draft articles or its commentary the idea that a rule of *jus cogens* could easily be created by the provisions of a treaty, since that could lead to difficulties in the sense that any subsequent treaty amending those provisions might be void under article 37 of the draft articles on the law of treaties.⁴

50. In the draft articles on special missions, special prominence should be given to article 1, paragraph 1, because it embodied the rule that the consent of the receiving State was necessary. He therefore suggested that that provision should be separated from the other provisions of the draft articles.

51. Partly for the reasons which he had stated and partly for more general reasons, he regretted that the Swedish delegation should have raised the question of *jus cogens* in the form in which it had done. In general, he supported Mr. Ago's approach and also the suggestion made by the Swedish representative in the Sixth Com-

mittee that it was advisable to accept as a basic presumption that States were free to derogate from the rules in the draft articles on special missions by express agreement between themselves, unless the contrary appeared.

52. The question now under discussion had some bearing on that of the relationship of the draft articles to other international agreements, a question dealt with in chapter II, section 5 of the Special Rapporteur's third report (A/CN.4/189). In that connexion, he wished to state that, contrary to the view he had expressed at the 819th meeting on a possible distinction between part I and part II of the draft,⁵ he now believed that, in general, all the articles embodied principles which were applicable in the absence of a particular agreement between the States concerned.

53. Mr. TSURUOKA congratulated the Special Rapporteur on the quality of his work. With regard to the point under discussion, he shared the view of most of the preceding speakers that it was only by studying the articles successively that the Commission could decide which of them contained rules of *jus cogens*, which contained mandatory treaty rules and which contained treaty rules from which derogation was permissible. There seemed to be general agreement that rules of *jus cogens* were very few in number, particularly if only those specifically relating to special missions were considered, to the exclusion of those which belonged to international custom and were general rules of international law. For instance, acts such as the assassination of the head of a special mission or the infiltration of spies or agitators under cover of a special mission had to be condemned as acts contrary to a general rule of international law, not as acts contrary to a specific rule relating to special missions.

54. He hoped that the Commission would specify what were the implications and legal scope of the rules it was formulating, even in the case of rules having a mandatory character as provisions of an international convention, without mentioning *jus cogens*. If it was specified in the future convention that a particular treaty rule could not be derogated from by agreement between the parties, and if two States found it necessary to conclude an agreement contrary to that rule, they could always evade the issue by stating that their agreement related to something other than a special mission, and the rule which the Commission wished to be mandatory would not have the desired effect. That was a problem the Commission should consider.

55. As Mr. Rosenne had already pointed out, the Commission was trying to codify the law on special missions, not with a view to imposing mandatory rules, but in order to facilitate and develop international economic, cultural and other relations. Its main purpose was to provide an instrument which would help States to deal with what was still a fluid situation. Members of the Commission would probably agree on that point.

56. Mr. JIMÉNEZ de ARÉCHAGA said he also wished to congratulate the Special Rapporteur on his work.

² League of Nations, *Treaty Series*, vol. XCIV, p. 59.

³ *Yearbook of the International Law Commission, 1964*, vol. I, p. 15, para. 2 *in fine*.

⁴ A/CN.4/L.115.

⁵ *Yearbook of the International Law Commission, 1965*, vol. I, p. 305, para. 126.

57. In his view, rules of international law could be divided into three categories: *jus cogens* rules, imperative rules and residuary rules.

58. He believed there was no place for *jus cogens* rules in the draft on special missions and urged that no reference to *jus cogens* should be made, either in the text of the articles or in the commentary. The example of the inviolability of the archives of a mission was not a case of *jus cogens*; there was no reason why two States should not validly agree among themselves that the archives of each other's special missions were open to judicial inspection, for instance.

59. He stressed that the essence of *jus cogens* was that it comprised those rules of general international law which affected the vital interests and moral values of the international community as a whole to such a point that not merely the actual violation of the rules was condemned, but even a preparatory act in the form of an inter-state agreement contemplating their violation was also inadmissible.

60. Mr. AGO thought it was essential to draw a clear distinction between rules of *jus cogens* and rules embodied in a treaty which itself specified that no derogation from them was allowed. In the latter case, the parties to the treaty could not derogate from the rule while the treaty was in force; but it was self-evident that the treaty itself could be amended or terminate. As Mr. Rosenne had rightly pointed out, if certain rules of a treaty were rules of *jus cogens*, the treaty in which they were embodied would be eternal, since any other treaty which derogated from those rules would be null and void. The sanction for concluding a convention derogating from those rules was the responsibility of the parties for violating the treaty, not the nullity of the convention in question. To become a rule of *jus cogens*, a treaty rule had to change its character and become a customary rule of *jus cogens*.

61. Mr. Ruda had said that there should be some criterion to distinguish between what was *jus cogens* and what was not; he had suggested that the criterion should be whether a rule safeguarded individual interests or the general interest. However, it was not enough for a rule to safeguard the general interest for it to become a rule of *jus cogens*. In his opinion, it was even more important to determine whether derogation from the rule by agreement between certain States would be prejudicial to the general interest of the international community.

62. The examples that had been given were not really examples of *jus cogens*, as Mr. Jiménez de Aréchaga had pointed out. It was difficult to regard even inviolability of archives and immunities in general as rules of *jus cogens*. The topic of special missions was too ill-defined and too diversified to be governed by such rigid principles. If two States decided to exchange special missions on fisheries, for example, but agreed that those missions would need no immunities, they could hardly be accused of having violated a rule of general international law. Even with regard to the rule of consent, to which Mr. Rosenne had referred, it was doubtful whether two States would infringe international law by agreeing, for instance, that their special missions could move freely between the two States

without special authorization, although in such a case the agreement to that effect might be regarded as prior general consent. Thus, the more one looked for rules of *jus cogens* in the particular field of special missions, the fewer one found.

63. The Special Rapporteur had been very wise to raise that question. The Commission should not exclude *a priori* the possibility that there might be rules of *jus cogens* relating to special missions, but it should proceed on the assumption that there were none; if it ultimately concluded that such rules did exist, it should substantiate that conclusion very clearly.

64. Mr. AMADO paid a tribute to the Special Rapporteur's mastery of the topic and said he had been most gratified by the sensible remarks of Mr. Ruda and Mr. Jiménez de Aréchaga on the important question of *jus cogens*. Mr. de Luna and Mr. Ago had also said things which needed to be said in order to counteract a tendency to generalize that concept, which owed its importance to its exceptional character. He wished Mr. Tunkin success in his attempts to find examples of *jus cogens* in the practice, but hoped that he would not find many.

65. The Commission's task in drafting articles on special missions was to formulate rules to help States solve the problems that might arise in connexion with those missions, which were being used with increasing frequency; it was important to facilitate their work, so that it might yield results which would be useful not only to the States concerned, but also to the international community as a whole. How could *jus cogens* be mentioned lightly in dealing with a topic dominated by the principle of reciprocity?

66. Mr. de LUNA said it was very difficult to conceive of the existence of *jus cogens* rules relating to special missions. But if any such rules existed, their source would not be a multilateral treaty but a customary rule of international law.

67. Mr. TUNKIN, referring to the distinction made by Mr. Jiménez de Aréchaga, said that rules of international law could be divided into two categories: rules of *jus cogens* and other rules. The latter, in turn, could be subdivided into the two further categories: imperative and purely residuary rules.

68. A multilateral treaty could well lay down rules from which no derogation was permitted; as far as the parties to the treaty were concerned, the position was not very different from that which resulted from *jus cogens* rules. However, he did not press for the use of the same term in both cases; it was perhaps preferable to reserve the term "rule of *jus cogens*" for peremptory norms of general international law.

69. The Commission could safely proceed with the formulation of the rules on special missions without inquiring whether any particular rule would be singled out as one from which no derogation was permitted.

70. Mr. BARTOŠ, Special Rapporteur, summing up the debate, pointed out that the comment made by the Swedish delegation in the Sixth Committee of the General Assembly might be regarded as an echo of a wider attack on the concept of *jus cogens* embodied in the Commission's draft on the law of treaties.

71. He himself did not believe either that there were any rules of *jus cogens* relating directly to special missions. There were only reflections of certain rules of *jus cogens*, such as the sovereign equality of States, which lay outside the scope of the draft.

72. He was grateful to Mr. Tunkin for drawing a distinction between rules of *jus cogens* and other rules of international law which did not have the character of *jus cogens* and among which there was a certain hierarchy. For example, no one would maintain that the Vienna Convention on Consular Relations was a compendium of rules of *jus cogens*; that Convention contained some treaty rules and some rules which the parties could modify between themselves.

73. The draft on special missions would be even less stringent than the Vienna Convention on Consular Relations; it might contain only one or two articles stating rules which could not be modified by the parties. He therefore thought it would be well to insert at the end of the draft a special article providing that the parties could, by mutual agreement, substitute their own rules for those stated in the convention, with the exception of certain articles in which the actual institution of special missions would be defined.

74. He recommended the Commission not to mention the concept of *jus cogens* either in the articles or in the commentary; he felt sure that all the members would agree with him on that point. Even the requirement of consent need not be said to be a rule of *jus cogens*; his own view was that that rule derived from the principle of State sovereignty. The rule was a general contractual one which the parties were obliged to apply unless the convention was modified, and from which no derogation could be made except by another treaty having equal status.

The meeting rose at 1.5 p.m.

878th MEETING

Monday, 27 June 1966, at 3.10 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Special Missions

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

(continued)

[Item 2 of the agenda]

1. The CHAIRMAN welcomed Mr. Stavropoulos, the Legal Counsel of the United Nations, and Mr. Koel-

meyer, the Observer for the Asian-African Legal Consultative Committee.

2. He invited the Commission to continue its discussion of the first of the preliminary questions raised by the Special Rapporteur, in Chapter II of his report (A/CN.4/189), namely, the nature of the provisions relating to special missions.

3. Mr. BRIGGS said that, no matter whether there were any *jus cogens* rules among the rules relating to special missions or whether such rules were to be found in the underlying principle of equality of States, he agreed with the view that the Commission should make no attempt to identify any rules of *jus cogens* in connexion with special missions until it had completed its draft.

4. It should be borne in mind that the Commission's purpose was to clarify any customary rules of international law on special missions that might be found to exist and to incorporate those rules which it considered appropriate and desirable in a draft convention on special missions. All those rules would be legally binding on the parties to the convention as rules of international law, though some of them might take the form of residuary rules, in other words, rules that were legally binding on the parties provided that they did not otherwise agree among themselves.

5. Sir Humphrey WALDOCK said that his view was much the same as Mr. Ago's. The Commission would have to exercise great care over the question of *jus cogens* or it would find itself in serious drafting difficulties. It was essential to keep clear the distinction between rules of general international law, which could be departed from by the will of the parties, and general rules of international law which, because of their substantive content, were rules of *jus cogens* from which no derogation was permissible. The topic which the Commission was studying was closely related to the Vienna Convention on Diplomatic Relations: if too much emphasis was placed on *jus cogens* in connexion with that Convention, much confusion would arise over such matters as the power of a State to waive or derogate from any particular rule which it contained. The Commission should put aside the question of *jus cogens* for the time being and feel free to specify which rules were residuary rules, without any implication that a rule which was not a residuary rule was necessarily a rule of *jus cogens*.

6. Mr. BARTOŠ, Special Rapporteur, restated the conclusions he had formulated at the end of the previous meeting.

7. In the Sixth Committee, several delegations, including that of Sweden, had expressed dissatisfaction at the use of the term *jus cogens* in the draft on the law of treaties (A/CN.4/188). Mr. Briggs had found that the Commission tended to seek out matters into which it could introduce the concept of *jus cogens*; that suggested that there was some confusion about the term. As understood by the Commission, rules of *jus cogens* were general peremptory rules of public international law which were binding in themselves, irrespective of the form in which they were introduced into international law, and even if they were not embodied in a treaty.

8. The Swedish delegation had made no distinction between treaty provisions which were contractual, not of *jus cogens*, and binding on the parties by virtue of the principle *pacta sunt servanda*, and treaty provisions which were residuary. A treaty contained some provisions which were binding on the parties which had accepted it, and others from which the parties could derogate by mutual agreement. The provisions of the Convention on Consular Relations were binding on the parties, but no one had ever assumed that those provisions had the character of *jus cogens*. They could be amended at any time by a stipulated majority, according to the appropriate procedure and, besides, the parties were authorized to derogate by mutual agreement from certain rules, even if they were in force.

9. What the Commission appeared to wish was that the rules laid down in the draft on special missions, though binding on the parties to some extent, should nevertheless be flexible, and that most of them should be applicable between the parties, unless other rules departing from the rules of the convention were established by mutual agreement.

10. In the first place, therefore, the Commission did not, in principle, perceive any rules of *jus cogens* in the draft on special missions. If *jus cogens* was to be found there, it was only as an echo of, for example, the principle of equality of States.

11. Secondly, the rules stated in the instrument would be binding on the parties, in so far as they did not leave the parties free to agree otherwise.

12. Thirdly, the Commission sought to allow States as much freedom as possible to derogate from those rules, as from the rules of treaty law, and to convert them into residuary rules, with the exception of two or three cases in which it would state that no derogation from the rule was permissible, though that would not make it a rule of *jus cogens*.

13. He was therefore convinced that there should be no mention of *jus cogens* in the draft. It should be expressly stated in the report that the Commission did not intend the rules which would become binding on the parties under the future convention on special missions to be rules of *jus cogens*, but intended most of the rules to be residuary.

14. Mr. ROSENNE said that the Special Rapporteur should reflect carefully on his statement that the Commission was not creating rules of *jus cogens* in the draft articles on special missions. It would be better if the report, in dealing with the point, did not use the expression *jus cogens* at all, but left the nature of the rules to be inferred from their general trend and from the way in which the report and commentary were put together.

15. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the phrase "rules from which no derogation is permissible" should be used instead of the term "*jus cogens*". Whether those rules had the character of *jus cogens* or not, it would be better for the Commission not to tackle the problem immediately. It would, of course, be possible to prohibit derogations from certain provisions of the convention on special missions by a separate agreement, but whether

those provisions would thereby acquire the character of *jus cogens* was debatable.

16. It would therefore be much wiser to leave the question aside until the final stage of the work on special missions; that course would avoid any difficulty over the conflicting views on controversial points.

17. Mr. REUTER said he fully endorsed the clear and sensible statement just made by Mr. Bartoš.

18. The CHAIRMAN said he did not think that the Commission's attitude was altogether clear. He would like Mr. Bartoš to explain whether the ideas he had just outlined meant that no rules of *jus cogens* could exist with respect to special missions, or only that the Commission intended to state that there might perhaps be rules from which no derogation was permissible.

19. Mr. BARTOŠ, Special Rapporteur, said that in his view international law was an integral system and concepts of international law could not be introduced into the law of special missions without a solid foundation on which the Commission would also be obliged to establish rules of *jus cogens*. For example, by providing in article 1 that the consent of the parties was required for a special mission, the Commission meant that States were sovereign and could not be compelled to send or to receive a special mission. The rule of State sovereignty was certainly now a rule of *jus cogens*, but the law of special missions was not its *sedes materiae*. In reality, the rule stated in article 1 and certain other articles of the draft on special missions were echoes or reflections of rules of *jus cogens*. Or course, if a rule was already *jus cogens* and was also applicable to special missions, it would not thereby lose its character of *jus cogens*.

20. That was why he had immediately endorsed the ingenious solution put forward by Mr. Ago, who had proposed stating at the end of the draft that the parties to the instrument could not derogate from certain articles, without specifying whether those articles stated rules of *jus cogens* or treaty rules safeguarding the unity of the instrument. As for the other rules, the Commission would leave States free to amend them by agreement *inter se*, as residuary rules.

21. He would therefore refrain from stating categorically that there were no rules of *jus cogens* in the draft, but he thought it undoubtedly contained rules which were absolutely necessary for the very institution of special missions: there were only four or five such rules, and the Commission should be sparing in its choice.

22. Mr. TUNKIN said that the discussion had been largely concerned with the general question whether rules of *jus cogens* were to be found not only in the body of contemporary international law, but also in specific branches of international law such as the rules on diplomatic immunity, the law of the sea and special missions. That very general question had little to do with the practical problem before the Commission, which was whether, at that stage of its work on special missions, it should decide in advance that there might be rules from which derogation was not permissible. The answer was simple: until the Commission had established the rules, such a decision could not be taken. Accordingly, the

Commission should proceed on the assumption that, if there were rules from which derogation was not permitted, it would say so either when it had formulated the rule or when the draft was complete.

23. Mr. REUTER said it was clear from Mr. Bartoš' explanations that, whether or not there was any rule of *jus cogens* relating to special missions, no such rule would be created by the Commission's draft: either it existed independently of the draft or it did not exist at all.

24. Mr. BARTOŠ, Special Rapporteur, said he agreed that at the final stage of its work, when it had drawn up the provisions of the draft, the Commission should decide whether there were any rules from which no derogation was permissible. He thought the discussion could be regarded as closed for the time being.

25. Mr. EL-ERIAN said there seemed to be general agreement that it was impossible to reach a definitive position until the rules had been formulated. There were, however, other aspects of the matter. For instance, in chapter II of his third report (A/CN.4/189) the Special Rapporteur had raised the question of the distinction between the different kinds of special mission; the legal status of Heads of State and Ministers for Foreign Affairs who went on high-level political missions, might have a *jus cogens* character. The whole question was not merely one of *jus cogens*; but of the relationship between the draft articles and other agreements, between general international law and particular international law. There might be rules of general international law which would be applicable as residuary rules if the parties did not agree on a particular rule to govern a certain situation.

26. The question was difficult to consider in the abstract; the Commission should confine itself to taking a provisional position and defer its decision.

27. Mr. AGO observed that really peremptory rules of international *jus cogens*, from which no derogation was permissible in general international law, should not be confused with treaty rules which the parties might decide were not subject to derogation, but in a purely limited and temporary sense.

28. The Commission was not at present engaged in codifying fundamental customary rules indispensable to the life of the international community. It was drawing up rules on what was largely a new subject, and it might well be that parties to a future convention on special missions would ultimately decide that no derogation could be made by mutual agreement from rules A, B, C and D, for example, without meaning to say that those rules would become rules of *jus cogens*.

29. *Jus cogens* met a vital need of the international community; derogation from its rules was not allowed by the general law of the international community and had special consequences. Breach of a purely treaty rule involved a breach of international law and responsibility was incurred, but that did not make the act void, as did breach of a rule of *jus cogens*.

30. He would hesitate to discern any rule of *jus cogens* in the draft on special missions. As Mr. Bartoš had said, it might contain an indirect reflection of one or two rules of *jus cogens*, but nothing more. Parties to the future convention might not wish to allow derogations

from that general convention by special agreements, but that did not automatically convert the provisions of the general convention into rules of *jus cogens*. Mr. Tunkin had mentioned various kinds of international rules which should be borne in mind. It was important to distinguish clearly between general rules of *jus cogens* and purely treaty rules from which the parties did not wish to allow derogations under rules that were also treaty rules.

31. Sir Humphrey WALDOCK said that if the Commission took a different view it would be departing from the position it had so recently adopted in connexion with the law of treaties, when it had not held that a provision in a convention from which the parties did not permit derogation would invalidate a subsequent treaty.

32. Mr. TUNKIN said it was not correct to say that a treaty could in no way influence the development of rules of *jus cogens*; the application of a rule in a treaty could lead to the development of a *jus cogens* rule of general international law.

33. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Ago and Sir Humphrey Waldock. It would be very difficult to find a rule of *jus cogens* relating to special missions; indeed, it might be that any of the rules on special missions, including those dealing with privileges and immunities, could be changed by the will of the parties.

34. Members had made their points of view clear and the best course would be to wait and see whether the Special Rapporteur's proposals expressed the consensus of opinion in the Commission.

35. The CHAIRMAN noted that agreement seemed to have been reached, if not on the substance, at least on the method to be adopted. He proposed that the Commission should do what the Special Rapporteur had suggested, and reserve its opinion on the admissibility of derogations from the rules in the draft until it had established the text of the articles.

It was so decided.

36. The CHAIRMAN invited the Commission to consider the second general question before it, namely, that of the distinction between the different kinds of special missions.

37. Mr. BARTOŠ, Special Rapporteur, pointed out that the Commission had already discussed the question whether the concept of a special mission should include technical as well as political missions. It had reached the conclusion that special missions represented the will of a sovereign State as signified to another sovereign State, irrespective of whether that will had political or technical action as its object.

38. He summarized the views on that subject expressed in the Sixth Committee by the delegations of Brazil, Czechoslovakia, Mali and Finland. In its written comments, the Czechoslovak Government (A/CN.4/188) had made a distinction between various kinds of special mission; missions of a political character should be governed by diplomatic law, while other missions should have a different legal status depending on their functions.

39. The United Kingdom Government (A/CN.4/188/Add.1) had raised the question whether, in view of the

increasing number of special missions, privileges and immunities should be granted to all such missions, and had taken a different view of the problem from that of the Commission. When he (the Special Rapporteur) had proposed that the functional factor should be taken into account and that members of a special mission should be granted the privileges and immunities necessary for the performance of their functions, the Commission had rejected that idea and had decided by a large majority that special missions should be assimilated to diplomatic missions, in accordance with the provisions of the Vienna Convention on Diplomatic Relations.

40. The delimitation of the rights of special missions also formed the subject-matter of the general comments by the Austrian Government, (A/CN.4/188/Add.2) which was in favour of granting to purely diplomatic missions the privileges and immunities provided for in the Vienna Convention on Diplomatic Relations, whereas the facilities granted to other missions would be limited by functional requirements. Mr. Verdross himself had explained to the Commission that he was not inclined to extend diplomatic privileges and immunities to a large number of people.¹ That view had been upheld by several States, which considered the Commission's draft prejudicial to their sovereignty and freedom of action.

41. He regretted that States had not indicated the kind of technical missions to which they thought that privileges and immunities might be extended. He had given some thirty examples of such missions, but no State had expressly indicated that it was unnecessary to grant diplomatic privileges and immunities to a particular type of mission.

42. Several solutions emerged from the statements and comments of governments. In the first place, the Commission might follow the recommendation of the Czechoslovak Government and decide that full privileges and immunities should be granted to special missions of a diplomatic character. But what was a diplomatic mission? It was by no means obvious.

43. Secondly, the Commission might adopt the functional theory and provide that such privileges and immunities should be granted as would enable special missions to perform their tasks quickly and efficiently. No doubt each concrete case would give rise to disputes, not of a legal nature, but purely factual, concerning the conditions necessary for the task to be performed quickly and efficiently.

44. Thirdly, technical missions might be excluded and States left to derogate by mutual agreement from the rules governing privileges and immunities. To allay the anxieties of certain governments, he had proposed that the Commission should insert in article 17 a new paragraph reading: "The facilities, privileges and immunities provided for in part II of these articles shall be granted to the extent required by these articles, unless the receiving State and the sending State agree otherwise". He agreed with Mr. Jiménez de Aréchaga that those privileges and immunities were not sacrosanct, that they were unnecessary in certain cases and that in those

cases States could derogate from the rules on which they had agreed. Moreover, the granting of such privileges and immunities depended on the receiving State. The receiving State might be prepared to grant diplomatic privileges and immunities to the special missions of one particular sending State but not to those of another, despite the principle of equality of States. That was a political question—a question of confidence. On the other hand, the performance of certain functions was more difficult for the special missions of some sending States than for those of others, whose missions had to be very careful not to exceed their terms of reference.

45. The Commission was thus again faced with the question whether special missions should be divided into political missions, which would be granted the full privileges and immunities provided for in the Vienna Convention on Diplomatic Relations, and technical missions, which would enjoy the guarantees necessary for the quick and efficient performance of their task. Alternatively, the privileges and immunities granted in the Vienna Convention could be taken as a model, though States would have the right to derogate from them by mutual agreement.

46. He had expected more positive assistance from States and had hoped that they would specify that certain privileges and immunities were unnecessary for certain special missions. But the only specific point they had made was that tax exemption should not be granted to subordinate officials. In short, States did not seem very willing to ratify a convention that would give special missions extensive privileges and immunities. The Czechoslovak Government had stated that it would have difficulty in obtaining parliamentary ratification of such a convention, and other governments were no doubt in the same position.

47. Mr. AGO said he saw no reason why the Commission should depart from the conclusion it had reached during its former discussion of the question; moreover, that seemed to be the opinion of the Special Rapporteur himself. It was undesirable and, indeed, impossible to distinguish between political special missions and technical special missions; even if such a distinction were possible, there would be missions of greater or lesser importance in both categories, so that a technical mission might be more important than a political one. By attempting to make such a distinction, the Commission would be opening the way for innumerable disputes in cases where the sending State and the receiving State did not agree on the character of the special mission and hence on the privileges and immunities to be granted to it.

48. If it maintained the system that had been adopted, the Commission would have two safeguards. First, the rules formulated in the draft would be rules from which the parties could derogate as much as they wished; derogations would certainly occur, whether or not they were authorized. Secondly, when the Commission came to examine the substance of the articles, it would do well to be cautious and rather strict with regard to the privileges and immunities of special missions, for public opinion certainly did not welcome the increase in the number of privileged persons going from one country

¹ *Yearbook of the International Law Commission, 1964*, vol. I, p. 12.

to another to perform tasks for which such privileges and immunities were not altogether essential. The Commission would run less risk of provoking unfavourable reactions on the part of States if it allowed special agreements to extend rather than restrict the privileges and immunities provided for in the draft.

49. Mr. ROSENNE said he was in general agreement with the Special Rapporteur's approach in chapter II, paragraph 10, of his report; the new paragraph he proposed to insert in article 17 could be examined in greater detail when the Commission came to discuss that article.

50. He thought that the difficulties mentioned in the Sixth Committee and in the comments by governments were partly due to the fact that the Commission's 1965 report had been somewhat bald. In his first report,² the Special Rapporteur had included a remarkable introduction which had placed the whole topic in a practical context; it would be useful if such an introduction could be included in the Commission's own report. The best answer to the comments by governments was to be found in the wide variety of special missions; if some of their views were accepted, it would be necessary to draw up a whole series of different sets of rules for the different kinds of special mission—a procedure quite inappropriate to a general statement of the law, which was in any case subject to mutual agreement between the parties.

51. Mr. TUNKIN said there was much practical value in the Czechoslovak Government's suggestion that special missions should be divided into two categories.

52. The rules on special missions drafted by the Commission, particularly those relating to privileges and immunities, were rules from which it was always possible for States to derogate. It was for the two States concerned to decide what facilities and privileges would be granted to a particular special mission. In practice, however, the two States concerned rarely had an opportunity of going into the question of privileges and immunities at the time when the decision to send the special mission was taken. The question usually arose in connexion with some specific problem relating to one of the members of the special mission.

53. The task of States would therefore be facilitated if the Commission, in its draft articles, divided special missions into two categories. States would then be able to choose the category in which they wished to place a particular mission. Even if they did not make that choice before the mission was despatched, the division into two categories would make it easier to solve any particular problems which might arise later.

54. In view of the great variety of special missions, which ranged from diplomatic missions of great importance to small missions dealing with secondary questions, States would, in practice, inevitably make some distinction between the different kinds of mission. Thus, despite the practical difficulties involved, he believed that, in order to assist States, the Commission should attempt to make a distinction on the lines suggested by the Czechoslovak Government.

55. Mr. CASTRÉN said that the question whether a distinction between the various kinds of special mission should be made in the draft was of great importance.

The nature and tasks of such missions varied widely, and that fact should be taken into account in determining their legal status. In view of their great diversity, however, it was hardly possible to deal separately with all the categories of special missions in a general convention. Moreover, some special missions were both technical and political in character, and it might be hard to say which of the two elements was predominant. The Commission had therefore been right to formulate general rules applicable to all special missions.

56. Article 17 of the draft³ provided that the facilities accorded by the receiving State to a special mission of another State depended on the "nature and task of the mission". That proviso was probably not sufficient to satisfy a number of governments which wished to limit the privileges and immunities of certain special missions, especially those of a purely technical nature. He therefore accepted the Special Rapporteur's proposal to insert a provision recognizing the right of the sending State and the receiving State freely to determine by agreement the facilities, privileges and immunities of special missions. But a provision should be inserted at the beginning of part II of the draft as a separate article which might read: "Articles 17 to 44 shall be applicable unless the States concerned agree otherwise". It should be borne in mind that the States concerned were not only the sending State and the receiving State, but also third States which accorded the right of transit through their territory, a question dealt with in article 39. Before inserting a general proviso of that kind in the draft, however, it would be necessary to re-examine each article of part II to see whether derogations were permissible or not.

57. Mr. BRIGGS said he agreed with Mr. Ago that the Commission should not go back on the decision it had taken in 1965. There was no satisfactory practical criterion for distinguishing between the many and varied special missions.

58. He therefore urged that article 17 should be retained as adopted in 1965, without the additional paragraph now proposed by the Special Rapporteur in chapter II, paragraph 10 of his third report (A/CN.4/189). The contents of that additional paragraph were already implicit in the existing text of article 17. With regard to the proviso "unless the receiving State and the sending State agree otherwise", he failed to see why the two States concerned should agree that full facilities should not be granted to special missions.

59. Article 25 of the Vienna Convention on Diplomatic Relations stated that "the receiving State shall accord full facilities for the performance of the functions of the mission" and article 17 of the draft articles on special missions set forth the same rule, with the addition of the words "having regard to the nature and task of the special mission".

60. Article 25 of the Vienna Convention on Diplomatic Relations and the corresponding article 28 of the Vienna Convention on Consular Relations had not given rise to any difficulty over the meaning of the words "full facilities". He therefore supported the retention of article 17 without the proposed additional paragraph.

² *Op. cit.*, vol. II, p. 67.

³ *Official Records of the General Assembly, Twentieth Session, Supplement No. 9, p. 27.*

61. Mr. REUTER said he agreed with the previous speakers. If the Commission was preparing the text of a convention, it should adhere to the system it had already adopted. The addition of a provision specifying that the rules stated in the draft were applicable unless the parties agreed otherwise was a matter of drafting which could not be settled forthwith.

62. Generally speaking, the Commission preferred to draw up conventions rather than codes. He did not wish to reopen discussion on that point, but he thought it might be of practical assistance to States to describe two typical situations, A and B, corresponding to large missions and small missions, not to serve as a guide, but to enable governments to clarify their position in relation to one or other of those situations. That would simplify the consultations which should take place before a special mission was despatched, but which often did not take place owing to lack of time, so that difficulties arose after the special mission had already been sent. He asked the Special Rapporteur whether, with his wide experience in the matter, he thought it would be possible to prepare two, or perhaps three, models of that kind to be attached to the draft, perhaps as an annex.

63. Mr. JIMÉNEZ de ARÉCHAGA said that, in view of the great variety of special missions, it would not be possible to classify them in two main categories. He thought the suggestion of such a division was prompted by concern about the scope of the privileges and immunities to be granted. He therefore agreed with the Special Rapporteur's proposal that governments should be given a choice as to the extent of the facilities and privileges to be granted to a particular special mission.

64. As Mr. Tunkin had pointed out, however, the question of the privileges of special missions was rarely dealt with before the mission was sent; it usually arose after the mission was already in the receiving State.

65. It would not be advisable to present the draft articles on special missions in the form of a guide; they were intended to supplement the 1961 Convention on Diplomatic Relations, which dealt with permanent missions. It was therefore essential that the articles should take the form of a convention or of a protocol to the 1961 Convention.

66. He suggested that it might be useful to explore the possibility of dividing privileges and immunities into two categories. The first category would consist of the minimum privileges and immunities which would be granted to all special missions and the second of the further privileges and immunities which would be extended to the more important, or so-called political, special missions. Unless otherwise agreed, the minimum privileges and immunities would be recognized.

67. Mr. RUDA supported the approach adopted by the Special Rapporteur. It was difficult to draw a distinction between political and technical missions. The situation varied from country to country and in one and the same country, according to the circumstances. For instance, negotiations on a country's foreign debt might be a purely technical matter at one period in its history, but constitute a political problem at another.

68. He drew attention to the statement in paragraph (2) (b) of the Commission's commentary on

article 1 that "the task of a special mission is in any case specified and it differs from the functions of a permanent diplomatic mission, which acts as a general representative of the sending State". The commentary added that: "In the Commission's view, the specified task of a special mission should be to represent the sending State in political or technical matters".⁴

69. Thus the conclusion reached by the Commission in 1965 had been that the characteristic feature of a special mission was the "specified" nature of its task and that a special mission could be political or technical in character.

70. The Commission had adopted a similar approach to the question of the facilities to be extended to special missions and had said in paragraph (3) of its commentary to article 17: "It is undeniable that the receiving State has a legal obligation to provide a special mission with all facilities necessary for the performance of its functions. In the literature, this rule is generally criticized on the ground that it is vague. The Commission is convinced that its content changes according to the task of the mission in question, and that the facilities to be provided by the receiving State vary. Consequently, the assessment of the extent and content of the above-mentioned obligation is not a question of fact; the obligation is an *ex jure* obligation, whose extent must be determined in the light of the special mission's needs, which depend on the circumstances, nature, level and task of the specific special mission".⁵

71. The Special Rapporteur's proposed addition to article 17 would thus merely introduce in the article itself an idea already expressed in the commentary. He therefore supported that proposal.

72. The CHAIRMAN, speaking as a member of the Commission, said he appreciated the logic of the comments by governments which wished to differentiate between special missions according to their nature. In practice, however, it was not easy to do so, for the importance of a mission depended not only on its nature, but also on the rank of its members and on certain other factors. For instance, if a technical mission was headed by the chancellor of a university and a political mission by a secretary of embassy, it would be difficult to agree that the latter should enjoy more extensive privileges and immunities than the former. The difficulty in making such a distinction lay in the meaning of the term "political" at a time when international relations were extremely varied and covered wider and wider fields.

73. The functional theory provided a way out, which the Commission had used in principle. The draft might state that all international missions, whether political or technical, should have a certain status and should enjoy the privileges and immunities necessary for the performance of their tasks. The Commission had not adhered strictly and exclusively to the functional theory, but had used it as a guide. On the basis of that theory, it would be possible to allay the anxieties of governments which feared that very extensive privileges and immunities

⁴ *Ibid.*, p. 13.

⁵ *Ibid.*, p. 27.

might be granted to an ever-increasing number of members of special missions. The Commission might specify that the status required was the irreducible minimum for the accomplishment of any special mission; governments could, of course, grant more. That solution would relieve the Commission of the heavy burden of having to distinguish between different kinds of special mission.

74. Mr. REUTER explained that he had merely suggested that two typical kinds of special mission should be described, in some form or another—in the commentary if necessary—to facilitate the work of governments. Mr. Jiménez de Aréchaga and the Chairman had gone further by suggesting that the convention itself should specify a minimum régime and a broader régime, which would, in a way, amount to establishing two classes of special mission. If the Commission defined a minimum régime and a régime of additional privileges, States would automatically consider that the minimum privileges were granted as of right and that additional advantages could be granted only by special agreement. His own suggestion was less far-reaching, namely, that the Commission should simply formulate a few important rules and draw attention to certain problems; apart from that it would leave States free to do whatever they wished, but would offer them two typical régimes as a guide.

75. The Commission should decide whether to adopt the idea of including the two régimes in the convention itself. If it rejected that idea, he still thought it might be useful, in order to facilitate the work of chancelleries, for an expert to outline two typical régimes, the elements of which would be judiciously graded.

76. Mr. JIMÉNEZ de ARÉCHAGA expressed his regret at having misunderstood Mr. Reuter and asked the Special Rapporteur whether the privileges in part II could not perhaps be divided into two categories, the first representing an irreducible minimum, the second consisting of privileges which went beyond that minimum. With such a division it would be possible, instead of inserting the Special Rapporteur's additional paragraph in article 17, to state the rule as follows: first, that the minimum privileges would be granted unless the receiving State and the sending State agreed otherwise; second, that the wider privileges would be granted to a special mission where the two States concerned so agreed.

77. Mr. BARTOŠ, Special Rapporteur, replying to Mr. Jiménez de Aréchaga, pointed out that the situation would be different once the Commission had decided whether or not to insert in the draft an article in which, as he had suggested at the previous meeting, it would specify the articles from which derogation by agreement between the parties was not permitted. Once it had taken that decision, the Commission would see which privileges and immunities were always necessary and would place the articles in which those privileges and immunities were defined among those from which no derogation was permissible.

78. He did not believe, however, that it was possible to establish degrees of privileges and immunities; for example, inviolability of the person and the secrecy of archives were indivisible and could not be graded. True, the Vienna Conventions had established two categories of immunity from jurisdiction, a "minor"

immunity limited to official acts and a "major" immunity covering all acts whatsoever. One of the most delicate questions was that of exemption from taxation; ministries of finance were usually less inclined to be liberal about it than ministries of the interior. He confessed that he could not say what were the minimum privileges and immunities which should be granted to special missions.

79. The Commission might limit the privileges and immunities of special missions to what was necessary. The best course would no doubt be for it to examine the draft article by article and indicate in each case what it considered indispensable; for example, the correspondence of special missions might be inviolable only when sent to the nearest diplomatic mission.

80. Nor did he think it possible to define two régimes—a first class and a second class régime as it were to be submitted as models. He would prefer to define certain indispensable immunities and to propose them to States as treaty rules.

81. At the General Assembly, the Netherlands delegation had been the only one to express the view that the Commission should prepare a code; all the other delegations had advocated a draft convention. Moreover, as Mr. Jiménez de Aréchaga had pointed out, international standards submitted as models had little significance. The Commission's drafts in code form had not met with much success; the General Assembly had merely taken note of them and recommended States to use them as a guide, but in fact the rules laid down in them had never been applied or even mentioned as sources in works on international law. He did not think it would serve any useful purpose to include models in the commentary, as Mr. Reuter had suggested. At the two Vienna Conferences and at the Geneva Conferences on the Law of the Sea, the commentaries attached to the articles had not been regarded as an integral part of the proposals to be discussed; participants had sometimes drawn arguments from those commentaries to support their contentions, but the only arguments that really counted had been those based on the articles themselves, particularly where there had been several successive versions of the text. He did not think chancelleries would be grateful to the Commission for proposing such models; they would be more inclined to think that an attempt was being made to interfere in matters within their competence and to limit their freedom of action.

82. He hoped that the Commission would take a decision on the questions he had raised in his previous statement. All the members seemed to agree that it was almost impossible to establish criteria for distinguishing between technical special missions and political special missions.

83. He also invited the Commission to consider a more serious question: if it decided to insert a provision prohibiting derogation from certain rules laid down in the draft, it would have to define very carefully the privileges and immunities which were indispensable for special missions.

84. Mr. TUNKIN suggested that a distinction should be made between certain rules on privileges and immunities which applied to all special missions, such

as the rule on the inviolability of archives, and other rules in respect of which a distinction could be made between political missions and administrative or technical missions. With regard to the latter type of rule, political missions would benefit from practically the same privileges as those extended to permanent missions by the Vienna Convention on Diplomatic Relations. Where administrative or technical missions were concerned, it could be agreed that they should benefit only from those privileges and immunities necessary for the performance of their functions.

85. That approach would leave open the question of determining which missions should be considered political and which administrative or technical. It would be left to the States concerned to decide in each case how a particular special mission would be treated.

86. Mr. AMADO said he was surprised that Mr. Tunkin found it possible to distinguish between a political mission and a technical mission. He did not see how that distinction could be made, since political questions were always bound up with technical questions; the very word "State" implied interests, and multiple interests at that. The Commission should not depart from the rules it had first formulated, which laid down minimum requirements, always bearing in mind that special missions, however important, were temporary in character and were appointed, as their name implied, to deal with special problems. Moreover, the Vienna Convention on Diplomatic Relations should be followed as closely as possible.

87. The functional theory was an easy one for the Commission, but not for States. It was not the rank of the persons concerned that counted. Some missions headed by very high ranking persons, which appeared to be of very great importance, gave rise to nothing more than a general exchange of views and settled no specific problems. The only criterion that the Commission could adopt for special missions was precisely their special, specialized and "secondary" character—the term "secondary" having no pejorative sense.

88. He wished it were possible to define two régimes, but he did not see how it could be done. In his opinion the Commission should specify the minimum of privileges and immunities necessary and possible to enable a special mission to perform its task and produce the desired results, and that should be done very cautiously, allowing States as much freedom as possible.

89. The CHAIRMAN, speaking as a member of the Commission, said he had maintained that the Commission's work on special missions was based on the functional theory. Mr. Amado also supported that theory, for indispensable privileges and immunities were precisely those which the special mission required in order to perform its functions.

90. Mr. BARTOŠ, Special Rapporteur, pointed out that he had originally proposed basing the Commission's work on the functional theory, but at the suggestion of Mr. Tunkin and in the light of the preamble to the Vienna Convention on Diplomatic Relations, the Commission had rejected that proposal.⁶ It had con-

sidered that the representational and functional elements were combined and that even in the case of a purely technical mission, certain questions of prestige and the determination to safeguard certain political interests always underlay the technical aspects. Most of the delegations to the General Assembly had accepted that combination of the two elements; only a few governments had stressed the functional character of special missions. Hence it could hardly be said that, on the whole, States favoured the functional theory.

91. The CHAIRMAN, speaking as a member of the Commission, stressed that he had referred to the functional theory as one of the bases, but not the only basis, for the Commission's work. In his opinion, that theory was an essential basis of the draft, as it had been an essential basis of the two Vienna Conventions.

92. Mr. CASTRÉN pointed out that the Special Rapporteur had originally proposed fairly extensive privileges for special missions and the Commission had considered it necessary to restrict those privileges to some extent. Generally speaking, governments had approved the position taken by the Commission. The majority of the Commission supported the functional theory, and the Special Rapporteur had also upheld the representational theory.

93. Mr. BARTOŠ, Special Rapporteur, said that, on the contrary, it was he who had upheld the functional theory, according to which immunities were granted to the extent required by the official acts to be performed. But the Commission had rejected that point of view and instructed him to bring the draft into line with the Vienna Convention on Diplomatic Relations. A few States were now coming back to the opinion which he had upheld at the outset.

94. Mr. AMADO urged the Commission to leave the theoretical question aside, for, in any case, elements of the various theories were intermingled in the topic of special missions.

The meeting rose at 6.5 p.m.

879th MEETING

Tuesday, 28 June 1966, at 11.20 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

(resumed from the 876th meeting)

[Item 1 of the agenda]

PROPOSED CODIFICATION CONFERENCE ON THE LAW OF TREATIES (ILC(XVIII)MISC.1)

1. The CHAIRMAN invited the Legal Counsel of the United Nations to introduce the Secretariat memorandum

⁶ Yearbook of the International Law Commission, 1964, vol. I, p. 13, paras. 51 et seq.

(ILC(XVIII) MISC.1) on the procedural and organizational problems involved in holding a conference on the law of treaties.¹

2. Mr. STAVROPOULOS (Legal Counsel) said that, at the last session of the General Assembly, several representatives had suggested that the Secretariat should prepare a paper on the procedural aspects of a conference to codify the Commission's work on the law of treaties. It had also been suggested that the Secretariat should informally ascertain the Commission's views on the proposals made in that paper. Document ILC/XVIII/MISC.1 had been prepared in response to those suggestions: it was a rough draft, based on the Secretariat's view that the General Assembly would probably find a conference necessary.

3. A conference on the law of treaties would clearly be a very arduous undertaking, if only because delegations would have to discuss some seventy articles, many of them of considerable technical difficulty. Governments would therefore need plenty of time to prepare for the conference and the memorandum accordingly suggested that it should not be held before 1968 at the earliest.

4. The next point was whether there should be a committee of the whole or two committees of the conference and, in the latter event, how the work should be divided. Then there was the question whether the conference should be held in two parts with an interval between them, in which case the work in committee would be done during the first part and only plenary meetings held during the second. That course would make the conference more expensive, but it would unquestionably ensure a more thorough study of the draft articles and it might make governments more willing to accept compromises.

5. A further question was that of the rules of procedure. Mr. Verosta, who had been President of the Vienna Conference on Consular Relations, had made a number of suggestions when speaking as Austrian representative in the Sixth Committee of the General Assembly.² He had criticized the rule that decisions on matters of substance taken in plenary required a two-thirds majority, claiming that it enabled a minority of delegations to reverse a decision reached by a simple majority in committee. That point had been thoroughly discussed before the United Nations Conference on the Law of the Sea, and, despite the opposition of Mr. François, the Special Rapporteur, it had been decided to maintain the two-thirds rule.

6. Mr. Verosta had also said it was desirable that the president of the conference should be given power to suspend a meeting in order to consult representatives before giving a ruling. But a conference was usually prepared to allow its president to adopt that course and a rule on the matter might not be necessary.

7. Another matter raised in the Sixth Committee had been the rule of procedure under which only two speakers could be heard in favour of a motion for the division of

proposals and two against. One of the committee chairmen at the Conference on Consular Relations had said that that left representatives insufficient time to consider the implications of a divided vote.

8. The Secretariat's view was that the rules of procedure hitherto used had proved their worth and should be retained, perhaps with some minor changes.

9. He would welcome the Commission's views on those problems and the other questions raised in the memorandum.

10. Mr. BARTOŠ said he thought the point raised by Mr. Verosta should be examined, but not his proposals. Account should also be taken of the experience of other participants in the Conference on Consular Relations, for when Mr. Verosta was in the chair, he had been found to be in a minority on several occasions when his rulings had been challenged. The Commission should seek rational rules which would ensure full freedom of expression for the representatives of sovereign States in discussing such an important matter as the law of treaties, as well as speed and efficiency in the work of the conference.

11. It would be inadvisable to devote part of the conference to technical questions, and hold no plenary meetings during that period. Vital matters of principle arose from time to time on which participants had to express their views, not only in committees, but also in the plenary conference from which even committees of the whole received their instructions.

12. At the Conference on Consular Relations, the two committees which had been set up had worked independently, with the result that disputes had arisen over the co-ordination of their work, the second committee having refused to apply to questions within its competence certain solutions adopted by the first. It should therefore be decided whether co-ordination was to be effected at the last moment, when the committees had completed their work, or at each stage of their proceedings.

13. Personally, he was convinced that the plenary conference should meet not only at the beginning and the end of the work, but also while the committees were sitting, in order to reach compromises. Experience had shown that members of committees made a practice of submitting technical solutions, without attempting to find political ones, thus jeopardizing the success of the conference and of the convention it adopted. It should therefore be possible for plenary meetings to be convened at any time by the officers of the conference, in order to settle questions requiring a compromise.

14. The Commission itself was not always concerned solely with the technical aspect of a matter; the political aspect often dominated its thinking, whether consciously or subconsciously. At a conference of some 118 States, not counting representatives of the specialized agencies, at which delegates who were neither experienced nor technically expert would have to settle technical questions, it would be difficult to obtain any kind of majority, even a simple one, and experience showed that small groups would tend to form holding three or four different opinions. Compromises would therefore have to be reached by adding a few words to certain texts to make

¹ This memorandum was subsequently issued in revised and expanded form as document A/C.6/371.

² *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 851st meeting, paras. 23-26.*

them acceptable and provide a sound basis for a majority. For when adopting a law-making treaty it was important to have a large majority.

15. In short, he hoped that the conference would at all times be able to meet concurrently in plenary, in committees, in sub-committees and in working groups, which would have the task of studying the really technical questions, reaching a compromise, and referring it back to the committees. In other words, he was in favour of rules which would be flexible, but would be based on strict principles and provide all the necessary safeguards.

16. Mr. AGO said that the task of codifying the law of treaties was the heaviest responsibility the United Nations had yet assumed in the codification of international law. It was therefore most important that the conference or conferences carrying out the final stage of a task to which the Commission had devoted so many years should be well prepared.

17. The undertaking was certainly a very difficult one, and he was glad the Legal Counsel considered that there should be no haste. He himself would be in favour of holding the conference in the autumn of 1968 or the spring of 1969; he believed, for several reasons, that all the intervening time would be needed to organize the conference satisfactorily. Above all, governments should have time to study the draft carefully, to appreciate its importance and its difficulties and to choose delegations equal to the task. The United Nations, for its part, should have time to give careful consideration to the choice of a meeting-place and of a president—two matters which were often interdependent. A conference of that kind needed a really first-class president; much depended on where it was held and how its work was directed.

18. Before expressing a definite opinion on whether the conference could or should work in committees, he would wait to hear Sir Humphrey Waldock's views on the matter. His first reaction was that a conference on the law of treaties could not be subdivided into several committees, since the draft formed a logical whole from beginning to end and all its provisions were interconnected. The case of the Conference on the Law of the Sea had been quite different, for it had been called upon to deal with a series of separate questions, such as the régime of the high seas, the continental shelf, the territorial sea and living resources.

19. Where the law of treaties was concerned, two committees working concurrently and along parallel lines might reach conclusions which would be hard to reconcile. Members of the Commission could see for themselves that, after having worked together for years on the subject, they were now finding it necessary to revise certain articles approved a year or two previously, because they had adopted a different text in the last part of the draft.

20. It might therefore be wiser to provide for two conferences, one to deal with the first part of the draft and the other with the second part. The first conference could work as a committee of the whole, so as to be able to adopt a text by a simple majority, at least at the first stage, and then review it all in plenary, where a

two-thirds majority would be required—that being a well-established practice, which it would be difficult to change. The second conference, which might be held a year later, would deal with the second part of the draft and the co-ordination of the whole.

21. Mr. BRIGGS said that he knew of no clearer document on the preparations for a conference than the excellent memorandum submitted by the Secretariat. He had been glad to hear the Legal Counsel say that the Secretariat believed such a conference would be found necessary. The Commission should express the same opinion in its report to the General Assembly.

22. As to the date of the conference, the Commission would conclude its work on the law of treaties during the coming month. The General Assembly would thus receive the draft not long before its twenty-first session and was therefore unlikely to discuss it in detail before its twenty-second session in 1967. Consequently, the conference could not be held before the spring of 1968. On the other hand, too long a delay would be inadvisable and 1968 therefore seemed the obvious choice.

23. He was attracted by the proposal, originally made by Mr. Tunkin, that the conference should be held in two parts, with an interval of a year or less between them, but he was not sure that committee work could be entirely dispensed with during the second part.

24. He was sceptical about the possibility of dividing the work between two committees. In dealing with certain articles, the Commission itself had encountered difficulty in recalling exactly how it had drafted comparable passages in earlier articles; moreover, the interrelationship between the articles was very close. That being so, it seemed unwise to divide the work between two committees, and any decision on how the division would be made was bound to be arbitrary.

25. In paragraph 44 of the memorandum it was stated that the Drafting Committee at the first Conference on the Law of the Sea had been responsible for the final drafting and co-ordination of the instruments approved by the Committees of the Conference, whereas at the Conference on Consular Relations the rule had been revised to provide that the Drafting Committee was to give advice on drafting as requested by other committees and by the Conference. In his view, the drafting committee at the future conference on the law of treaties should be responsible for co-ordination and for all drafting; its work should not be confined to giving advice.

26. Mr. EL-ERIAN said it was sometimes asked whether the Sixth Committee could not undertake the drafting of the convention. In view of the limited facilities at its disposal, however, and the fact that the complexity of the subject would necessitate the continuous presence of experts, it was difficult to see how it could do so. The best course therefore seemed to be to follow previous practice and hold an international conference.

27. He agreed with Mr. Briggs that momentum should not be lost and that undue delay would be harmful. The conference should therefore be held in 1968; the time interval would then correspond to that allowed for the first Conference on the Law of the Sea.

28. It seemed quite feasible to divide the work of the conference between two committees, one of which would deal with part I of the draft and the other with parts II and III. Such a division was, of course, arbitrary, but it should be remembered that the conference would have a basic text before it; the drafting committee would have to be given ample power to co-ordinate.

29. The question of the rules of procedure at conferences had been carefully investigated by a committee of experts convened by the Secretary-General, which had suggested rules substantially the same as those of the General Assembly. Those rules had successfully met the needs of the Conferences on the Law of the Sea and on Diplomatic Intercourse and Immunities, which were landmarks in the work of codification. As to the two-thirds rule, it had been adopted by the Commission itself in article 6 of its draft on the law of treaties and was also applied by organizations outside the United Nations system; it would therefore be best to retain it.

30. He saw no reason for any change in the powers of the president of the conference. A president could always suggest a recess or arrange with a representative to do so.

31. The drafting committee should be given more authority and should have powers similar to those of the Commission's own Drafting Committee.

32. He was attracted by the idea of dividing the conference into two parts with an interval between them. One difficulty which arose at conferences was that of taking proper account of all the amendments. The work could perhaps be so arranged that, during the first part of the conference, there was a first reading at which all amendments would be submitted, and governments would then have an opportunity of considering them. It might be feasible merely to provide for the possibility of holding the conference in two parts; if everything went smoothly during the first part, the second might prove unnecessary.

33. Mr. ROSENNE said it had been his suggestion, made in the Sixth Committee as his country's representative, that the Secretariat should prepare, for submission to the General Assembly at its twenty-first session, a memorandum on the lines of the one now under discussion. The Secretariat had taken the matter one stage further and had decided to submit a first draft of the memorandum to the Commission.

34. The importance of that new development in codification technique should not be underestimated. For the first time, the Commission was being called upon to consider in advance the implications of a conference which would give final form to its work. It would give some consideration to the organizational and administrative implications of such a conference, although they were not perhaps its direct concern; for the Commission, the most important implications were those relating to its own work and the presentation of that work to the General Assembly.

35. As a member of the Commission, he wished to thank the Legal Counsel and the Codification Division of the Office of Legal Affairs for an extremely thoughtful and well-prepared memorandum which would ensure

that the Commission and the Sixth Committee did not take decisions without adequate information.

36. He hoped the Commission would recommend to the General Assembly that a conference of plenipotentiaries should be convened to consider its work on the law of treaties.

37. The Secretariat memorandum raised three main points. The first was the date of the conference. He appreciated some of the arguments put forward against losing momentum, but it would not be wise to convene the conference too early. The legal departments of Foreign Ministries would have to make a careful study of the Commission's report, its draft articles and its discussions, and that would be in addition to their other legal work; moreover, some of the points raised by the draft articles went beyond the competence of Foreign Ministries. For those reasons, the Commission should avoid undue haste and he had some doubts about proposing 1968 as the year for the conference.

38. The second point was the division of the draft articles between two committees. He felt strongly that such an arrangement would undermine the work the Commission had done on the law of treaties over a period of many years. Any division of the material would necessarily be arbitrary; there was also a very real danger that it would lead to the conclusion of more than one convention on the law of treaties. Moreover, experience of previous codification conferences had shown the difficulty of transferring material from one part of the text to another when a conference was divided into two or more committees.

39. In 1959, when the General Assembly had last discussed the question of reservations, the Sixth Committee had reached the conclusion—contrary to the one it had reached in 1950 and 1951—that that question could not be separated from the other parts of the law of treaties. The Assembly had accordingly not instructed the Commission to prepare a separate report on reservations, but had called upon it to study that subject in the general context of the law of treaties.³

40. A further argument against having two committees working concurrently was that it would be extremely difficult for most Members of the United Nations to send sufficiently large delegations to work on both committees at once, and failure to do so might endanger the cohesion of the text finally adopted.

41. He fully approved of the suggestion that the conference should be held in two stages and thanked Mr. Tunkin for putting forward that excellent idea.

42. With regard to the rules of procedure, he saw no reason to depart from those used at the 1963 Vienna Conference, except for any modifications that were necessary to bring them up to date in the light of experience.

43. There was, however, one organizational problem which deserved consideration, but did not necessarily call for any change in the rules of procedure. It related to the time at which a vote took place, especially at the committee stage of a discussion. The Commission had for a number of years followed the practice of not

³ See General Assembly resolution 1452 B (XIV), para. 2.

voting on a text until it had come back from the Drafting Committee and discussion on that Committee's proposals was exhausted. It had thus avoided tying the hands of the Drafting Committee at too early a stage. The results had been very satisfactory, and since that method of work had been adopted very few votes had been cast against any of the articles adopted by the Commission. During the early years, it had almost invariably been those texts which the Commission had adopted by narrow majorities that had caused difficulties subsequently. He therefore urged that the conference on the law of treaties should avail itself of the Commission's experience with its Drafting Committee.

44. Mr. JIMÉNEZ de ARÉCHAGA said he wished to associate himself with the tributes paid to the Secretariat memorandum. He was in general agreement with the views expressed by Mr. El-Erian, particularly as to the date of the conference and the desirability of not losing momentum.

45. As to the possibility of dividing the work of the conference between two committees, he thought that such an arrangement would have great practical advantages. In particular, the reduction in cost which would result from shortening the conference was an important consideration. The articles on the law of treaties could be divided as suggested by Mr. El-Erian: the first committee could deal with part I, the preamble, the final clauses and the final act, and the second committee, with parts II and III. The indivisibility of the draft articles was a point that should not be overstressed; after all, the method of working in several committees had been followed by many international conferences, including the San Francisco Conference, which had adopted the Charter of the United Nations— an instrument requiring an even closer relationship between its various chapters.

46. The suggestion that the conference should be held in two stages had drawbacks in regard to cost, both for States and for the United Nations. There was also a danger of losing momentum, and difficulties would be caused by changes in the composition of delegations. Certain participating States might even lose interest in the interval. In the circumstances, he preferred the solution suggested by Mr. El-Erian, namely, that the conference should aim at completing its work in one session, but should have the option of holding a second session if complications arose. Should it be decided to hold the conference in two stages, he could not accept the division of work suggested by Mr. Ago, which would have all the disadvantages of division without its one advantage, that of providing an interval for reflection.

47. Lastly, with regard to the rules of procedure, he agreed that decisions in plenary should be taken by a two-thirds majority, and he supported the other suggestions made in the memorandum.

48. Mr. TUNKIN thanked the Legal Counsel for the Secretariat memorandum and for his enlightening statement.

49. He had no doubt that it would be necessary to hold an international conference to codify the law of treaties. Experience had shown how important it was for a

complex branch of international law to be considered by special delegations which were solely concerned with the draft prepared by the International Law Commission.

50. With regard to the date and the organization of the conference, the primary considerations should be the topic and the object.

51. As to the topic, the law of treaties occupied a special place in international law as a whole. Every article of the draft involved not one, but several problems, and problems of much greater complexity than those which had arisen, for example, at the 1958 Conference on the Law of the Sea. The topic was also one of great practical importance to States, which were daily confronted with problems of the law of treaties.

52. The object of the conference would be the same as that of the 1958 and 1960 Geneva Conferences and the 1961 and 1963 Vienna Conferences, namely, the codification and progressive development of general international law—a fact which had not always been appreciated by some representatives speaking in the Sixth Committee of the General Assembly. The aim should therefore be to obtain the support of the largest possible number of States for the draft as a whole, not to force the acceptance of particular proposals. In view of the nature of a codification conference, the suggestion that decisions in plenary should be taken by simple majority could only be based on a superficial view of the object of the conference. A convention adopted by a narrow majority might never become part of general international law and might even do more harm than good. The two-thirds majority rule provided a guarantee of broad support; moreover, the existence of that rule was an inducement to negotiate agreed solutions.

53. In view of the complexity of the subject and the need to obtain the broadest possible support for the text, it was important that the arrangements for the conference should allow time for reflection. It was for that reason that he had put forward, some years previously, the idea of a conference in two stages. A realistic appraisal of the problem of codifying the law of treaties would show that it was impossible to deal with the whole draft in ten to thirteen weeks. It might be possible to do so in four months, but a conference of that length was not feasible. He had therefore suggested that the conference should be divided into two stages, which would have the great advantage of giving participants an interval to reflect on the issues brought to the fore during the first stage.

54. He did not believe that there was any real danger of loss of momentum. The law of treaties was a subject to which States attached great importance and it was inconceivable that they would lose interest in it in one or two years.

55. The question of the division of work between the two stages of the conference would be one for governments to settle. It would be possible either to divide the draft into two parts, or to have a first reading of the whole draft during the first stage and a final reading during the second stage.

56. He shared some of the doubts which had been expressed about working in two committees, but the

Commission should not at that stage exclude the possibility of the conference setting up two committees if that arrangement could accelerate its work. The Sixth Committee of the General Assembly should consider that matter and see whether it was feasible to have two committees, one to deal with the preamble, the final clauses and part I and the other to deal with the rest of the draft.

57. Mr. Rosenne had made some particularly useful comments about the drafting committee of the conference. It would be remembered that the Drafting Committee at the 1961 Vienna Conference had worked in much the same way as the Commission's own Drafting Committee.

58. With regard to the date of the Conference, he thought that the earliest it could be held was in 1968. But if it was decided to hold it in 1969, governments would have more time to study the draft.

59. Mr. REUTER said he would confine himself to a few very general remarks because, unlike many other members of the Commission, he had only a limited experience of international conferences. The Secretariat memorandum was excellent, as had been the statement made by the Legal Counsel. The proposed conference would be an outstanding event and could hardly be compared with previous codification conferences, for it would be the first attempt to codify material which was of such a definitely constitutional nature, not only for the international community, but also in relation to the United Nations Charter, which was specifically mentioned in several articles of the draft, in relation to United Nations practice, which was referred to several times, and in relation to national constitutions. It was thus an entirely new undertaking, which must succeed; in other words, it must secure the support of a large number of States belonging to all the main groups of the international community. It was of course difficult to satisfy everyone, but success would not be achieved if the conference resulted in a text establishing a partial view, even though it was adopted by a large majority, but one which did not include certain groups of States representative of the family of nations. With a view to success on those lines, he wished to take up some of the points raised by the Legal Counsel.

60. As to the organization of the conference, it seemed clear that the work could not be completed in a single stage, for two reasons: the wide scope of the topic, stressed by several speakers, and, even more important, the constitutional character of the text to be studied. In the first stage, delegations might consider the draft as a whole, in order to determine which provisions could be agreed on fairly easily and quickly despite their technical difficulty, and which raised questions of principle and might therefore bring groups of States into opposition. The first stage could be conducted in plenary and probably also in committees; the arrangements could be left to the Secretary-General. He did not wish to reject *a priori* the idea of setting up several committees to examine certain parts of the draft during the first stage, provided that a method of work was adopted which would make it possible to avoid the most serious disadvantages of such a division. During the second stage, the conference might adopt a text which

would be acceptable to all representative States; when that point was reached, it would probably be less desirable to divide up the work among several committees.

61. The Commission could not disregard the work done by other bodies. For instance, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had studied some of the questions dealt with in the draft, and many governments would naturally see some connexion between the Commission's draft and that Committee's work.

62. With regard to the date of the conference, he endorsed the views of the previous speakers. It would be well to lose no time in making the first contacts and to arrange for a reasonable interval between the two stages of the conference. He had no objection to the choice of 1968; after all, three years had already elapsed since governments had begun to study the draft.

63. The question of majorities was very important. He was not opposed to applying the two-thirds majority rule at the final stage of the conference, but more easily obtainable majorities would probably be preferable in the earlier stages. In view of what he had said about the kind of success the conference should achieve, however, even a two-thirds majority would not be sufficient at the final stage: it would be necessary to approach unanimity. In that connexion, Mr. Rosenne had stressed the importance of choosing the right time for a vote. In the introduction to his latest annual report on the work of the Organization,⁴ the Secretary-General had welcomed the institution of conciliation machinery in the United Nations Conference on Trade and Development; the United Nations would certainly have to extend such measures in coming years. Perhaps the rules of procedure of the coming conference might provide for conciliation procedures.

64. The CHAIRMAN thanked the Legal Counsel and the Office of Legal Affairs as a whole for their careful preparatory work which would undoubtedly contribute to the success of the Commission's efforts.

65. Speaking as a member of the Commission, he said that the draft on the law of treaties was vitally important, for apart from the constitutional aspect stressed by Mr. Reuter, the whole future of the codification of international law would depend on what happened to it. Treaties were becoming an increasingly important source of international law, and the purpose of the Commission's draft was to formulate that source clearly and precisely. Undue haste must therefore be avoided, and it was essential that the Commission's draft be submitted to a conference of plenipotentiaries who would be called upon to make it into an international convention. He thought he could safely say that that was the consensus of opinion in the Commission.

66. The date proposed by the Secretariat seemed suitable. It could, of course, be put back, but it would be difficult, not to say impossible, to advance it.

67. It had been suggested that the work of drawing up the future convention should be divided between

⁴ *Official Records of the General Assembly, Twentieth Session, Supplement No. 1A, p. 4.*

several committees and that the conference should be split into two parts. With regard to the appointment of committees, he pointed out that the Commission itself had at first been uncertain whether one or more conventions on the law of treaties should be drafted; thus it had contemplated some division of the work. It had subsequently found that in view of the interdependence of the rules to be stated, it would be difficult and impractical to prepare several separate texts. On the whole, that attitude had met with the approval of the Sixth Committee of the General Assembly. But it did not necessarily follow that the work of the conference should not be divided between several committees; there were practical considerations both for and against that procedure. Even if several committees were set up, each delegation formed an independent unit, and its members could and should always consult each other. Moreover the drafting committee of the conference would play a unifying role. The ideal procedure would be for all the articles to be considered in plenary, but if that raised practical difficulties, there were no technical or theoretical objections to splitting up the work between several committees.

68. As to the division of the conference into two sessions, he supported the plan suggested by Mr. Tunkin, subject to Mr. Reuter's comments: at its first session, the conference would consider all the articles and then, after a reasonable interval, the second session would be devoted to the adoption of the convention. The interval between the two sessions would not be wasted, since States would have the draft before them and could consult together and review their attitudes, which might facilitate compromises. If possible, the work should be divided between committees only during the first session, and conducted entirely in plenary during the second.

69. In conclusion, he saw no need to amend rules of procedure which had proved effective at several conferences.

The meeting rose at 1.5 p.m.

880th MEETING

Wednesday, 29 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Co-operation with other bodies

(resumed from the 856th meeting)

[Item 5 of the agenda]

1. The CHAIRMAN invited the representative of the European Committee on Legal Co-operation to address the Commission.

2. Mr. GOLSONG (European Committee on Legal Co-operation) said that during the second part of its seventeenth session, held in Monaco, the Commission had decided to establish a working relationship with his Committee,¹ the co-ordinating body of the Council of Europe on legal matters. In future, a representative of the Commission would be invited to attend meetings of the Committee dealing with questions of common interest to the two bodies, and there would be a full exchange of all documentation between their secretariats.

3. In Monaco, he had given the Commission a brief outline of those matters the Committee was working on which might be of interest to the Commission. They included: ratification by States associated with the Committee of the universal conventions prepared on the basis of the Commission's reports; privileges and immunities of international organizations, a question which might be of particular interest to the Commission's Special Rapporteur on relations between States and inter-governmental organizations; immunity of States from jurisdiction, a matter regarding which the Committee was drafting principles, though it had not yet decided whether or not it should become the subject of a European convention; and finally, the question of reservations to multilateral conventions, on which the Committee was seeking to establish a common position of the European States. He was convinced that the contacts established would help the Commission in its efforts to create a more orderly international legal system.

Law of Treaties

(resumed from the previous meeting)

[Item 1 of the agenda]

PROPOSED CODIFICATION CONFERENCE

ON THE LAW OF TREATIES (ILC(XVIII)MISC.1)(continued)

4. The CHAIRMAN invited the Commission to continue its discussion on the questions raised by the Legal Counsel at the previous meeting.

5. Mr. CASTRÉN thanked the Legal Counsel for the interest he was taking in the Commission's work and the United Nations Secretariat in general for its excellent memorandum on the organization of a conference on the law of treaties.

6. Like the other members of the Commission, he welcomed the idea of convening a conference of plenipotentiaries to complete the Commission's work by adopting a convention codifying the important rules on the law of treaties. The date of the conference could be fixed later; he would not make any proposal, but urged that it should not be too early, so as to leave sufficient time for the preparatory work.

7. Although it was important to expedite the work of the conference as much as possible, it would be very difficult to divide it up among two or more committees, because of the very close interdependence of the various parts, articles and provisions of the draft, to which

¹ Yearbook of the International Law Commission, 1966, vol. I, part I, 827th meeting, para. 2.

several members had already drawn attention. The Conference on Diplomatic Intercourse and Immunities had worked very efficiently with a single committee of the whole, but there was nothing to prevent the appointment of working groups, if necessary, in order to save time, as had already been suggested.

8. There were certainly some arguments for holding two successive conferences, but the arguments against it were stronger. In particular, he was afraid that much of the work might be repeated, and he did not believe that States were likely to change their views between the two conferences. If the conference was carefully prepared and had enough time available—say, three to four months from mid-January to mid-May—satisfactory results could be achieved at the first attempt. The Diplomatic Conference at Geneva, held in 1949 to adopt international Conventions for the protection of war victims, had met for nearly four months and adopted four conventions, two of which contained over a hundred articles and some annexes. If it proved impossible to complete the work on the law of treaties in three or four months, a second conference would, of course, have to be held; but instead of waiting a year, as had been proposed, it would be better to meet again after an interval of only a few months.

9. With regard to the procedure at the proposed conference, he did not think it would be advisable to depart from the normal rules for conferences convened by the United Nations General Assembly. Final decisions should be taken by a two-thirds majority.

10. Mr. BARTOŠ said he wished to draw the Secretariat's attention to the important part it would have to play in the preparation and proceedings of the conference. At the Conference on Consular Relations, the United Nations Secretariat had been less active than it usually was at conferences organized by the United Nations, and the work had suffered in consequence.

11. The Commission's draft formed an integral whole; the conference was not, of course, obliged to leave it as it stood, but it was to be hoped that it would not upset the balance of the draft, delete essential provisions or introduce contradictions. The draft was well-balanced and the Special Rapporteur had made great efforts to harmonize different views. Moreover, the draft was not intended to settle points of detail; it only contained general provisions designed to give legal form to relations between States. It was therefore important to preserve its unity, and he appealed to the Legal Counsel to ensure that the Secretariat would play the full part assigned to it by the rules of procedure. The representative of the Secretary-General at the conference should avail himself of the rule of procedure which authorized the Secretary-General or his representative to speak when he thought it advisable, or at the request of a delegation, in order to furnish explanations. The judicious application of that rule could contribute greatly to the success of the conference—even more than a change in the rules of procedure to extend the powers of the president.

12. The members of the Secretariat who were in close contact with the Commission had been working with it on the topic for years and knew the spirit in which

the articles had been drafted; thus they could furnish any necessary explanations to delegations which might tend, perhaps even subconsciously, to wish to introduce radical changes into the draft.

13. Furthermore, it was essential for the conference to have the assistance of first-class experts. In particular, the Special Rapporteur should be able to introduce, if not every article, at least every group of articles, and explain the spirit and general philosophy of the draft. It was also most important that delegations should be composed of highly qualified persons, as they had been at the Conference on Diplomatic Intercourse and Immunities. Even after acrimonious discussions and the amendment of certain rules, first-class jurists could find means of preserving the cohesion and unity of the system.

14. In view of the financial situation of the United Nations economy must be the watchword, but the success of such a great work of codification was certainly worth a few tens of thousands of dollars.

15. Sir Humphrey WALDOCK, Special Rapporteur, said he felt sure that the Secretariat memorandum would be of great value both to practitioners and to academic lawyers.

16. The Commission's work on the codification of the law of treaties was one of the most important tasks ever undertaken in the codification of international law. The law of treaties was an essential element of international law, and part of its very basis. Consequently, if a conference of plenipotentiaries was to be held on that topic, it was essential that it should succeed. Nothing could be more damaging to the work of codification and to the essential unity of the international legal system than for a conference to be convened on the law of treaties—to deal not with questions of detail, but with the fundamental operation of the law of treaties—and for that conference to fail to adopt a text.

17. It was highly desirable that the draft articles, with any revisions that might be considered appropriate, should be endorsed by a conference of plenipotentiaries. However valuable the Commission's work might be, and despite the fact that some of its members acted as representatives of their countries elsewhere, the endorsement of one of its texts by representatives of governments gave that text an authority which it would not otherwise possess. Although representatives were empowered only to vote on a text and not to bind their governments, their endorsement of a text by a two-thirds majority at a conference gave that text an entirely different status. It was, of course, highly desirable that a large number of States should ratify a convention adopted by a conference of plenipotentiaries. But even if States were slow in ratifying a convention, the text adopted by a conference convened by the United Nations and representing all groups of States in the international community had an intrinsic value and authority.

18. With regard to the date of the conference, the year 1968 seemed the earliest that could be considered; but it should not be held much later, as there might then be some lessening of interest in the work of codification. The conference should be convened as soon as was practicable from the point of view of governments.

19. He appreciated that it might be necessary to hold the conference in two stages, but he thought it would be unwise to stress the difficulties of dealing with the draft articles on the law of treaties at a conference, as that would provide arguments for those who were against convening a conference at all.

20. As to the division of the work between two committees of the conference, he thought it would be technically possible to divide the articles into two sections for separate study on the understanding that, at a certain stage, the whole text could be co-ordinated by a drafting committee. Part I could be treated as a self-contained body of articles and be allocated to the first committee, together with a few other articles that could be conveniently associated with those in part I, such as the articles on interpretation. The first committee could also deal with the preamble and final clauses. But the Commission had not yet taken a final decision on the arrangement of the draft articles, and all that had been said about their division was naturally subject to that decision.

21. With regard to the problems of conference procedure, of which the Secretariat memorandum gave a well balanced account, he wished to refer only to the question of the adoption of final decisions by a two-thirds majority. He felt strongly that, from the standpoint of codification, the adoption of a text by a simple majority—with a substantial number of dissentient votes and perhaps many reservations—would have nothing like the value of adoption by a two-thirds majority. A vote taken by such a substantial majority would have the great advantage of carrying conviction in legal circles.

22. Mr. JIMÉNEZ de ARÉCHAGA said he wished to revert to the question of holding the conference in two stages. Towards the end of international conferences, a consensus of opinion and a feeling of solidarity among the participants often began to emerge. It was undesirable that, precisely at that moment, the conference should be broken off and the issues referred back to governments, as there was serious danger that positions might then become hardened. The holding of a conference in two stages might also result in the replacement of open discussion by private negotiations, perhaps even by restricted or bilateral negotiations. That would not be consistent with the spirit in which the Charter had entrusted the General Assembly with responsibility for promoting the codification of international law.

23. Mr. AGO said he thought the Commission was unanimous in thinking that, in applying itself to the codification of the law of treaties, the United Nations was taking a great risk: if that ambitious enterprise was successful, the result would be magnificent, but failure would be disastrous for the future of the codification of international law. Preparations for the conference should therefore be taken very seriously and everything should be done to ensure its success. The Commission had been working on its draft for years, but it must not overlook the fact that there were some people who disliked the draft, thought that it should have been differently conceived or were even opposed to codification of the law of treaties. An offensive by those people could therefore be expected. Moreover, hundreds of amendments might be submitted, and some participants

would again put forward the idea of drafting a code rather than a convention, which could only create confusion and increase the risk of failure. It was necessary not only that the conference should adopt a convention, but that it should depart as little as possible from the draft prepared by the Commission; that draft was not perfect and could no doubt be improved, but it would be very easy to make it worse.

24. No matter how the conference was organized, it would have less time than the Commission had devoted to the draft. It would probably be necessary to hold two conferences, or two sessions of the conference, but it would be wise merely to hint at that possibility; for if it were decided from the outset that a second session was to be held, the first session might be almost entirely taken up with useless theoretical discussions. It would be better for the conference to apply itself from the beginning to preparing a final text, though the possibility of holding a second session if necessary should not be excluded.

25. With regard to the question of committees, he agreed with the Special Rapporteur that it was theoretically possible to divide up the draft: for instance, parts I and II could be referred to one committee and parts III and IV to the other. But as Mr. Rosenne had pointed out at the previous meeting, the position of some of the provisions in the draft was still open to discussion. From the practical viewpoint, moreover, it was doubtful whether all delegations could count on several qualified jurists capable of following such difficult problems—certainly more difficult than those examined at the Conference on Consular Relations. It had been said that that drawback would be partly overcome by the existence of a single drafting committee; but the Commission's experience had shown that the reason why its own Drafting Committee was able to work so well was that all its members had followed the discussion in the Commission itself. The situation at the conference would be different, for some members of the drafting committee would have followed the work of one committee and some the work of the other; no one would have an over-all view, and that was bound to cause practical difficulties.

26. Furthermore, in the light of the experience of the two Conferences on the Law of the Sea and of the Conference on Diplomatic Intercourse and Immunities, he thought it essential that as many members of the Commission as possible should attend the conference to explain why the Commission had chosen a certain course, to point out that it had already discussed certain points and to give the reasons why it had rejected certain proposals.

27. Finally, too much weight should not be given to theoretical arguments in favour of dividing the conference into several committees; it would be better for the whole draft to be examined by a single committee of the whole, if that were possible.

28. Mr. TUNKIN said that the question whether the conference was to be held in two sessions or one session should be decided in advance, if only for practical reasons: to make arrangements for the conference, it was necessary to know its probable duration. If it

was to be held in a single session, it would take about four months; if it was divided into two sessions, each session might be of two months duration, and the sessions might be held, say, in March-April 1968 and in March-April 1969.

29. He saw little justification for the fears expressed by Mr. Ago. The system of adopting a convention in two stages separated by an interval of a year had been followed by the International Labour Organisation for some forty years. A convention was adopted provisionally at an International Labour Conference, and its final adoption took place at the next Conference; that arrangement made it possible to correct many defects in the text and, as the number of ratifications had shown, to produce a final text that was more acceptable to governments.

30. The final decision was, of course, a matter for governments. If it were decided to hold the conference in two stages, however, the whole text should be provisionally adopted at the first stage. Governments were unlikely to change their positions in the interval between the two sessions of the conference; moreover, the time available for reflection would make it possible to improve the text. He did not think there was much substance in the suggestion that the first stage of the conference might be taken up with theoretical discussions; it was also possible to waste time in general discussion in the early stages of a single long conference.

31. Mr. STAVROPOULOS (Legal Counsel) said that the discussion had been invaluable. He had been particularly glad to find that the members of the Commission were in unanimous agreement on the need for a conference on the law of treaties and he hoped that that view would be reflected in its report.

32. As to the places where the conference might be held, there was really not much choice. New York would not be acceptable for a number of reasons; that left Geneva or, if a government was willing to pay the additional expenses involved, possibly one of the major European capitals where conference facilities were available. When a conference was held in a country by invitation of its government, it was customary for the president of the conference to be a national of that country. It was important that the president of the proposed conference should be a member of the International Law Commission and thus fully conversant with the topic. Subject to the requirements of geographical distribution, the same might be said of the chairmen of committees. It was also desirable that members of the International Law Commission should sit on the drafting committee; he noted the general feeling in the Commission that the drafting committee of the conference should be given considerable powers.

33. He thought it would be necessary to hold the conference in two parts, if only because it was unreasonable to expect that people holding important posts in their own countries would be able to be absent for as long as four months; moreover, some of them would have been attending the General Assembly not long before the conference and some would have to attend the session of the International Law Commission

afterwards. It was important to decide in advance whether the conference was to be in two parts; it would be unsatisfactory to have to return to the General Assembly and ask it to convene a second conference.

34. As to the date, he thought that the conference might be expected to begin in mid-February or early March, 1968; it could not be held in the autumn.

35. As an argument against having two committees instead of one committee of the whole, it had been suggested that difficulties would be created for the delegations of the smaller countries. That might be true, but in his experience it applied to very few delegations; if governments were informed in advance that there were to be two committees, they made their arrangements accordingly.

36. He welcomed the Commission's view that there was nothing wrong with the rules of procedure used hitherto. There was no reason to suppose that the difficulties at a conference were any greater than in the General Assembly. Much depended on the skill of individual chairmen in applying the rules.

37. He hoped that Sir Humphrey Waldock, the Special Rapporteur, would attend the conference as an expert and that many members of the Commission would be present as members of their delegations. If the conference was attended by lawyers and diplomats it would be a success and the texts it adopted would become part of international law. The Secretariat would do everything in its power to contribute to that end.

Other Business

[Item 6 of the agenda]

RESPONSIBILITIES OF UNITED NATIONS ORGANS IN FURTHERING CO-OPERATION IN THE DEVELOPMENT OF THE LAW OF INTERNATIONAL TRADE AND IN PROMOTING ITS PROGRESSIVE UNIFICATION AND HARMONIZATION (ILC(XVIII) MISC.2)

38. Mr. STAVROPOULOS (Legal Counsel) said that, at the nineteenth session of the General Assembly, the delegation of Hungary had requested that an item be placed on the agenda concerning steps to be taken for the progressive development of private international law with a particular view to promoting international trade. The item had not been discussed at the nineteenth session, but following its re-submission at the twentieth session it had been decided that the Secretary-General should prepare a comprehensive report for submission to the General Assembly at its twenty-first session, after consultation with the International Law Commission.² The general attitude in the Sixth Committee had been favourable to the idea of work in that field, but it had been considered that insufficient information was available about what would be entailed.

39. The Hungarian proposal had been based on the idea that the International Law Commission was empowered by its Statute to deal from time to time with topics of private international law.

40. The Secretariat had studied the question with the help of Professor Clive Schmitthof, an authority on the

² General Assembly resolution 2102 (XX).

law of international trade and it had reached the conclusion, subject to the Commission's views, that it was not a matter of concern to the International Law Commission. Moreover, it had become apparent that the question was not really one of private international law, in other words of resolving a conflict of laws when it occurred, but rather one of harmonizing the laws of the different countries in such a way as to ensure that no conflict could occur. The subject was important, but it was primarily a question of co-ordination rather than formulation, and there were already a number of bodies dealing with it, such as the regional economic commissions of the United Nations, the International Institute for the Unification of Private Law, the International Chamber of Commerce, the Council for Mutual Economic Assistance and the Council of Europe. Generally speaking, those bodies prepared model texts which, if adopted by States, brought about unification of the law. The United Nations should encourage those bodies and co-ordinate their work. The Secretariat's idea was to set up a committee of States, the members of which would be appointed by the Secretary-General on the proposal of governments; it would meet once a year for a few weeks to co-ordinate the work on the subject. It would be interesting to know whether that idea met with the Commission's approval.

41. Mr. BARTOŠ thought that the question should be carefully examined by the Commission, because, in his opinion, it was wrong to regard the Hungarian delegation's proposal as relating to private international law. In fact, international economic law was a new branch, which did not belong to private international law and was concerned, not with the conflict of laws, but with matters which were certainly not entirely foreign to the United Nations. For instance, the Economic Commission for Europe had prepared several drafts on the subject, including some model contracts for the supply of plant and machinery. The distinction between the law dealt with by the Commission and the law dealt with by The Hague Conference on Private International Law was not applicable to the matter under discussion. The Commission had not placed questions of private international law on its agenda up to the present, and had thought it wiser not to concern itself with a matter which called for extreme specialization.

42. There was a body dealing with the unification of private law which was affiliated to the United Nations: the International Institute for the Unification of Private Law in Rome.

43. The major defect of the Hungarian proposal was that the idea had not been properly developed. In the present state of legal science, there was no precise line of demarcation between public international law and private international law, or between those two branches and the new economic branch of international law; hence, it was difficult to know where to place the proposal in question.

44. The International Academy of Comparative Law, of which he was general rapporteur, was concerned with the legal régime of the investment of foreign capital, which was a question of public international law, international economics, private international law and economic law, and on which a conference was to

be held at Uppsala in August 1966. The Institute of International Law had placed a similar item on the agenda for the session it was to hold at Athens in 1967.

45. International economic law had really broken away from private international law without quite becoming part of public international law. There were still a few more stages to be completed in developing the subject and the International Bank for Reconstruction and Development (IBRD) deserved great credit for its contribution to the progress achieved. It seemed that UNCTAD was now also concerned with that branch of law.

46. The Commission had a heavy programme of work comprising some twenty topics, eleven of which had priority. Consequently, even if it decided to take up the question and appointed a Special Rapporteur in 1967, it could not reach any firm conclusions for four or five years. International economic law was becoming more important every day, as conflicts arose which no one was competent to settle. The rules of that law were derived from private law and, hence, also from the rules on the conflict of laws, but they no longer belonged to private international law. If the Commission were to classify them among the topics of public international law, it might retard their study.

47. Consequently, the Legal Counsel's suggestion that a special subsidiary body of the United Nations General Assembly or of UNCTAD should be set up to deal exclusively with economic law seemed to him the best way of obtaining rapid results. It should be borne in mind, however, that the subject was primarily economic and was accordingly becoming increasingly political, rather to the detriment of legal solutions. The group to be set up should, of course, consist of jurists, but they should be jurists with sound economic and political knowledge. The aim of the Hungarian delegation had been to reach legal solutions in a sphere which was daily giving rise to more acute problems in inter-State relations, where commercial contracts properly so called were losing some of their force and importance, and considerations of public law were giving way to the concept of the collective economy, followed by that of the international collective economy.

48. In short, he thought that the topic, which was urgent and worth studying, was not one of private international law, and hence not one for the Commission to take up; it was a matter for specialists in international economic law. A special body should be set up to codify the topic, concerning which there were as yet few usages and few recognized international rules.

49. Mr. AGO considered that the Hungarian delegation's proposal had the serious defect of not explaining clearly what that delegation had in mind and that it was probably not clear even to its authors. In particular, the term "trade" was very vague.

50. Public international law might be involved, but he wondered whether the Hungarian delegation had envisaged problems relating to economic relations between States, rather than to trade properly so-called, and the international law governing the whole subject of economic relations and international investments. If the Hungarian delegation was concerned with the

latter, the subject would, theoretically, be within the Commission's province; but the Commission had a very heavy programme of work. Moreover, the topic was not really ready for codification: it was in a state of flux and was criss-crossed by different trends, which should be left to settle down.

51. A number of institutions were dealing with those problems. Most of them were private institutions, which often also represented certain interests, so that the solutions they proposed were not entirely objective. In addition, United Nations bodies such as the IBRD were working on the topic. Was it necessary for the United Nations to set up a special body? He had some doubts on the matter, but he did not think it was for the Commission to decide.

52. His impression was that the Hungarian delegation had been thinking of other matters than the rules of international law governing economic relations between States, and he saw two possibilities. The unification of rules on the conflict of laws or of jurisdiction might be what was intended; that was a real problem of private international law in commercial matters, but one with which the Commission was in no way concerned. Besides, there would be a danger of duplicating the work of The Hague Conference on Private International Law, which was undertaking the study of such questions. Alternatively, the aim might be to arrive at uniform laws on commercial matters, in which case it was not a question of private international law, but of the unification of private law on commercial matters. The competent body would then be the International Institute for the Unification of Private Law. Since the object of the Hungarian proposal was so uncertain, he thought the Commission could conclude that, for the time being at least, it was not called upon to deal with the matter.

53. Mr. ROSENNE said he had found the Hungarian proposal interesting and in some respects constructive. He was looking forward to the fuller study which had been promised by the Secretariat.

54. For the time being, he accepted the view that the Commission could assume additional responsibilities with respect to the law of international trade only at serious sacrifice to its present work.

55. It was difficult as yet to express any firm opinion on the steps to be taken if the Commission could not undertake the work. He had been impressed by some of the arguments of the International Institute for the Unification of Private Law in the explanatory note which it was submitting to its general assembly at its sixteenth session in July 1966, and by some of the material contained in the memorandum of 23 May 1966 by the Secretary-General of The Hague Conference on Private International Law. The views of those two bodies and of other interested bodies would no doubt be taken into consideration in the Secretariat's study.

56. He had listened with interest to the Legal Counsel's remarks on the co-ordinating role of the United Nations in the sphere in question, and thought that was probably the right approach. But in due course, when the subject had been adequately defined and properly analysed, there might possibly be a part for the Commission to play.

57. He wished to take advantage of the presence of the Legal Counsel to say that the improvements in the presentation of the Commission's *Yearbook* for 1965 had been of great value and had greatly facilitated its use. They met nearly all the points of criticism which he had made the previous year.

58. Mr. AMADO pointed out that the Commission had been set up to codify the law. There was nothing to prevent it from codifying private law if it had the time and the means to do so and if the present needs of the international community so required, since article 1, paragraph 2, of its Statute provided that "The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law". Nevertheless, the Commission had a clearly-defined task, which was to single out existing rules of international law that were recognized by the international community; its role was that of a research worker attempting to discover the rules on which States had agreed and which they applied in practice. The Commission had been established not to aspire to the general well-being of mankind, but to work for it by ascertaining the rules and customs in force.

59. If, when codifying the law of treaties, the topic on which its members had most experience, the Commission needed several meetings and sometimes the help of its Drafting Committee to formulate a rule set out in two lines, how could it be expected to codify rules which did not exist? He did not believe there was a single rule establishing the procedures by which States conducted their trade, even in any one sector, not to mention maritime trade or commodity trade. Hence he did not think the Commission need look for any excuses for openly expressing its regret that it could not act on the Hungarian delegation's proposal.

60. Mr. RUDA said he would confine himself to the practical aspects of the question. The history of the International Law Commission could be divided into two stages: during the first it had received a mandate from the General Assembly to consider certain topics; during the second the General Assembly had left it to the Commission itself to determine the topics of public international law with which it would deal. The success achieved during the second stage was demonstrated by the Conventions on the Law of the Sea and the Convention on Diplomatic Relations. The Commission should therefore be left to work on the four major topics to which it was already committed and which would certainly occupy it for the next five years; it should not assume responsibility for the new topic under discussion.

61. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was not precluded from considering questions of private international law; but did the proposed topic come within that category? If it was a matter of unified private law, he personally did not regard it as belonging to private international law.

62. In its resolution 2102(XX), the General Assembly had referred to "harmonization of the law of international trade", in other words the formulation of rules on the conflict of laws which would lead to harmonization of the commercial law of different countries.

International rules on the conflict of laws were regarded as rules of private international law. Many such rules were formulated in treaties themselves, but that ideal was not always attained. If the proposal related only to that aspect of the matter, namely, harmonization of the commercial law of different countries by means of rules on conflict, he thought the Commission was competent to deal with it.

63. If the problem was approached from that particular standpoint, he could not quite agree with Mr. Ago. In his opinion, the Commission's work on the subject would not duplicate that of The Hague Conference on Private International Law, which, although it had become a permanent institution, retained a rather special character, because it consisted of the European States and only three or four countries outside Europe.

64. A clear idea of the question could only be formed by studying its other aspects, which were of course the commercial aspect and that relating to the peaceful coexistence of different political and social systems. That was why, for practical reasons, he thought the Commission could not undertake to study the question as a whole, since it could deal with it only from the standpoint of private international law.

65. He would not express any opinion on the suggestion made by the Secretariat in paragraph 6 of its note, as he thought it was for the United Nations to decide whether it was desirable and feasible to establish a new commission to deal with the matter.

66. Mr. STAVROPOULOS (Legal Counsel) noted that there was clearly a consensus of opinion in the Commission that it should not undertake responsibility for studying the topic in question.³

The meeting rose at 1.5 p.m.

³ See document A/6396.

881st MEETING

Thursday, 30 June 1966, at 11.15 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Special Missions

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

(resumed from the 878th meeting)

[Item 2 of the agenda]

1. The CHAIRMAN invited the Commission to continue consideration of the second general question raised by the Special Rapporteur concerning the draft

articles on special missions, namely, the distinction between the different kinds of special mission (A/CN.4/189, chapter II).

2. Mr. BARTOŠ, Special Rapporteur, said that many States had not expressed an opinion on that question, but he did not infer from that that they were in agreement with the Commission. He found it very difficult to accept the Czechoslovak Government's suggestion that a distinction should be made between political missions and technical or administrative missions (A/CN.4/188). It was hard to see on what basis such a distinction could be made; for instance, were special missions entrusted with the delimitation of frontiers or the conclusion of commercial treaties or financial agreements to be regarded as political missions?

3. The Austrian Government thought that a distinction should be made between diplomats and non-diplomats serving on the same special mission (A/CN.4/188/Add.2). He was rather in favour of such a distinction, but it would be hard to maintain that a member of a special mission who was a first secretary of embassy was a diplomat, whereas the chancellor of a university, an eminent scientist or a politician leading, or serving on, a special mission was not.

4. He would therefore prefer to leave it to States to decide how far they would follow the rules to be proposed by the Commission.

5. Mr. TSURUOKA said he agreed that it was difficult to draw a very clear distinction between special missions described as "diplomatic" or "political" and other special missions. The matter was one that could be left to the judgement of the parties concerned without endangering the development of international relations.

6. He would like to know whether the Special Rapporteur wished the Commission, at that stage, to go into the extent of the specific privileges and immunities to be accorded to special missions in the draft articles.

7. Mr. BARTOŠ, Special Rapporteur, said he had not wished to make a list of privileges and immunities. He had first thought that they should be granted within the limits of functional necessity; but the Commission had rejected that idea, and after reflection he thought it had been right. It would be better to state what the privileges and immunities were, using the Convention on Diplomatic Relations as a guide.

8. The Commission had a choice of two alternatives. It could follow the system it had established and specify privileges and immunities, subject to certain limitations where subordinate staff were concerned, leaving States free to derogate from the relevant provisions by a mutual agreement to restrict the enjoyment of privileges and immunities; or it could produce a theoretical solution, within the limits set by functional necessity, leaving it to States to decide what was required to enable a special mission to function.

9. He preferred the first alternative and thought it advisable to specify the limitations. For example, where freedom of movement was concerned, it was necessary to specify that what was meant was a special mission's freedom to enter the country concerned, to travel in it for the purpose of performing its functions and to go

to the nearest embassy or consulate without restriction. It would be better to adopt that solution than merely to refer to functional necessity which, even where travel was concerned, could be interpreted in very different ways. Mr. Ago had adopted a rather liberal approach when he urged that the Commission should provide for special missions to have complete freedom of movement except in restricted zones. If the Commission wished to grant that privilege to special missions, he would not object, especially as the present tendency was to grant all tourists the right to travel freely, except in zones to which entry was prohibited by the authorities.

10. Mr. TSURUOKA said that, where privileges and immunities granted to the members of special missions were concerned, it would be advisable for the draft articles to lay down certain rules common to all kinds of special missions, based on the functional theory. The parties would be free to derogate from those provisions by increasing or decreasing the privileges or immunities granted, but the provisions would apply in the absence of other written or oral agreements.

11. The effect should not be underestimated; if the future convention contained provisions of that kind, the parties concerned would be inclined to comply with them and would be encouraged to conclude agreements on the subject. The advantage of such provisions was that they would not bind the parties too strictly, but would guide them in the interests of the development of international relations; since the rules would be based on the functional theory, they would make it easier for the special mission to perform its task.

12. The Commission need not go into details at that stage; it would be in a better position to discuss the need for those various provisions when the Special Rapporteur submitted the articles.

13. Mr. JIMÉNEZ de ARÉCHAGA suggested that when the Special Rapporteur submitted the articles on privileges and immunities, he should do so in the form proposed by Mr. Tsuruoka; in other words, he should distinguish between the privileges and immunities which he considered indispensable for all special missions and those which might be useful for a special mission at a higher level.

14. Mr. BARTOŠ, Special Rapporteur, said that in his view all the privileges and immunities provided for in the draft articles were useful and even necessary for all special missions, but they could be restricted in some cases. It could be laid down that all special missions were entitled to import personal effects and articles for the official use of the mission free of duty, irrespective of the rank of the head of the special mission or of the task it was to perform. Obviously, the articles in question would differ according to the mission's task.

15. As to archives, he could not conceive that States would maintain that technical special missions did not need a guarantee of inviolability of their archives. There were always official secrets, and national interests had to be safeguarded.

16. With regard to immunity from jurisdiction, he had made a distinction between acts which were immune from jurisdiction and acts which were not. He had

proposed that acts performed in the exercise of the mission's functions be immune from criminal jurisdiction, which was essential to enable it to perform its task. Wars had often been caused by what the sending State had regarded as the arbitrary arrest of members of a special mission.

17. It must also be borne in mind that special missions were sent not only to countries which maintained more or less cordial relations with the sending State, but also to countries with which that State had no relations. It could hardly be contemplated that in the latter case special missions would enjoy no safeguards and would be deprived of certain immunities.

18. In short, he thought the Commission could not go into detail; it could either take the Convention on Diplomatic Relations as a model, leaving it open to States to agree among themselves not to grant particular privileges and immunities to certain special missions, or state that privileges and immunities were restricted in accordance with the functional theory.

19. The CHAIRMAN suggested that the Commission should ask the Special Rapporteur to bear in mind the statements made during the discussion and draw the necessary conclusions from them.

It was so decided.

20. The CHAIRMAN invited the Commission to consider the third general question raised by the Special Rapporteur, namely, the question of introducing into the draft articles a provision prohibiting discrimination.

21. Mr. BARTOŠ, Special Rapporteur, reminded the Commission that he had proposed including a provision on non-discrimination corresponding to article 47 of the Convention on Diplomatic Relations and to article 72 of the Convention on Consular Relations, but that proposal had been rejected.¹ After summarizing the comments made by the Yugoslav, Belgian, Swedish and United Kingdom Governments (A/CN.4/188 and Add.1), he noted that, apart from the Yugoslav Government, all of them had been against the inclusion of a provision prohibiting discrimination. In the circumstances the Commission need only maintain its decision.

22. Mr. CASTRÉN supported the Special Rapporteur's suggestion that the Commission should abide by its previous decision. The reasons why the Commission had decided that it would be unwise to include a provision prohibiting discrimination were explained in its report and the only government which had taken the opposite view had given no reasons.

23. Mr. RUDA said that the Commission had made the right decision at the previous session; there was no reason to include an article corresponding to article 47 of the Vienna Convention on Diplomatic Relations. The position of permanent missions was quite different from that of special missions, which were often covered by a special agreement between the sending and the receiving State.

24. Mr. EL-ERIAN said that in fact the majority of special missions were not covered by special agreements. He agreed that, in view of the diversity of such

¹ *Yearbook of the International Law Commission, 1965, vol. I, p. 241, paras. 67 et seq.*

missions, it would be difficult to include a provision on non-discrimination similar to those in the Conventions on Diplomatic Relations and Consular Relations. Nevertheless, it was important not to encourage discrimination with respect to legal status and immunity between special missions of identical character, although discrimination might exist with respect to facilities and privileges. It must be remembered that Heads of State, for instance, had a special legal status in international law. The problem might be dealt with in the commentary.

25. Mr. BRIGGS said he agreed that there was no need to include an article on non-discrimination, for the reasons given by the Commission in paragraph 49 of its 1965 report,² namely, that the nature and tasks of special missions were so diverse that in practice such missions had inevitably to be differentiated *inter se*.

26. In an article he had written some years previously for the *American Journal of International Law*,³ he had questioned the need for article 47 of the Vienna Convention on Diplomatic Relations.⁴ He had always regarded paragraph 1 of that article as entirely unnecessary because, when States became parties to a treaty, it was understood that there should be no discrimination as between parties. In essence, paragraph 2 (a) of the article merely provided that discrimination should not be regarded as discrimination in the case of a restrictive interpretation of the treaty permitted by the terms of the treaty, and paragraph 2 (b) that discrimination should not be regarded as taking place where the treaty was inapplicable, since clearly the Convention did not apply in a situation where "... States extend to each other more favourable treatment than is required by the provisions of the present convention".

27. So far as the point raised by Mr. El-Erian was concerned, he considered that some discrimination would be inevitable in the application of the articles on special missions, since it would be impossible for States to treat all special missions on a basis of parity. The draft could be applied without unfair discrimination by adapting the articles to the situation of each particular special mission.

28. The CHAIRMAN, speaking as a member of the Commission, said that it would be difficult to tolerate discriminatory treatment of several special missions which had arrived simultaneously in the same capital to settle a particular question at joint meetings. The inclusion of a provision prohibiting discrimination in such a case might be justified.

29. Mr. EL-ERIAN said that article 47 of the Vienna Convention on Diplomatic Relations was based on the idea that there were fairly widely established rules of customary international law relating to permanent diplomatic missions, which laid down a certain standard of treatment; while that standard represented a minimum, States were free to accord more favourable treatment. But there were no established rules of customary international law relating to special missions, and their

functions and status, unlike those of permanent diplomatic missions, were not uniform. On the other hand, it was surely inconceivable that there should be discrimination in such a case as that just mentioned by the Chairman or that the Commission should do anything to encourage such an idea.

30. Mr. BARTOŠ, Special Rapporteur, explained that one of the reasons why he had first proposed including a rule prohibiting discrimination was that on several occasions States had complained that their special missions were being treated with less consideration than those of other States which had come to the same town for the same negotiations. But the Commission had taken the view that it was difficult to lay down such a rule for special missions, and that a certain minimum standard of courtesy in their treatment was all that was needed.

31. Of the governments which had commented on the point, only the Yugoslav Government had expressed itself in favour of his original idea. The Government of Upper Volta, however, had suggested that the draft should include, not a general rule prohibiting discrimination, but a provision to the effect that there should be no discrimination with regard to the formal reception of special missions from different States. That suggestion echoed a provision in article 13 of the Vienna Convention on Diplomatic Relations to the effect that the practice prevailing in the receiving State for the presentation of credentials "shall be applied in a uniform manner". The Government of Upper Volta had not put forward any arguments in support of its suggestion, but it seemed to him to be justified, for some special missions had been kept waiting for several weeks before being officially received, whereas others were received immediately. He also thought that a rule on non-discrimination was necessary in the special case to which the Chairman had drawn attention.

32. He was still convinced, however, that the draft articles should contain a general provision on non-discrimination. If the Commission did not share that view, it would have to reiterate in its report the reasons why it considered that such a provision should not be included; otherwise, if the draft were submitted to a diplomatic conference, proposals on the subject would certainly be submitted for political, if not for legal reasons. Some governments had pressed most vigorously for the inclusion of a rule prohibiting discrimination in both the Vienna Conventions and he was therefore rather surprised that so few had expressed themselves in favour of including such a provision in the draft articles on special missions. In view of that attitude on the part of governments, he would not urge that the rule be reintroduced.

33. Mr. PESSOU said that some degree of discrimination in the reception and treatment of special missions was only human and was difficult to prevent. A mission from a friendly country was inevitably given favoured treatment. Moreover, previous personal relationships were bound to play a part; for instance, if at some future date, it were to fall to him in the exercise of official duties to welcome a special mission led by one of the present members of the Commission, he would obviously be inclined to receive it with special honours. As

² *Official Records of the General Assembly, Twentieth Session, Supplement No. 9*, p. 38.

³ Vol. 56 (1962), p. 475.

⁴ United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 87.

Mr. El-Erian had already pointed out, States could not be prevented from sometimes going beyond the minimum standard.

34. Such human behaviour did, however, lead to some inequality and injustice, so it should not be encouraged. He therefore hoped that the Special Rapporteur would find a formula, either on the lines of the Vienna Convention on Diplomatic Relations or more appropriate to the case in point, to limit discriminatory practices in regard to special missions.

35. Mr. TUNKIN said that in 1965 the Commission had not accepted the Special Rapporteur's suggestion on the ground that the nature and tasks of special missions were so diverse that in practice such missions had inevitably to be differentiated *inter se*. In view of that diversity, it was clearly not possible to lay down a rule that all special missions should be placed on the same level even in respect of privileges and immunities.

36. The problem had another aspect, however, which was connected with the principle of sovereign equality of States. It was because of that fundamental principle of international law that provisions on non-discrimination had been included in the 1961 and 1963 Vienna Conventions. Thus the draft articles could well include a provision requiring non-discrimination as between States, rather than as between special missions. In view of the principle of sovereign equality of States, special missions on the same level belonging to different States should not receive different treatment. He was not, of course, referring to differences in the cordiality of the reception, which would correspond to the degree of friendship between the countries concerned. Such differences, which reflected political considerations, were not prohibited by international law.

37. For those reasons, he suggested that the Special Rapporteur should prepare a provisional draft article on non-discrimination between States in respect of the privileges and immunities of special missions. That non-discrimination had no bearing on other problems relating to special missions. When the Commission had the Special Rapporteur's text before it, it could take a final decision on whether or not such a provision should be included in the draft.

38. Mr. TSURUOKA said that his view was very similar to Mr. Tunkin's. The privileges and immunities granted to special missions might differ according to the nature of the mission but not, for missions of the same kind, according to the sending or receiving State. Nevertheless, although he had no objection to that aspect of the matter being examined by the Commission, he did not think it would be of much use to include an article on non-discrimination in the draft, even if it were confined to privileges and immunities. In particular, it was hard to see how such an article could be applied in practice and how a State which, in the opinion of other States, had infringed the rule could be called to account. After all, there were always differences between the tasks of special missions; even in the special case to which the Chairman had referred, namely, that of delegations attending the same meeting to discuss a particular matter, their tasks might differ in a way which justified differences in privileges and immunities. Besides

certain advantages, such an article would therefore have disadvantages. It might perhaps be better to rely on custom and courtesy to ensure observance of the principle of equality and non-discrimination between States.

39. Mr. VERDROSS said he had supported the Special Rapporteur's proposal at the first reading and he entirely agreed with Mr. Tunkin's remarks.

40. Mr. AGO said he also supported Mr. Tunkin's suggestion. The Commission could not take a final decision until it had seen a text, considered its implications and determined whether it could appropriately be included in the draft, for the position of special missions was very different from that of permanent diplomatic missions.

41. Mr. BARTOŠ, Special Rapporteur, said he was glad to see that the Commission was reverting to his original idea. He was prepared to draft an article based on the corresponding articles of the two Vienna Conventions, but taking into account the fundamental difference between permanent missions and special missions. Permanent missions should enjoy absolute equality because their tasks were identical, but the same was not true of special missions, and the Commission should be careful not to assimilate unlike things. At that stage, it would only be taking a provisional decision; the final decision would be taken when it came to discuss the draft article by article and had a text before it.

42. Mr. BRIGGS said that Mr. Tunkin had drawn a valid distinction between non-discrimination as between States and non-discrimination as between special missions. In the application of any treaty, however, non-discrimination as between the parties was taken for granted and did not require to be specified. For that reason, he would abstain on the question put to the Commission.

43. Mr. AMADO said he fully agreed with Mr. Briggs. It must not be suggested even indirectly that some discrimination between States was permissible. As to special missions, it was obvious that even if equal treatment was accorded to them it might vary in cordiality.

44. The CHAIRMAN said that if there were no objection he would assume that the Commission agreed to adopt Mr. Tunkin's suggestion.

It was so decided.

45. The CHAIRMAN invited the Special Rapporteur to introduce his fourth general question: reciprocity in the application of the draft.

46. Mr. BARTOŠ, Special Rapporteur, drew attention to paragraphs 14 and 15 of chapter II of his report (A/CN.4/189). In his view, reciprocity was a condition for the application of any treaty text of that kind and an express provision on the subject was therefore unnecessary. He had raised the question only because of the comment by the Belgian Government.

47. Mr. ROSENNE said he fully agreed with the Special Rapporteur. At most, consideration might be given to mentioning the matter in the commentary.

48. Mr. TUNKIN said he also agreed with the Special Rapporteur. It was implicit in any convention that the reciprocity rule could be applied by the States parties.

In fact, reciprocity was relevant to all rules of international law. If a State committed a breach of a rule of international law, the State injured by that breach could retaliate in kind. The rule of reciprocity thus had the effect of a sanction.

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

It was so decided.

50. The CHAIRMAN invited the Special Rapporteur to introduce his fifth general question: the relationship of the draft on special missions with other international agreements.

51. Mr. BARTOŠ, Special Rapporteur, drew attention to paragraphs 16 to 20 of chapter II of his report. In a comment received after he had written the report (A/CN.4/188/Add.1), the United Kingdom Government had stated that there would be advantage in adding to the draft articles a provision dealing with their relationship to other international agreements. Thus four governments in all had advocated the inclusion of a provision of that kind and no contrary view had been expressed either in the Sixth Committee of the General Assembly or in the written comments. The Commission might therefore include in the draft an article similar to article 73 of the Vienna Convention on Consular Relations.

52. Mr. TUNKIN said it would be difficult at that stage to take a decision on the relationship between the draft articles and international agreements in force. He therefore proposed that the decision be postponed until the Commission had adopted all the draft articles on special missions.

53. He did not believe it would be advisable to include a provision on the lines of article 73 of the Vienna Convention on Consular Relations; that article was unsatisfactory and he was convinced that it would remain a dead letter.

54. Mr. BRIGGS agreed that article 73 of the 1963 Vienna Convention was unsatisfactory.

55. He believed that the Commission could adopt the various draft articles on special missions without taking any decision at that stage on the desirability of including an article on their relationship with existing international agreements.

56. Mr. ROSENNE said he agreed with Mr. Tunkin and Mr. Briggs.

57. Mr. TSURUOKA said it seemed to him that the point had already been settled in the draft articles on the law of treaties,⁵ which laid down rules concerning the relationship between different treaties, including *inter se* agreements. In settling the Special Rapporteur's question, the Commission should accordingly be guided by what it had already done in its work on the law of treaties.

58. Mr. BARTOŠ, Special Rapporteur, suggested that he should draft a trial article on the relationship with other international agreements; the Commission should come to a decision when that text was before it.

59. Mr. CASTRÉN supported the Special Rapporteur's proposal. Like several other speakers, he thought it would be better not to take article 73 of the Vienna Convention on Consular Relations as a model, as that article had been much criticized since its adoption.

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

It was so decided.

61. The CHAIRMAN announced that he had received a letter from Mr. Elias expressing regret that his official duties prevented him from attending the session. He requested the Secretariat to write to Mr. Elias on behalf of the Commission to thank him for his letter.

The meeting rose at 1 p.m.

882nd MEETING

Friday, 1 July 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Later: Mr. Herbert W. BRIGGS.

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

Special Missions

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

(continued)

[Item 2 of the agenda]

1. The CHAIRMAN invited the Commission to consider the next of the preliminary questions raised by the Special Rapporteur in his third report, namely, the form of the instrument relating to special missions (A/CN.4/189, chapter II, section 6).

2. Mr. BARTOŠ, Special Rapporteur, said that of the governments which had expressed their views on the subject, either in the Sixth Committee of the General Assembly or in written comments, only the Netherlands Government had advocated a code,¹ just as it had done in the case of the draft on the law of treaties.

3. In comments received recently (A/CN.4/188/Add.1 and 2), the United Kingdom and Austrian Governments appeared to favour a convention, though they had omitted to specify whether it should be a separate instrument or be attached to an existing convention.

4. He interpreted the reservation made by the Government of Israel (A/CN.4/188) as relating rather to the procedure or machinery for adopting the instrument than to the form it should take.

⁵ *Official Records of the General Assembly, Twenty-first Session, Supplement No. 9, pp. 10 et seq.*

¹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 847th meeting, para. 7.*

5. In the light of the opinions expressed by governments, he would advise the Commission to prepare draft articles and submit them to the General Assembly, with the recommendation that they be put into the form of a convention, either by the Assembly itself or by a body appointed by it.

6. With regard to the relationship between that convention and the Vienna Convention on Diplomatic Relations, he thought that the terminological unity of the series of instruments on diplomatic law should be maintained, though that did not necessarily mean that the draft should ultimately be annexed to the Vienna Convention.

7. Mr. ROSENNE said he agreed with the Special Rapporteur's conclusion in chapter II, paragraph 34 of his report, with the minor reservation that not only the 1961 Vienna Convention on Diplomatic Relations, but also the 1963 Vienna Convention on Consular Relations should be taken into account.

8. He confirmed the Special Rapporteur's interpretation of his statement in the Sixth Committee as representative of Israel and of the Israel Government's written comments: the reservation expressed related not to the form of the instrument, but to the procedure for its adoption. The question of that procedure was perhaps not the direct concern of the Commission, though it should not be ignored when the Commission considered its final recommendations to the General Assembly.

9. Mr. CASTRÉN said that, during the preliminary discussion on the subject, he had expressed the opinion that the Commission should frame rules to be embodied in a separate convention on special missions and should not regard those rules as merely complementary to the Convention on Diplomatic Relations, although in formulating them it should bear in mind the provisions of that Convention and, where appropriate, those of the Convention on Consular Relations.² He still held to that opinion, which had been strengthened by the virtually unanimous comments of governments and by the Special Rapporteur's recommendations in his report and in his oral statement.

10. Mr. BARTOŠ, Special Rapporteur, said that the Commission had sometimes appeared reluctant to refer to the Convention on Consular Relations, but he considered that the two Vienna Conventions were complementary and that the instrument on special missions would form, as it were, the third leaf of a triptych.

11. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to adopt the Special Rapporteur's proposal that it should prepare draft articles intended to form a convention.

It was so decided.

12. The CHAIRMAN invited the Special Rapporteur to introduce the next question raised in chapter II of his report: the body which should adopt the instrument relating to special missions.

13. Mr. BARTOŠ, Special Rapporteur, drew attention to the opinions mentioned in his report. The Austrian delegation to the Sixth Committee had expressed the hope that the instrument on special missions would be adopted at Vienna, which implied that the Austrian Government thought the instrument should be adopted by a plenipotentiary conference.

14. He had learned during informal conversations that the Government of Israel regarded a plenipotentiary conference as an unduly expensive means of settling questions which were of secondary importance as compared with the subject matter of the two Vienna Conventions, and would prefer a less elaborate and more economical procedure.

15. Personally, he would suggest that the instrument be adopted by a conference held on the occasion of a session of the General Assembly, beginning, say, two weeks before the opening of the session and continuing for one week after it. Several international conventions had been drawn up in that way, and it would be less expensive for the United Nations and for States than a plenipotentiary conference held independently of the General Assembly. It might also be the best means of ensuring that all States would be represented and would send to the conference representatives with sufficient knowledge of the legal and technical aspects of the subject. On the other hand, he was rather opposed to the idea of entrusting the preparation and adoption of the instrument to the Sixth Committee of the General Assembly, for experience had shown that that method tended to prolong the debates to such an extent that questions were sometimes adjourned until the next session.

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

16. Mr. ROSENNE said that, in his oral explanations, the Special Rapporteur had given a well-balanced account of the various problems involved. He could confirm what the Special Rapporteur had said about the thought underlying his own remarks as representative of Israel in the Sixth Committee.

17. It would be premature to discuss the date of a possible conference at that stage and still less its duration. He therefore suggested that no decision be taken on the matter for the time being; when the Commission had completed its examination of the draft articles on special missions, it could decide what recommendations to make to the General Assembly. Meanwhile, perhaps the Secretariat could be asked to prepare a paper on the problems of organizing a conference on special missions, on the lines of its paper concerning a conference on the law of treaties.³

18. Mr. TUNKIN said that in principle he supported the Special Rapporteur's suggestion. The Commission could proceed on the assumption that a diplomatic conference would be convened to deal with the articles on special missions.

19. As there were few established rules of general international law in the matter the topic of special missions was rather complicated, so it could hardly be entrusted to the Sixth Committee in its final stages. He

² *Yearbook of the International Law Commission, 1964, vol. I, p. 17.*

³ Document ILC(XVIII) msc.1.

agreed with Mr. Rosenne, however, that it was too early to go into the question of arrangements for a conference; that was a matter which should be considered, in accordance with the Commission's custom, when the final report on the topic was being drawn up.

Mr. Yasseen resumed the Chair.

20. Mr. BRIGGS said that chapter II, section 7 of the Special Rapporteur's report appeared to be based on the assumption that the draft articles on special missions would become a draft convention. Article 23, paragraph 1, of the Commission's statute empowered it to recommend the General Assembly "To recommend the draft to Members with a view to the conclusion of a convention" or "To convoke a conference to conclude a convention". It would accordingly be for the General Assembly to take a final decision on the matter, though he saw no harm in the Commission's discussing what body should adopt the instrument relating to special missions.

21. Mr. BARTOŠ, Special Rapporteur, said he had prepared his third report on the assumption that, in view of the decision taken at the last session,⁴ the Commission would complete the draft on special missions at its eighteenth session. Since it now appeared that it would be unable to do so, he proposed that the Commission take note of the comments by governments on the question under discussion and defer its decision until the draft had been completed.

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

It was so decided.

23. The CHAIRMAN invited the Special Rapporteur to introduce the next question raised in chapter II of his report, namely, that of a preamble to the draft articles.

24. Mr. BARTOŠ, Special Rapporteur, said he had considered it his duty to mention the question of a preamble in his report, because the Yugoslav Government had raised it. It was not the Commission's usual practice to provide its drafts with a preamble, since it considered that that task should be left to the conference drawing up the convention. The Yugoslav Government's comments on the definition of a special mission and the difference between special missions and permanent diplomatic missions (A/CN.4/188) could be taken into account in the body of the draft.

25. Mr. CASTRÉN said that the definition of a special mission would be more appropriately placed in the introductory article, a draft of which the Special Rapporteur had submitted in chapter IV of his report (A/CN.4/189/Add.1). On the other hand, it might be advisable to stress the differences between special missions and permanent diplomatic missions in a preamble, which might also deal with some other general questions. But it was still too early to decide whether a preamble should be included, let alone what its exact contents should be. As a rule, the diplomatic conference convened to adopt a convention was responsible for preparing the text of a preamble if it found one necessary, but the

Commission could also submit suggestions or recommendations on the subject if it saw fit.

26. Mr. AGO said he did not think the Commission's practice of not providing a preamble to its drafts should become a fixed principle. In any case, where the draft on special missions was concerned, a decision on the matter would have to be deferred until the draft had been completed. In view of the relationship between the draft and the two Vienna Conventions, the Commission might then consider it advisable to attach a draft preamble.

27. The CHAIRMAN, speaking as a member of the Commission, said he shared Mr. Ago's view, especially as the preamble formed part of a treaty and was taken into account in interpreting it. In examining the draft on special missions, and also the draft on the law of treaties, the Commission should consider the possibility of bringing out certain points in a preamble. In any event, it should not consider itself bound by its former practice and should not exclude in advance the possibility of introducing a preamble.

28. Mr. BARTOŠ said that, as Special Rapporteur, he had considered himself bound by a kind of precedent the Commission had established, of leaving the drafting of the preamble to those who were to establish and authenticate the text.

29. As a member of the Commission and as a jurist, he believed that the Commission had sometimes been mistaken in omitting to draft a preamble, for it was in the preamble that the ideas embodied in an instrument could be thrown into relief. He was also prepared to recognize that when it was left to the body responsible for establishing and authenticating the text to pronounce on the underlying ideas, too much latitude was sometimes given to people who had an insufficient grasp of the system on which the draft was based. The Commission should therefore review its practice, not only with regard to the draft on special missions, but perhaps even with regard to the draft on the law of treaties, which was of outstanding legal importance, since it introduced entirely new elements into international life.

30. If the Commission decided to draft a preamble to the articles on special missions, it should perhaps bring out the relationship between those articles and the Vienna Conventions on Diplomatic Relations and Consular Relations.

31. As a member of the Commission, he proposed that the question be left in abeyance for the time being and that on reverting to it the Commission should consider the advisability of changing its practice.

32. Mr. TUNKIN said he supported Mr. Ago's suggestion. It might be well for the Commission to reconsider its views on preambles to the drafts it prepared. In the present instance, the Special Rapporteur might be asked to draft a preamble to the future convention; the Commission could then decide whether to include it.

33. He did not wish to discuss the question whether a preamble should be prepared for the draft articles on the law of treaties, but the Commission might give the matter some thought, for there was one problem of great importance which could be dealt with in a preamble, namely, the relationship of the articles to the

⁴ Document A/CN.4/184, para. 14.

customary rules of international law in force. At the 1961 Vienna Conference the Swiss representative had proposed a special provision, which had been introduced into the preamble, safeguarding the application of the rules of customary international law.⁵ In the case of the draft articles on special missions, as the Commission was familiar with all the implications of the draft articles it had prepared, it might usefully devote some attention to the problem of a preamble.

34. Mr. ROSENNE said that he was in agreement with Mr. Ago, Mr. Tunkin and the Chairman. Moreover, he was convinced that a careful examination of the Commission's records would show that its practice in the matter of preambles was not quite so clear-cut as it was sometimes made out to be. For instance, a preamble to the draft articles on consular relations had been prepared by the Special Rapporteur; it had been amended by the Drafting Committee and printed in the commentary introducing the draft.⁶

35. He was quite sure that where there were real legal elements that could not be appropriately expressed in the form of rules and were not purely descriptive, like the article on definitions, it was highly desirable that the Commission should draw attention to those elements in an appropriate form in its report.

36. Mr. BARTOŠ, Special Rapporteur, said that if the Commission instructed him to draft a preamble, as Mr. Tunkin had suggested, it would not be departing from precedent. The case was not the same as that of the Vienna Conventions, when the Commission had been anxious that the drafts should not be coloured by the views of its members and had preferred to let the politicians pronounce on relations between States. There had been some question of drafting a preamble to the Convention on the Law of the Sea, but the idea had been abandoned when the draft was divided into five parts.

37. The CHAIRMAN proposed that the Commission defer its decision on the matter until it had completed the draft articles.

It was so decided.

38. The CHAIRMAN invited the Commission to consider the arrangement of the articles, discussed in chapter II, Section 9 of the report.

39. Mr. BARTOŠ, Special Rapporteur, said that the Commission had decided to revise the general arrangement of the articles, but only when it had completed its work on the draft. The Governments of Israel, Belgium and Finland had made suggestions to that effect, while the Belgian delegation had proposed a new order. In his opinion, however, the arrangement of the articles could not be settled until they were in final form, and it was too soon to take a decision at that stage.

40. The CHAIRMAN proposed that the decision on the arrangement of the articles be postponed.

It was so decided.

41. The CHAIRMAN invited the Commission to consider Chapter V of the Special Rapporteur's third report: Draft provisions concerning so-called high-level special missions (A/CN.4/189/Add. 1).

42. Mr. BARTOŠ, Special Rapporteur, said he had submitted the draft provisions concerning so-called high-level special missions at the seventeenth session. The Commission had not discussed them, but had asked governments whether they considered that special rules should or should not be drafted for so-called high-level special missions whose heads held high office in their States.

43. The comments submitted by governments in answer to that inquiry and the observations made by various delegations in the Sixth Committee were analysed in his report. The Government of Malta was in favour of drafting rules on high-level missions (A/CN.4/189/Add.2), but most States considered them neither necessary nor useful and had given the Commission no encouragement to introduce them into its draft. His provisional conclusion, therefore, was that that chapter should be dropped.

44. Mr. CASTRÉN said that a preliminary examination of the question would be useful, as the Commission had not yet had time to consider it and the comments by governments showed rather varied reactions. The Special Rapporteur needed to know the views of members of the Commission in order to be able to continue his work one way or the other.

45. It should no doubt be recognized that so-called high-level special missions could not be treated in the same way as normal special missions in every respect. The rules concerning their legal status must also differ. Even if the Swedish Government's view were accepted, that special treatment was already required by the international status of the heads of high-level special missions, it might be advisable to specify the necessary derogations from the general rules on special missions. On the other hand, it might be argued that if the Commission formulated special provisions for one category of special missions, namely those led by a Head of State or holder of some other high office, it might also have to distinguish between other special missions, according to their tasks and other circumstances.

46. At the end of his report, the Special Rapporteur had noted that States had given the Commission no encouragement to introduce rules concerning high-level special missions into its draft articles. It was true that three governments had adopted a completely negative attitude, but four others had supported the Special Rapporteur's idea and suggested amendments to the proposed rules. He associated himself with those four and wished to submit some specific comments.

47. He doubted whether sub-paragraph (a) in each of rules 2 to 4 was necessary, since the matter it dealt with could always be settled during the negotiations which preceded the sending of the special mission concerned. The same applied to rule 6.

48. Under rules 4 and 5, a special mission led by a Minister for Foreign Affairs or by another cabinet minister might be composed of, or include, members of the minister's personal suite, who were to be treated as

⁵ United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 82.

⁶ *Yearbook of the International Law Commission, 1961*, vol. II, p. 92.

diplomatic staff. But there was no corresponding provision in rule 3, which related to special missions led by a Head of Government.

49. As the Czechoslovak Government had pointed out, it seemed that the rules could be abridged and considerably simplified. Rules 2 to 5 contained mainly similar provisions and could be combined in a single rule which would list the exceptions, mentioning the kind of special mission, according to its head, which was contemplated in each case.

50. The simplest solution might be merely to supplement various articles of the draft on special missions, where necessary, by adding separate rules on high-level special missions, or on some of them, or by stating that the provisions in question were not applicable to such missions.

51. Mr. RUDA pointed out that the draft provisions concerning high-level special missions had been annexed to the Commission's report on the first part of its seventeenth session, but had not been discussed by the Commission. It seemed premature to take a decision, especially as the comments by governments were far from unanimous. The rules should be examined at the next session, when it could be decided what action to take on them.

52. Mr. VERDROSS said that he had supported the Special Rapporteur's proposal during the first reading. The discussion at the previous meeting on the distinction between the different kinds of special missions had convinced him that a distinction must be made between the two categories, especially where privileges were concerned.

53. Mr. AGO said that on the whole he was against referring to a difference in the level of missions. Once two kinds of mission were distinguished, some missions being placed on a high level while others were not, problems of protocol and even of prestige would immediately arise in regard to missions relegated to the second category. Nevertheless, in certain articles the Commission could probably take account of the case of a special mission led by a Head of State or Head of Government. That would be one way of getting round the difficulty.

54. The CHAIRMAN, speaking as a member of the Commission, said that during the past year he had come round to a rather different view and now thought it might be better not to deal in the draft with special missions led by Heads of State and perhaps not even with those led by Heads of Government, for the simple reason that such special missions were always arranged bilaterally. It was improbable that a Head of State would go to another country without all the details of his visit being settled in advance. Such visits were the subject of special arrangements which could perhaps be excluded from the field of special missions envisaged by the Commission in its draft.

55. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the Chairman, not only for practical reasons, but because the matter of the privileges and immunities of Heads of State lay outside the general subject of the codification of diplomatic law. The Special Rapporteur should be asked to consider the matter in the light of the

comments made by governments and by members of the Commission.

56. Mr. TSURUOKA said it would be better not to deal in the draft with so-called high-level special missions as such. Sending a Head of State to another State involved a number of emotional factors, such as national feeling on both sides and the degree of friendship between the two States; the question of prestige also had some bearing, and above all, differences between the constitutions of the two countries could cause difficulties. The Head of State might be an elected president, a king or an emperor and that factor would strongly influence the decision of a government regarding a journey abroad. Of course, the matter could be covered by a rule of law, but in the light of diplomatic experience it seemed that too many emotional factors were involved. And even if the Commission did not adopt any rules on the subject, diplomatic relations were not likely to suffer unduly.

57. Mr. AMADO said that in the Sixth Committee he had expressed the cautious opinion that a special chapter might be included, giving high-level missions separate treatment. He now wished to retract that tentative view and to support those members of the Commission who had spoken against the inclusion of such provisions in the draft, because in practice they might lead to complications and even to complaints by some Heads of State that they had not been received with as much ceremony as others.

58. Moreover, the Commission's task was to codify existing rules, to interpret reality and to see that its rules conformed to contemporary thinking. That was how it could fill the gaps and advance international law.

59. Mr. CASTRÉN said there seem to be fairly strong opposition in the Commission to the draft provisions on high-level special missions. He nevertheless supported Mr. Ruda's suggestion that no decision should be taken for the time being, since a decision must depend on the final content of the principal rules on special missions. In drafting the articles, however, the Special Rapporteur could take account of the special cases in which missions were led by a Head of State—a way out which he (Mr. Castren) had already suggested.⁷

60. Mr. TUNKIN said that, while he appreciated the difficulties which would confront the Commission if it tried to formulate rules on the subject, he fully agreed that at that juncture it was inadvisable to decide what action should be taken in the future. It would be necessary to give the draft articles on special missions a second reading, and during that reading, or after it, the Commission would be in a much better position to decide finally whether or not to include any provisions on high-level special missions.

61. Mr. AGO said that one of Mr. Amado's remarks had made him reflect on a question to which the Commission should probably pay some attention, namely, the relationship between high-level special missions led by a Head of State and the principle of non-discrimination which the Commission had thought of including in its draft. That principle could, of course, be applied to normal special missions, but it would be difficult to

⁷ Para. 50 above.

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

The meeting rose at 12.50 p.m.

883rd MEETING

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

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

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

Special Missions

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

(continued)

[Item 2 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on his draft provisions concerning so-called high-level special missions (A/CN.4/189/Add.1).
2. Mr. BARTOŠ, Special Rapporteur, said that most questions relating to high-level special missions were already governed by the rules of courtesy and, usually, by an *ad hoc* agreement between the sending State and the receiving State. Nevertheless, there could be cases in which a mission led by a Head of State or other eminent person was governed neither by the rules of protocol for official visits, nor by the rules on special missions, nor by an *ad hoc* agreement between the sending State and the receiving State. It would therefore be useful to lay down rules on the subject. But governments were not agreed on the minimum level of such missions: should the term "high-level" cover only missions led by a Head of State or Head of Government or should it also include missions led by a Minister or even, for instance, a Chief of Staff?
3. There could be no doubt that for missions led by a Head of State rules of general international law already existed, so that there was no need to lay down any special rules. Nevertheless, the comment by the Government of Upper Volta (A/CN.4/188) was quite pertinent: through a desire to enjoy full freedom of movement, a Head of State visiting a foreign country sometimes caused grave anxiety to the services responsible for his safety. But private visits by Heads of State, which were obviously outside the scope of the topic being studied by the Commission, should not be confused with official visits by Heads of State, which were covered by general rules of international law, often confirmed by bilateral

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

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

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

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

It was so decided.

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

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

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

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

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

¹ Previous meeting, para. 50.

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

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

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

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

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

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

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

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

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

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

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

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

It was so decided.

Law of Treaties

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

(resumed from the 880th meeting)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³ Paras. 58-63.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Modification of treaties by subsequent practice"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

89. The CHAIRMAN put article 68 to the vote.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 6 p.m.

884th MEETING

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

Chairman: Mr. Herbert W. BRIGGS

later, Mr. Mustafa Kamil YASSEEN

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

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

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

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

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

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

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

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

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

¹ For text see previous meeting, para. 90.

² Para. 97.

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

expressed a preference for the language used in the text now before the Commission.

8. Mr. JIMÉNEZ de ARÉCHAGA said that the 1964 text of article 69,⁴ which was largely reproduced in the Drafting Committee's text, had been well received both by governments and in legal circles. It was therefore undesirable to depart from that text.

9. Paragraph 1 of the Drafting Committee's text stated the golden rule of interpretation. Paragraph 4, on the other hand, dealt with a minor point which was of limited application; in fact, the Drafting Committee had even considered dropping that provision altogether. It would therefore detract from the importance of paragraph 1 if the contents of paragraph 4 were incorporated in it or placed immediately after it as a new paragraph 2. Such a change would also have the disadvantage of breaking the continuity of the provisions of article 69; the present paragraph 2 contained a definition of the "context of a treaty", an expression used in paragraph 1; paragraph 3 logically followed paragraphs 1 and 2, since it referred to means of interpretation additional to those set out in paragraph 1.

10. With regard to the point raised by Mr. Verdross, the use of the conjunction "and" before "in the light of its object and purpose" made the meaning clear in the English text: the object and purpose of the treaty were not divorced from its context.

11. Lastly, he favoured the retention of the expression "the context of the treaty", which had been used in the 1964 text, in order to show that the reference was to instruments such as those referred to in paragraph 2 (a) and (b) and not, for example, to the circumstances surrounding the conclusion of a treaty.

12. The CHAIRMAN*, speaking as a member of the Commission, said he accepted the basic idea underlying article 69, namely, that a treaty must be interpreted in good faith in accordance with the meaning to be given to its terms in their context and in the light of the object and purpose of the treaty. He was opposed to the use of the expression "the ordinary meaning", but the Drafting Committee had not accepted the alternative wording he had suggested. He still believed that it would be possible to avoid using that unsatisfactory expression and thereby also to obviate the need for paragraph 4.

13. He agreed with the Special Rapporteur that article 69 showed no intention of establishing a rigid hierarchy of means of interpretation.

14. He would vote in favour of article 69.

15. Mr. AGO endorsed Mr. Reuter's comments on the use of the word "context" and suggested that the difficulty might be overcome by replacing the words "to its terms in the context of the treaty" in paragraph 1 by the words "to the terms of the treaty in their context".

16. Mr. TUNKIN pointed out that the purpose of paragraph 2 was to define the special concept of the "context of a treaty".

17. Mr. REUTER said he did not see why paragraph 2 should not begin with the words "For the purpose of its interpretation, a treaty shall comprise . . ."

18. Mr. JIMÉNEZ de ARÉCHAGA said that, in view of the contents of paragraph 2 and the intention of the article, which referred to the meaning given to the terms of the treaty in their context in the treaty as a whole, it was necessary to use the expression "in their context in the treaty" and not merely "in their context".

19. Sir Humphrey WALDOCK, Special Rapporteur, said that he would hesitate to remove the reference to the context of the treaty from paragraph 2, as that would transform the paragraph into a definition of a "treaty" for the special purpose of interpretation. It seemed inadvisable to introduce that expanded notion of "treaty", which might have implications for other articles of the draft.

20. Mr. JIMÉNEZ de ARÉCHAGA pointed out that if Mr. Reuter's suggestion for paragraph 2 were adopted, the draft articles would contain two different definitions of the term "treaty", one in article 1 and another, for purposes of interpretation, in article 69.

21. Paragraph 2 of article 69 was intended to define the expression "the context of a treaty". That expression was meant to cover documents which were not actually part of a treaty, but which shed light on its terms. An example of such documents was the statements on membership and withdrawal which had been agreed upon at the San Francisco Conference.⁵ The effect of paragraph 2 was to give those documents a status different from that of mere preparatory work.

22. He was surprised that the definition of the "context of a treaty" should have given rise to so much debate, since the matter had been discussed in 1964 and the definition had not been criticized by governments.

23. Mr. TUNKIN said it would be awkward to have two definitions of the term "treaty", a general definition in article 1 and a definition for purposes of interpretation in article 69. He urged the adoption of the text proposed by the Drafting Committee.

24. Mr. REUTER reiterated that he had not intended to raise a point of substance. In order to get rid of the unsatisfactory expression "The context of a treaty", paragraph 2 might be worded "For the purpose of its interpretation, a treaty shall comprise, in addition to the text . . ."

25. Mr. AGO said he had been about to make exactly the same proposal.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that he could not accept that proposal, which would place paragraph 2 on a different level from paragraph 1. He proposed that the words "to be given to its terms in the context of the treaty" in paragraph 1 should be replaced by the words "to be given to the terms of the treaty in their context" and that the opening sentence of paragraph 2 should be reworded to read:

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

27. Mr. REUTER said he accepted the Special Rapporteur's proposal.

⁴ *Ibid.*, p. 199.

* Mr. Briggs.

⁵ United Nations Conference on International Organization, 1945, vol. I, pp. 615 *et seq.*

28. Mr. ROSENNE requested separate votes on paragraphs 3 (a) and 3 (b), on which he would abstain.
29. Mr. RUDA requested a separate vote on paragraph 3 (c).
30. The CHAIRMAN put paragraphs 3 (a), 3 (b) and 3 (c) to the vote separately.

Paragraph 3 (a) was adopted by 15 votes to none, with 1 abstention.

Paragraph 3 (b) was adopted by 15 votes to none, with 1 abstention.

Paragraph 3 (c) was adopted by 13 votes to none, with 3 abstentions.

31. The CHAIRMAN put article 69 to the vote as a whole, with the amendments to paragraphs 1 and 2 proposed by the Special Rapporteur.

Article 69 as a whole, as amended, was adopted by 16 votes to none.⁶

ARTICLE 70 (Supplementary means of interpretation) [28]⁷

32. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the following new title and text for article 70:

"Supplementary means of interpretation"

"Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 69, or to determine the meaning when the interpretation according to article 69:

- (a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

33. A number of changes had been made in the Special Rapporteur's text (A/CN.4/186/Add.6) which the Commission had discussed at its 872nd and 873rd meetings. First, the expression "further means of interpretation" in the title and in the opening phrase had been replaced by "supplementary means of interpretation". Secondly, the words "to verify" had been deleted from the opening sentence. Thirdly, the words "in the light of the objects and purposes of the treaty" had been deleted from sub-paragraph (b).

34. Sir Humphrey WALDOCK, Special Rapporteur, explained that the two deletions were not intended to alter the meaning. The idea of "verification" was contained in "confirmation". The words "in the light of objects and purposes of the treaty" had been dropped as unnecessary and their deletion had no particular significance.

35. In reply to a question by Mr. AGO, he said that the word "supplementary" was the closest English equivalent to the French word "*complémentaire*".

36. Mr. EL-ERIAN said he was grateful to the Special Rapporteur for giving favourable consideration to the

⁶ For further discussion of article 69, see 893rd meeting, paras. 7-34. The text, however, was not amended.

⁷ For earlier discussion, see 869th meeting (paras. 52-70), 870th-872nd meetings, and 873rd meeting, paras. 1-48.

suggestion he had made at the 871st meeting, that the words "further means" should be replaced by "supplementary means" in order to remove the discrepancy between the English, French and Spanish texts and facilitate the task of finding exact equivalents in the other languages into which the articles would eventually be translated.

37. He would have preferred to retain the words "in the light of the objects and purposes of the treaty", in order to soften any impression given by articles 69 and 70 of two successive and separate processes of interpretation. But after hearing the Special Rapporteur explain that those words were unnecessary and that their deletion had no particular significance, he was prepared to vote in favour of the Drafting Committee's text.

38. Mr. TSURUOKA said that, although he was not opposed to article 70, he had not changed his views since the discussion at the 871st and 872nd meetings. He was still convinced that recourse to the preparatory work should be given a rather more important place in the process of interpreting a treaty; it should not be regarded as a "supplementary means of interpretation". Moreover, there was not much difference between the means referred to in article 69, paragraph 3 (b), and those referred to in article 70.

39. Mr. ROSENNE said that his views were similar to those of Mr. Tsuruoka.

40. The CHAIRMAN,* speaking as a member of the Commission, said that he, too, agreed with Mr. Tsuruoka. He regretted that the Commission had not seen fit to include the subject matter of article 70 in article 69, but he would nevertheless vote in favour of article 70.

Article 70 was adopted by 15 votes to none.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that, in preparing the commentaries on the articles on interpretation, it would be necessary to take into account certain differences of opinion that had arisen in the Commission regarding the relationship between articles 69 and 70. He himself believed that the use, in article 70, of the words "in order to confirm the meaning resulting from the application of article 69", provided the strongest link between the two articles which was acceptable to the majority of the Commission.

ARTICLE 72 (Interpretation of treaties expressed in two or more languages) [29]⁸

42. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 72:

"Interpretation of treaties expressed in two or more languages"

"1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

* Mr. Briggs.

⁸ For earlier discussion, see 874th meeting, paras. 1-43.

“ 2. A version of the treaty expressed in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provide or the parties so agree.

“ 3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 69 and 70 does not remove, a meaning which as far as possible reconciles the texts shall be adopted ”.

43. The main difference between that text and the one proposed by the Special Rapporteur in his sixth report (A/CN.4/186/Add.7) was that the substance of the Special Rapporteur's paragraph 3 had been incorporated in the new text of paragraph 1.

44. Mr. VERDROSS pointed out that in paragraph 3, as in paragraph 4 of the version considered at the 874th meeting, the words “ as far as possible ” led the reader to ask himself what would happen if it was not possible to find a meaning which reconciled the texts. Either the words “ as far as possible ” should be deleted or a provision should be added stating that, if it was not possible to find a meaning which reconciled the texts, it was the text in the language in which the treaty had been drafted that was to be considered.

45. Mr. CASTRÉN pointed out that as the Drafting Committee had changed the position of the words “ *autant que possible* ” in the French text, it now corresponded to the English and no longer had the defect to which Mr. Verdross had referred. The words “ as far as possible ” should therefore be retained.

46. Mr. TSURUOKA said he was satisfied with the new wording of article 72, which he preferred to the previous version. At the 874th meeting he had instanced a treaty between Japan and Thailand the text of which was in English as well as in Japanese and Thai, and which stipulated that in the event of a dispute over interpretation the English text should prevail. Paragraph 1 of the new text dealt with that case more satisfactorily than paragraph 3 of the previous version had done.

47. Mr. AGO suggested that, in paragraph 1, it might be necessary to insert the word “ otherwise ” between the words “ parties ” and “ agree ”, since that part of the sentence referred to cases in which the parties concluded an agreement otherwise than by inserting a provision in the treaty.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that the expression “ the parties agree ” was used in certain other places in the draft. It would, however, be desirable to see whether the expression “ the parties otherwise agree ” was not also used in some places with the same meaning; if so, an effort should be made to achieve uniformity throughout the draft.

49. The CHAIRMAN put article 72 to the vote.

*Article 72 was adopted by 15 votes to none.*⁹

⁹ For a later amendment to the title and text of article 72, see 893rd meeting, para. 43.

ARTICLE 13 (Consent to be bound expressed by accession) [12]¹⁰

50. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that having regard to the votes which had taken place in 1965,¹¹ the Drafting Committee had decided to omit articles 8 and 9 on participation in a treaty. It had considered that some of the legal aspects of participation could be covered in article 13, dealing with consent to be bound expressed by accession. The Drafting Committee now proposed a new version of that article which read :

“ Consent to be bound expressed by accession ”

“ The consent of a State to be bound by a treaty is expressed by accession when :

(a) the treaty or an amendment to the treaty provides that such consent may be expressed by that State by means of accession;

(b) it appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that such consent may be expressed by that State by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession ”.

51. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the general questions involved had been fully discussed in 1965¹² and that the Commission had been unable to arrive at a conclusion, none of the proposals then made having been adopted. It had been clear that any decision the Commission might reach by means of a vote would be taken by a narrow majority, and the Drafting Committee had therefore considered that it would be preferable to omit articles 8 and 9. Although the main issue of participation had thus not been dealt with, article 13 as now redrafted did touch on the problem.

52. Mr. AGO said that, in order to bring the French text into line with the English, the words “ *s'exprimer par l'adhésion de cet Etat* ” in sub-paragraphs (a), (b) and (c) should be replaced by the words “ *être exprimé par cet Etat par voie d'adhésion* ”.

53. The CHAIRMAN put to the vote article 13, subject to amendment of the French text as proposed by Mr. Ago.

*Article 13 was adopted by 14 votes to none, with 1 abstention.*¹³

54. Mr. TUNKIN, explaining his vote, said that he very much regretted that the principle of general partici-

¹⁰ For earlier discussion of article 13, see *Yearbook of the International Law Commission, 1962*, vol. I, 648th, 649th, 650th, 665th and 668th meetings. The text of the article, then renumbered article 11, was adopted at the 668th meeting. It was again discussed (as article 13) at the first part of the seventeenth session; see *Yearbook of the International Law Commission, 1963*, vol. I, 786th meeting, 787th meeting (paras. 1 and 2) and 812th meeting, footnote 4.

¹¹ *Yearbook of the International Law Commission, 1965*, vol. I, 795th meeting, paras. 42-59.

¹² *Ibid.*, 791st meeting, paras. 61-86, 792nd-795th meetings, and 796th meeting, paras. 1-8.

¹³ For a later amendment to the title of article 13, see 886th meeting, para. 114.

pation in general multilateral treaties had not found expression in the draft articles. He had abstained from voting on article 13 because it cast doubt on that very important principle of contemporary international law. General multilateral treaties played a most important part in the development of general international law, and the very essence of those treaties required that they should be open to participation by all States. As was well known, even within the United Nations a practice existed which was in conflict with fundamental principles of contemporary international law and which was an outcome of the cold war. He hoped that the diplomatic conference which would consider the draft articles on the law of treaties would remedy the omission.

Mr. Yasseen took the Chair.

55. Mr. EL-ERIAN expressed his regret at the Commission's failure to work out an acceptable text for a provision dealing with the important problem of universal participation in the framing of general rules of international law. The gap that left in the draft articles was particularly unfortunate, because in most other instances the Commission had achieved a fairly wide measure of agreement on controversial issues. It could take pride in its record over the years of reconciling different points of view. The decision not to take a vote on the issue of participation in general multilateral treaties was wise, however, because it was clear that even if a satisfactory text had been formulated, the majority would have been a narrow one.

56. Nevertheless, the thesis that all States were entitled to participate in the creation of general rules of international law was well-founded both in theory and in practice and, with regard to general multilateral treaties as defined in the commentary on articles 8 and 9 of the 1962 text,¹⁴ he could not accept the argument that States were free to choose their partners by analogy with municipal systems of the law of contract. If the purpose of a codification conference was to codify general rules on questions of common interest, then all States had the right to take part in the process by virtue of their sovereign equality.

57. Mr. BRIGGS, speaking as Chairman of the Drafting Committee, proposed that the Commission should take a formal decision to delete articles 8 and 9.

58. Mr. JIMÉNEZ de ARÉCHAGA said that there was no need for the Commission to vote on the Drafting Committee's recommendation concerning articles 8 and 9. He interpreted the affirmative vote on article 13 to mean that that recommendation was accepted.

59. Mr. EL-ERIAN pointed out that the Commission had taken no decision either in favour of or against articles 8 and 9, but had only decided not to make any reference to participation in a treaty in its draft at that stage.

60. Mr. TUNKIN pointed out that as the Drafting Committee had not put forward any texts for articles 8 and 9, there was nothing for the Commission to delete; but there was general agreement that it would be inadvisable to vote on the principle at issue at that stage,

because there was little likelihood of reaching agreement by a substantial majority.

61. Mr. REUTER said he agreed with Mr. Tunkin and Mr. El-Erian: articles 8 and 9 had not been deleted, but merely omitted.

62. The CHAIRMAN, speaking as a member of the Commission, said he too thought that article 13 did not meet the requirements which articles 8 and 9 were to have met. A gap would be left in the draft if it omitted to deal with participation in general multilateral treaties, especially codifying treaties, to which he believed that every State was entitled to accede in the interests of the international community. The work of codification was not the private preserve of an exclusive club or even of a certain majority of States: it should be open to all States to take part in it. He had been in favour of including article 8 in the draft, but had accepted the minimum proposal in article 13 on the clear understanding that the vote on article 13 in no way prejudged the Commission's attitude to articles 8 and 9.

63. Mr. BRIGGS, Chairman of the Drafting Committee, said he agreed with Mr. Tunkin. He had been mistaken in proposing that the Commission should vote on the Drafting Committee's recommendation that articles 8 and 9 be deleted and he withdrew the proposal.

64. Speaking as a member of the Commission, he said that the implications of the vote on article 13 could be explained in the commentary.

65. Sir Humphrey WALDOCK, Special Rapporteur, agreed.

66. Explaining his vote on article 13, he said that he too regretted the absence of any provisions on participation in a treaty, since that left a gap in the general scheme of the draft. As he had indicated in earlier reports, his personal view was that the widest possible participation in general multilateral treaties was desirable. The difficulty had arisen over finding the right form of words to express an idea about which there was probably a fairly wide measure of agreement in the Commission.

67. Mr. CASTRÉN said that, for the reasons given by previous speakers, he also regretted the omission from the draft of articles 8 and 9.

68. Mr. AGO said that, as there was so much regret, perhaps the Drafting Committee should try to produce a text. He noted, however, that although everyone deplored the fact that there was a gap in the draft, no one had suggested how it could be filled.

69. The CHAIRMAN, speaking as a member of the Commission, observed that the conference of plenipotentiaries would be sure to remedy the defect.

ARTICLE 15 (Exchange or deposit of instruments of ratification, accession, acceptance or approval) [13]¹⁵

70. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 15:

¹⁴ *Yearbook of the International Law Commission, 1962, vol. II, p. 168.*

¹⁵ For earlier discussion, see *Yearbook of the International Law Commission, 1965, vol. I, 787th meeting, paras. 4-98, 812th meeting, paras. 65-77, and 816th meeting, paras. 28 and 29.*

“*Exchange or deposit of instruments of ratification, accession, acceptance or approval*”

“Unless the treaty otherwise provides, instruments of ratification, accession, acceptance or approval establish the consent of a State to be bound by a treaty upon:

- (a) Their exchange between the contracting States;
- (b) Their deposit with the depositary; or
- (c) Notification to the contracting States or to the depositary, if so agreed.

71. The Drafting Committee had considered the proposal that instruments of ratification, accession, acceptance or approval should take effect after a stipulated interval of time, but had come to the conclusion that the matter could be left to those responsible for drawing up the treaty and that the clause “unless the treaty otherwise provides” would be enough to meet the point. During discussions in the Commission, some members had pointed out that the task of a depositary would become much more difficult if the traditional rule that a treaty entered into force upon the exchange or deposit of certain instruments was modified by the introduction of a thirty- or ninety-day rule.¹⁶ He had been authorized by Mr. Rosenne, who had originally proposed a ninety-day rule,¹⁷ to state that that proposal was withdrawn.

72. Sir Humphrey WALDOCK, Special Rapporteur, explained that some difficulty had arisen over the phrase “becomes operative”, which had been used in the text approved during the second part of the seventeenth session (A/CN.4/L.115). Members would recall the title of article 12, “Consent to be bound expressed by ratification, acceptance or approval”. It was difficult to find appropriate language to describe the point in time at which the instrument or notification took effect and the phrase “becomes effective” had been criticized on the ground that it might cast doubt on the provisions of article 12 and of certain other articles. In the interests of greater precision, the Drafting Committee was now proposing the phrase “establish the consent of a State to be bound”.

73. Mr. ROSENNE thanked the Special Rapporteur and the Drafting Committee for the care with which the proposal he had made at the seventeenth session had been considered. He was satisfied that the problem had been examined from all angles, including entry into force, termination and reservations. He was still inclined to believe that in the long run it would be beneficial to introduce, as a standard practice applicable to general multilateral treaties, a short interval before the exchange or deposit of instruments or a notification to a depositary took effect in regard to the States for which it was intended; but he recognized that, for the time being, no further progress could be achieved than what was suggested in the Drafting Committee’s text. That being so, he no longer wished to maintain his abstention in the vote on article 19, paragraph 5, which had taken place at the 816th meeting, the reservation he had made on article 22 at the same meeting,¹⁸ or the other reservations he had entered during the seventeenth session on the

question of the moment from which an act relating to a treaty took effect in relation to the other parties to a multilateral treaty.

74. Mr. AGO said that he approved of the substance of the article. From the point of view of drafting, the word “Notification” in sub-paragraph (c) was not clear; it should be amended to read “Their notification” or “Notification of the fact that those instruments have been established”.

75. Sir Humphrey WALDOCK, Special Rapporteur, proposed that the word “Notification” should be replaced by the words “Their notification”.

It was so agreed.

76. The CHAIRMAN put article 15 to the vote, as amended.

Article 15, as amended, was adopted by 17 votes to none.¹⁹

ARTICLE 23 (Entry into force of treaties) [21]²⁰

77. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 23:

“*Entry into force of treaties*”

“1. A treaty enters into force in such manner and upon such date as it may provide or as the States which adopted its text may agree.

“2. Failing any such provision or agreement, a treaty enters into force as soon as the consent of all the States which adopted its text to be bound by the treaty has been established.

“3. When the consent of a State to be bound is established after a treaty has come into force, the treaty enters into force for that State on the date when its consent was established unless the treaty otherwise provides”.

78. The text of paragraph 1 was identical with that approved during the first part of the seventeenth session (A/CN.4/L.115).

79. In paragraph 2, the words “as soon as the consent of all the States which adopted its text to be bound by the treaty has been established” had been substituted for the words “as soon as all the States which adopted its text have consented to be bound by the treaty”. He did not think that change was very felicitous in English.

80. The only change made in paragraph 3 was consequential on the deletion of the phrase “becomes operative” in article 15.

81. Mr. REUTER said that, although the article as a whole was acceptable to him, he supported Mr. Briggs’ comment on paragraph 2, the French text of which should read “... *dès que le consentement à être lié par le traité a été établi pour tous les Etats qui ont adopté son texte*”.

82. Mr. TSURUOKA said that the expression “Failing any such provision or agreement” in paragraph 2 was not very satisfactory; it was not clear what provision or agreement was meant.

¹⁹ For a later amendment to the title and text of article 15, see 892nd meeting, para. 91.

²⁰ For earlier discussion, see *Yearbook of the International Law Commission, 1965*, vol. I, 789th meeting, paras. 59-74, 790th meeting, paras. 1-70, 814th meeting, paras. 31-37, and 816th meeting, paras. 72-79.

¹⁶ *Ibid.*, 803rd meeting, paras. 38 *et seq.*

¹⁷ *Ibid.*, 803rd meeting, para. 30.

¹⁸ *Ibid.*, p. 284, paras. 51 and 63.

83. Mr. AGO said that the imprecision was partly due to the fact that in paragraph 1, as in article 72 which the Commission had just adopted, reference was made, first to an agreement between the parties expressed by a provision of the treaty and, secondly, to an agreement concluded by the parties in some other way. The Special Rapporteur had said that it would be necessary to review all the articles in which those ideas appeared and make them uniform.

84. The CHAIRMAN, speaking as a member of the Commission, pointed out that the words "any such provision" in paragraph 2 referred to the expression "in such manner and upon such date as it may provide" in paragraph 1, while the word "agreement" in paragraph 2 referred to the concluding words of paragraph 1 "or as the States which adopted its text may agree". The relationship might be brought out more clearly.

85. Mr. AMADO said he agreed that the link between the two paragraphs of the article should be made clearer by expanding the expression "Failing any such provision or agreement" in paragraph 2. Furthermore, the word "*modalités*" in paragraph 1 of the French text was too sophisticated in comparison with the English word "manner".

86. Sir Humphrey WALDOCK, Special Rapporteur, said he doubted whether the English text of paragraph 1 could be made any clearer. The parallel between paragraphs 1 and 2 had been rendered with precision and the insertion of the word "otherwise" would not serve any purpose. The word "or" was clearly being used as a disjunctive and could lead to no misunderstanding. Similar wording had been approved by the Commission on no less than three occasions without provoking any criticism.

87. Mr. AGO said that the problem of the parallel between the two paragraphs arose only in the French text. In paragraph 1 of that text, the words "*ou convenues par les Etats*" should be replaced by the words "*ou par un accord des Etats*". Paragraph 2 should begin with the words "*A défaut de telles dispositions ou d'un tel accord*".

88. The CHAIRMAN put article 23 to the vote with the amendments to the French text proposed by Mr. Reuter and Mr. Ago.

*Article 23, with those amendments to the French text, was adopted by 17 votes to none.*²¹

The meeting rose at 1 p.m.

²¹ For later amendments to the title and text of article 23, see 887th meeting, para. 68, and 892nd meeting, para. 109.

885th MEETING

Wednesday, 6 July 1966, at 11 a.m.

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

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

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of articles submitted by the Drafting Committee.

ARTICLE 29 (*bis*) (Notifications and communications)[73]¹

2. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the following new text was proposed for article 29 (*bis*):

"Notifications and communications"

"Unless the treaty or the present articles otherwise provide, any notification or communication to be made by any State under the terms of the treaty or of the present articles:

(a) Shall be transmitted

(i) if there is no depositary, directly to the States for which it is intended;

(ii) if there is a depositary, to the latter;

(b) Shall be considered as having been made by the State in question upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary."

3. The Drafting Committee had decided not to incorporate a rule stating when a notification would be regarded as operative for the recipient State, as had been proposed during the discussion.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that some members had favoured a provision that would allow for a short interval between the time a notification or communication was made and the time it came into effect for the other State or States. The Drafting Committee had considered the possibility of introducing say, a thirty-day rule, in order to meet that point, but after careful examination it had concluded that the eventuality, if it had to be covered at all, was more likely to arise under article 23, dealing with the entry into force of treaties. The general view in the Drafting Committee had been that the existing practice was for instruments of, for example, ratification, accession, acceptance or approval to come into force at the moment they were deposited or notified. In view of the decision taken at the previous meeting not to introduce a specified time-limit in article 23, the new article 29 (*bis*) was designed simply to cover the question of when a notification or communication was to be regarded as having been made or received. The article was of a procedural character and ought to be placed among the provisions dealing with the functions of a depositary.

5. Mr. AGO drew attention to a drafting error in the French text of the introductory sentence which had

¹ For earlier discussion, see 862nd meeting, paras. 2-74.

survived from an earlier version. The words “*par un Etat*” should be substituted for the words “*à un Etat*”.

6. Mr. TSURUOKA said that two points needed clarifying. First, he did not understand why the phrase “under the terms of the treaty or of the present articles” had been used instead of the phrase “under the terms of the present articles”. Only certain types of notification affecting the existence of a treaty, such as modification, reservations, withdrawal or denunciation, were contemplated: the Commission had not intended to deal with all the different kinds of notification which the parties might have to make in applying a treaty. Thus the words “of the treaty” might unduly extend the scope of the article.

7. For instance, article 13 of the Montreux Convention regarding the Régime of the Straits² laid down that “The transit of vessels of war through the Straits shall be preceded by a notification given to the Turkish Government ‘through the diplomatic channel’”, despite the fact that there was a depositary, the French Government. Thus the Turkish Government could be notified directly without using the depositary as an intermediary. If that Convention had not contained the clause “through the diplomatic channel”, would it be necessary, under the terms of article 29 (*bis*), to transmit the notification through the French Government as the depositary rather than directly to the Turkish Government?

8. His second question related to the words “or, as the case may be, upon its receipt by the depositary” in sub-paragraph (*b*) of the Drafting Committee’s new text. The purpose was, of course, to indicate that the obligation to notify was discharged once the notification had been received by the depositary and there was no question of any legal effect. A reading of the text, however, inevitably suggested that a notification might have a legal effect in that it might be invoked against other States. His doubts had arisen after comparing that text with the text of article 19, paragraph 5 (A/CN.4/L.115), according to which “. . . a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later”. From which date would the twelve-month period run? Did a State for which notification of a reservation was intended have to reply within twelve months reckoned from the date of the receipt of the notification by the depositary and not from the date of receipt by that State?

9. Sir Humphrey WALDOCK, Special Rapporteur, said that many treaties contained provisions fixing time limits for the submission of various kinds of instruments. During the discussion of the kind of difficulty mentioned by Mr. Tsuruoka, some members had expressed concern about the possibility of a depositary, whether a State or an international organization, neglecting its duties and failing to transmit a communication as soon as it had been received. Mr. Tsuruoka was, of course, right in saying that a difficulty might arise when the treaty itself imposed a time-limit for registering an objection to a reservation made by another State. But that very real

point of substance was surely adequately covered by the provisions of article 15, as approved by the Commission at the previous meeting. Admittedly, certain legal effects might flow from the new article 29 (*bis*), but it was believed to reflect existing practice and it would be hard to devise a sufficiently detailed text to cover all the possible situations that might occur. Furthermore, the practice of States themselves when acting as depositaries varied widely. The possibility of serious failures in the exercise of depositary functions should not be exaggerated and, if they took place, the matter would have to be settled in the light of the circumstances.

10. The practical problems to which Mr. Tsuruoka had drawn attention had certainly not been overlooked by the Drafting Committee, but the proviso “Unless the treaty or the present articles otherwise provide” should be a sufficient safeguard against abuse. If a treaty expressly provided for a depositary, but a State nevertheless despatched a notification simultaneously to the depositary and to another State, any dispute over the time when the notification actually took effect with respect to that other State could be settled under the provisions of the new article 29 (*bis*).

11. Mr. AGO said that, in the particular case of an objection to a reservation, the rule to be applied was that set forth in article 19, paragraph 5, which clearly specified that a reservation was considered to have been accepted by a State if it had raised no objection by the end of a period of twelve months after it had been notified of the reservation. The operative date was therefore not that on which the notification of the reservation had reached the depositary but the date on which notification had been received by the State entitled to make objection.

12. Mr. TSURUOKA said he found Mr. Ago’s interpretation very ingenious but did not feel sure that it could really be justified within the ordinary meaning of the terms of article 29 (*bis*). When there was a depositary, a notification was considered as having been made by the notifying State upon its receipt by the depositary. Since the notification was thus deemed to have been made, how could it be said that the State for which it was intended had not been notified?

13. Mr. BARTOŠ pointed out that he had raised that very question on a number of occasions. But as the replies he had received failed to resolve the very real difficulties which were constantly arising, or to cover all eventualities, he would have to abstain in the vote on article 29 (*bis*).

14. Sir Humphrey WALDOCK, Special Rapporteur, said that he agreed with Mr. Ago that under article 19, paragraph 5, the notification would take effect for the State that would be bound by its terms as soon as it had been received by that State. Many multilateral treaties contained time limits and the problems to which Mr. Tsuruoka had drawn attention could arise in other circumstances, for example, over a notice of termination. However, careful examination of practice had not revealed much evidence of such provisions causing difficulty.

15. Mr. AGO said that, in order to meet the legitimate concern over notification of an objection to a reservation—the only concrete practical problem which arose—the

² League of Nations, *Treaty Series*, vol. CLXXIII, p. 223.

Commission might consider making article 19, paragraph 5, even more explicit by stating that the period specified in that paragraph would run from the date on which a State was notified of the reservation either by the State making the reservation or by the depositary.

16. Mr. TSURUOKA said that, while Mr. Ago's suggestion solved the problem as far as that particular case was concerned, other cases might arise, particularly if the words "under the terms of the treaty" were retained in article 29 (*bis*). The simplest course would be to delete the last part of sub-paragraph (*b*). The specific issue involved in the preliminary objections in connexion with the *Case concerning right of passage over Indian Territory*³ was that of acceptance of the compulsory jurisdiction of the International Court of Justice, and, in that instance, a mere notification to the depositary had been able to produce legal effects without any injury to the interests of the other party. It was, however, dangerous to derive a general rule from that particular case.

17. Mr. PESSOU said that it was hard to see what serious difficulties could arise in connexion with article 29 (*bis*). In private law there were two conflicting principles, one that a communication took effect from the date of its despatch, and the other that it took effect from the date of its receipt. If the problem which had arisen with regard to article 29 (*bis*) related to the application *mutatis mutandis* of one of those two principles and the question was that of determining at what point a notification became legally effective, he thought the solution presented no difficulty. The practice of States was to consider an instrument as legally effective from the date on which it was despatched, but, as a general rule, it was agreed to adopt, instead, the date of receipt by the State for which it was intended. The wording as amended by Mr. Ago might therefore meet the situation.

18. Mr. BARTOŠ said that, if the last part of sub-paragraph (*b*) were retained, there was no guarantee that the State for which the modification was intended would be aware that it had been made.

19. Statistics showed that even in the United Nations several months at least elapsed between a notification made to the Secretary-General and its transmission to the other parties. And yet United Nations procedure was in fact the most satisfactory—the practice of some depositary States was much less so. In the interval between the conclusion of a treaty and the receipt of notifications, the attitude of the depositary towards the treaty might change, leading it to disregard its obligations as depositary.

20. He would be in favour of the text of the article if a practice existed whereby a notification received by a depositary was automatically transmitted on the date it was received. As matters now stood, the Commission appeared to be creating the legal fiction that the States concerned were aware of the notification, whereas in fact they remained unaware of it for a certain period of time, a period which might sometimes be extended deliberately. In the United Nations, delays were not deliberate: the Secretariat received some thirty notifications daily and had not sufficient staff to retransmit them immediately. In that respect, the Secretary-General's

obligation to draw up every two or three days a list of the letters received by him acted as a palliative, because it enabled permanent missions to find out from the Office of Legal Affairs what notifications had been received. But that indirect method of information was no substitute for notification. In the case of some depositary States, however, delays in transmission were deliberate and were due to an unwillingness to give effect to the notification.

21. He feared that the use of the words "upon its receipt by the depositary" might be taken to mean that the State concerned was deemed to have received the notification upon its receipt by the depositary. Since he was not prepared to vote for a legal fiction, he proposed to abstain.

22. Mr. ROSENNE said that the difficulties to which article 29 (*bis*) had given rise were not primarily legal in character, but were mainly due to the great diversity in the administrative practices of States and depositaries. As he had indicated at the previous meeting, he was satisfied that it was not feasible at that stage to frame a general rule governing the receipt of notifications and communications as distinct from a rule about the making of notifications and communications and the time when they became operative in relation to the other State.

23. After long reflection on the problems involved, he had come to the conclusion that, in the introductory part of its report on the law of treaties, the Commission ought to draw the attention of the international community to the need for a much greater degree of administrative co-ordination in the exercise of depositary functions. There had been a very marked improvement in the depositary practice of the Secretary-General of the United Nations during the past five or six years, but the same could not be said of all the specialized agencies, some of which could even be charged with administering depositary services without regard for the general law of treaties and the usual practices of Ministries of Foreign Affairs.

24. It would be most useful if the General Assembly could take some action in the matter. It would certainly be necessary for it to review its regulations on the registration and publication of treaties and international agreements as well as its resolutions on reservations to general multilateral treaties, as the codification of the law of treaties progressed. In the meantime, he would vote in favour of the Drafting Committee's text of article 29 (*bis*) in the belief that the Commission could not achieve more at that stage.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that it was by no means easy to resolve the problem that had arisen over sub-paragraph (*b*). Whichever approach was adopted, an entirely symmetrical formula was probably impossible. Even if an explicit rule regarding the time at which a notification or communication was to be regarded as having been received was inserted in article 29 (*bis*), the problem of a depositary's failure to transmit the notification or communication promptly would still not have been overcome. Such a failure, if complete, might need to be dealt with in an entirely different context, that of responsibility, jurisdiction or rights and obligations. Indeed, just as much difficulty might be caused by introducing a rule that was generous

³ *I.C.J. Reports 1957*, p. 125.

to the recipient State as by the kind of rule being proposed by the Drafting Committee in its new text.

26. Another alternative might be to abandon hope of dealing with the point at all and to delete sub-paragraph (b) altogether. It would, however, be a pity to jettison what must be regarded at least as a useful element in the article, since it reflected existing practice and was not unduly stringent.

27. Article 29 (*bis*) could be rendered a little more strict if Mr. Bartoš' idea were followed, but the practical difficulties were inherent in the nature of things and could not be avoided. Personally he could vote for the Drafting Committee's text as it stood, but the Commission might wish the Drafting Committee to consider it once again in order to see whether sub-paragraph (b) could be satisfactorily modified.

Mr. Yasseen took the Chair.

28. Mr. AGO said that he was concerned at the misunderstanding which seemed to persist with regard to article 29 (*bis*), as shown by the remarks of Mr. Tsuruoka and Mr. Bartoš, although it had been made perfectly clear that the article dealt exclusively with the rights and obligations of the notifying State and not with those which might arise as a result of the notification for the State for which the notification was intended. The sole purpose of sub-paragraph (b) was to indicate that a State which had an obligation to make a notification was not relieved of its obligation as soon as that notification had been sent; in point of time, it could be considered as having discharged that obligation when the notification was received by the addressee, whether that addressee was a State or the depositary.

29. He would be opposed to article 29 (*bis*), if sub-paragraph (b) were to be interpreted in the sense in which Mr. Bartoš understood it, namely that as soon as a notification was received by the depositary, that notification became effective vis-à-vis the State for which it was intended. It would be preferable to delete sub-paragraph (b) rather than run the risk of its being misinterpreted in that manner.

30. Mr. PESSOU pointed out that in practice, a Ministry of Foreign Affairs which received an important communication invariably acknowledged its receipt in terms which reproduced and confirmed the contents of the communication. That practice might provide a means of overcoming the difficulty.

31. Mr. BARTOŠ said that article 29 (*bis*) should be considered from two different angles. As Mr. Ago had rightly pointed out, that article specified the moment at which the obligation to make a notification was discharged. If the article had merely stated that the moment in question was that of the receipt of the notification either by the State for which it was intended, if made directly to that State, or by the depositary on behalf of that State, he would have had no objection since, in general international law, the depositary might be regarded as an address for service designated by the parties.

32. But, like Mr. Tsuruoka, he considered that article 29 (*bis*) should also specify at what moment a State entitled to receive a notification was deemed to have received it. It was necessary, in that connexion, to consider two possibilities. The first was that of a noti-

fication made directly to the State concerned; in that case, the moment at which the notifying State was considered as having made the notification and the moment at which the State for which it was intended was deemed to have received it would coincide and would be the moment when the notification was received. The second case was that of a notification made to a depositary. In that case the two moments would not coincide: as soon as the notification had been received by the depositary, the notifying State was considered as having discharged its obligation, but the State for which the notification was intended could not be considered as having received it, since it had not yet come to its knowledge. In such a case, the provisions of article 29 (*bis*) were unsatisfactory.

33. He would not vote against article 29 (*bis*), because its provisions dealt adequately with the first aspect of the question, relating to the obligation to make a notification, but would have to abstain, because the second aspect had not been taken into consideration.

34. Mr. TUNKIN said that the point raised by Mr. Tsuruoka and Mr. Bartoš had not escaped the attention of the Drafting Committee, but it had not been possible to find an adequate formulation to cover it. The question dealt with in sub-paragraph (b), of course, had two aspects, the first relating to the State making the communication and the second to the State to which the communication was made. Only the first aspect was covered by the Drafting Committee's text. The other aspect raised a general problem of international law of wider scope than the law of treaties, that of determining when a communication would be deemed to have been received by a State. A possible solution might be to delete sub-paragraph (b) altogether and confine article 29 (*bis*) to procedural provisions.

35. Mr. BARTOŠ said that he agreed that a solution would be to delete sub-paragraph (b) and to incorporate the words "shall be transmitted" in the opening sentence. A gap would then be left in the provisions of the article but that would be preferable to creating a dangerous legal fiction.

36. The CHAIRMAN, speaking as a member of the Commission, stressed the importance of the article. Provision for notification was made in a number of articles of the draft and it was therefore necessary to determine to whom and in what manner notifications should be made. The prevailing view in the Commission was that article 29 (*bis*) did not deal with any detrimental effects that the notification might have on the State for which it was intended.

37. Sub-paragraph (a) was useful and clear. Sub-paragraph (b) dealt with the important question of determining the moment at which the notification would be considered as having been effected by the State whose duty it was to make it; that sub-paragraph had the merit of stressing that a notification was deemed to have been made not when it was sent but when it was received by the State for which it was intended.

38. A slight risk was, however, involved: as Mr. Tsuruoka, Mr. Bartoš and Mr. Tunkin had pointed out, sub-paragraph (b) could be taken to mean that a notification could be invoked against the State for which it

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so decided.*⁵

The meeting rose at 1 p.m.

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

886th MEETING

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

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

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

⁴ Para. 29.

Organization of future work

[Item 3 of the agenda]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

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

Mr. Tunkin's proposal was adopted.

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Date and place of the nineteenth session

[Item 4 of the agenda]

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

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

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

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

It was so agreed.

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

Law of Treaties

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

(*resumed from the previous meeting*)

[Item 1 of the agenda]

REARRANGEMENT OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

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

Part I. Introductory provisions

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

Part II. Conclusion and entry into force of treaties

Section I—Conclusion of treaties by States

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

Section 2—Reservations to multilateral treaties

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

Section 3—Entry into force

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

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

Part III. Observance, application and interpretation of treaties

Section 1—Observance of treaties

- Article 55. *Pacta sunt servanda*

Section 2—Application of treaties

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

Section 3—Interpretation of treaties

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

Section 4—Treaties and third States

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

Part IV. Modification of treaties

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

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

Section 1—General provisions

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

Section 2—Invalidity of treaties

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

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

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

Section 3—Termination and suspension of the operation of treaties

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

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

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

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

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

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

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

Article 43. Supervening impossibility of performance

Article 44. Fundamental change of circumstances

Article 44. Severance of diplomatic relations

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

Section 4—Procedure

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

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

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

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

Article 52. Consequences of the invalidity of a treaty

Article 53. Consequences of the termination of a treaty

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

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

Part VI. Miscellaneous provision

Article Z. Case of an aggressor State

Part VII. Depositaries, notifications and registration

Article 28. Depositaries of treaties

Article 29. Functions of depositaries

Article 29 (*bis*). Notifications and communications

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

Article 25. Registration and publication of a treaty

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

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

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

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

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

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

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

Part I. Introductory provisions

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

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

Mr. Yasseen took the Chair.

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

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

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

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

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

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

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

Mr. Amado's proposal was adopted.

Part I, as thus amended, was approved.

Part II. Conclusion and entry into force of treaties

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

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

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

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

It was so agreed.

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

It was so agreed.

Part II, as thus amended, was approved.

Part III. Observance, application and interpretation of treaties

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

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

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

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

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

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

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

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

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

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

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

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

Part III was approved.

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

Part IV. Modification of treaties

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

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

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

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

Part IV, as thus amended, was approved.

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

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

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

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

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

Part V was approved.

Part VI. Miscellaneous provision

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.**

Part VI, as thus amended, was approved.

Part VII. Depositaries, notifications and registration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Special Rapporteur's amendment was adopted.

Part VII, as thus amended, was approved.

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

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

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

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

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

It was so agreed.

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

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

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

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

The Drafting Committee's recommendation was approved.

The meeting rose at 1 p.m.

887th MEETING

Monday, 11 July 1966, at 3 p.m.

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

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldoack.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 1 (Use of terms) [2]

Paragraph 2

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

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

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

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

3. Some members of the Commission had expressed the view that that paragraph should be dropped, but certain governments in their comments now indicated that they would prefer to keep a saving clause on those lines. The Drafting Committee had examined the question and now proposed the following formulation for paragraph 2 of article 1, now entitled "Use of terms":

"2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."

4. Sir Humphrey WALDOCK, Special Rapporteur, said that, in their comments, some Governments had wanted the Commission to go even further and make the saving clause apply also to the actual procedures in internal law. In 1965, he had himself suggested a formula to meet that wish² but the Commission had not been prepared to accept such an extension of the application of the clause.³ The Drafting Committee had therefore now proposed a reservation which referred only to the use of terms.

5. The CHAIRMAN, speaking as a member of the Commission, said that there was every justification for the paragraph, because it was possible in the same legal system to use the same terms with different meanings. The question had been the subject of lengthy discussion in connexion with private international law and it had been generally agreed that terms used in the rules of private international law could have a different meaning from terms used in the rules of internal law. There was therefore all the more reason for making it clear that the terms used in the draft articles were concerned only with the future convention on the law of treaties and in no way prejudiced the use of those expressions in the legal system concerned.

6. Mr. BARTOŠ said that he welcomed the provision, which seemed to him necessary. A convention, once ratified, became an integral part of the law of the country which had ratified it and in that case the expressions used acquired some currency, though only to the extent necessary for the purposes of the convention, whence the two provisos in the paragraph, the second of which referred to the internal law of a State; in his view that was a wise limitation.

7. He would vote for paragraph 2, subject to a review of the French text, which was somewhat inelegant.

8. The CHAIRMAN put to the vote paragraph 2 of article 1 on the understanding that the French text would be reviewed.

Article 1, paragraph 2, was adopted by 13 votes to none.

ARTICLE 29 (*bis*) (Notifications and communications)[73]⁴

9. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following redraft for article 29 (*bis*):

² See *Yearbook of the International Law Commission, 1965*, vol. II, document A/CN.4/177.

³ *Op. cit.*, vol. I, 778th meeting, paras. 12-59, and 820th meeting, para. 23.

⁴ For earlier discussion, see 885th meeting, paras. 1-54.

"Notifications and communications"

"Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State under the terms of the treaty or of the present articles shall:

(a) if there is no depositary, be transmitted directly to the States for which it is intended; or if there is a depositary, to the latter;

(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State for which it was intended only upon the latter State's having been informed by the depositary in accordance with article 29, paragraph 1(e)."

10. The redraft contained a new sub-paragraph (c) that referred back to article 29, paragraph 1(e), where it was specified that the functions of the depositary included "Informing the contracting States of acts, communications and notifications relating to the treaty". The purpose of sub-paragraph (c) was to meet the concern of some members over the point of time at which a State would be legally regarded as having received a notification in those cases where there was a depositary.

11. Mr. TSURUOKA said he was glad the Drafting Committee had taken account of the misgivings expressed by Mr. Bartoš and himself at the 885th meeting. Sub-paragraph (c) undoubtedly improved the article as a whole, but he wished to propose the deletion from the introductory sentence of the words "of the treaty or". If the words in question were not deleted, the only situation that would not be covered by the article, in cases where there was a depositary, was the situation where the treaty itself expressly stated that any notification should be made direct to the parties. If the intention was that it was only after a treaty had been interpreted that such a communication should be made directly to a party and not through the depositary, the proviso "Except as the treaty or the present articles otherwise provide" was insufficient.

12. Article 39, paragraph 1, stated that a treaty which contained no provision regarding its termination and which did not provide for denunciation or withdrawal was not subject to denunciation or withdrawal unless it otherwise appeared that the parties intended to admit the possibility of denunciation or withdrawal. The word "appears" seemed to mean that an attempt would have to be made to see whether, by means of interpretation, it could be established whether denunciation was permissible. Article 29 (*bis*) on the other hand stated: "Except as the treaty or the present articles otherwise provide", a stipulation which, as he interpreted it, only contemplated one situation, namely, that where there was a depositary and where the treaty provided directly and positively that a State which was required to make a notification must address it directly to the parties.

13. A wide variety of notifications was to be found in treaties. For instance, article 11, paragraph 3 of the Convention on Consular Relations⁵ referred to a noti-

⁵ United Nations Conference on Consular Relations, *Official Records*, vol. II, p. 177.

fication regarding the appointment of the head of a consular post. Article 19, paragraph 2 of that Convention⁶ required the sending State to notify to the receiving State the full name, category and class of all consular officers, other than the head of the post. There was also a reference to notification in article 19 of the Convention on Diplomatic Relations.⁷ Was it suggested that all those notifications had to be transmitted through the depositary? Yet that was what a literal interpretation of article 29 (*bis*) implied.

14. The retention of the words "of the treaty" in the third line of the introductory sentence might lead to misunderstanding, whereas, if it were deleted, no harm would be done so far as the purpose of the article was concerned.

15. If the Commission agreed with him, it would also be necessary to make a slight change in the English text of article 19, paragraph 5, and to replace the words "after it was notified" by the words "after its having received the notification". In addition, it would be necessary to insert in article 51, paragraph 2, between the words "three months" and "except in cases of special urgency", the words "from the date on which the parties received the notification".

16. Mr. BARTOŠ said the Special Rapporteur and the Drafting Committee were to be commended for having worded sub-paragraph (*c*) in such a way as to distinguish between two separate ideas, namely, the duty to make the notification and the effect of the notification on the State to which it was addressed.

17. Referring to Mr. Tsuruoka's objection, he said that he (Mr. Bartoš) understood the text in a different way. For him, the words "under the terms of the treaty"—which he considered necessary—indicated a general rule which should be applied when there was no special provision in the treaty. There were, in fact, three rules which could be applied in the present case—the provisions of the treaty as between the parties in a specific case; the rules contained in the draft articles on the law of treaties; and the general rule stipulating that a special rule must be applied. He approved those three rules, which were in accordance with practical requirements.

18. Mr. de LUNA said that he could accept sub-paragraph (*c*) as a compromise solution although it did not reflect existing practice. That practice was to regard the depositary as more than a mere letter-box; by a sort of legal fiction, the receipt of a notice by the depositary was considered as a notification to all the parties. The advantage of that system was that it avoided having a great many different dates on which a notification would become operative; the date would be the same for all the parties. Under the system in sub-paragraph (*c*), the operative date would be that on which each State concerned had been informed by the depositary; in a treaty with a large number of parties, there would be a large number of different dates for the various parties.

19. He had some doubts about the legal position between the moment when, under sub-paragraph (*b*), a notice was considered as having been made by the

notifying State, and the moment when, under sub-paragraph (*c*), it was to be considered as received by the State for which it was intended, and would be glad to have some clarification on that point.

20. Mr. TSURUOKA said that there were three ways in which the question could be settled. Either the treaty stated rules that were different from those which the Commission was considering, or it stated no rules, or again it stated rules similar to or identical with those of the Commission. Article 29 (*bis*), however, only provided for exceptions in the first situation; it contained no provision covering the second situation, the situation where no rules were stated by the treaty. It provided that the notification or communication was to be made to the parties, but according to the proviso, the notification would have to be addressed to the depositary, which was what he wished to avoid.

21. Mr. AGO said that perhaps the difficulty to which Mr. Tsuruoka had drawn attention was due to a misunderstanding. The first reference to the treaty in article 29 (*bis*) constituted the normal safeguard, indicating that the rule would apply in cases where the treaty did not state a different rule. The purpose of the second reference to the treaty was to explain exactly what had to be done in cases where a State was responsible for making the notification or communication; it was stipulated that such notification or communication had to be made under the terms of the draft articles, but that it could also be made a responsibility of a State by a provision in the treaty itself. What had to be done in a situation where the treaty required a certain communication or notification to be made other than as the article provided? If the treaty provided not only that a notification had to be made but that it had to be made in a certain way, the case was covered. But if the treaty merely stated that that notification had to be made, and if that notification was of a supplementary nature not provided for in the draft articles but provided for in the treaty, why should not the residuary rule in article 29 (*bis*) apply? If the treaty did not specify how the communication was to be made, it should be possible to apply the general rule.

22. Mr. TSURUOKA said that, in the examples he had cited from the Conventions on consular and diplomatic relations, notification had to be made by a State and all communications and notifications addressed to a party or to the parties; a depositary existed, but there was nothing to show that the notifications had to be transmitted either through the depositary or through the interested parties. On the other hand, a literal interpretation of the introductory sentence of article 29 (*bis*) required any notification or communication to be made through the depositary; that did not seem to have been the intention of the parties to the Convention on Consular Relations, though that intention could only be deduced by interpretation.

23. Mr. BARTOŠ said that the depositary was neither a letter-box nor a general factotum. Many jurists mistakenly believed that a depositary provided a sort of accommodation address for relations between the parties. That was not so: a depositary was only responsible for all the acts necessary to safeguard the effect of a treaty.

⁶ *Ibid.*, p. 178.

⁷ United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 84.

24. It was necessary to differentiate between two kinds of notification; those which covered such matters as reservations and affected the actual substance of the treaty, and those which dealt with questions such as the appointment of a consul or a statement of an intention to open a diplomatic mission, which were not related to the substance of the treaty.

25. Mr. AGO said that, as he understood it, Mr. Tsuruoka's concern was with the situation where, although the treaty made no express provision, a particular intention might result from the interpretation of the treaty. If that understanding was correct, then Mr. Tsuruoka's misgivings were justified, but it seemed to him that the remedy was to make the first reference to the treaty more general; in other words, instead of a reference to the fact that a provision of the treaty might otherwise provide, what was needed was some such formula as "unless a different method is provided for by the treaty or by the present articles".

26. Sir Humphrey WALDOCK, Special Rapporteur, said that in the examples given by Mr. Tsuruoka from the two Vienna Conventions, there would appear to be no doubt that the notification should be made by one party to another directly. Those cases would normally be covered by the interpretation of the terms of the treaty in accordance with their ordinary meanings.

27. In order to meet the point in cases that were less clear, he would suggest that the opening phrase of article 29 (*bis*) be amended to read:

"Except as the present articles otherwise provide, or as may otherwise appear from the provisions of the treaty, any notification or communication to be made by any State . . .".

28. Mr. TUNKIN said that the discussion had revealed the existence of a very real difficulty. There were two kinds of notifications: the first was notifications which concerned all the parties to a treaty, such as a notice of withdrawal, or a proposal for the amendment of the treaty, and the second was notifications relating to purely bilateral disputes between two parties to the treaty. It should be made clear that article 29 (*bis*) concerned only the first type of notifications, and that could perhaps be done by making the opening phrase refer to "any notification or communication intended for all the parties to the treaty".

29. Mr. TSURUOKA said that either of the two suggested solutions would be satisfactory to him.

30. Mr. ROSENNE said that the point raised by Mr. Tunkin could perhaps be met by inserting the word "required" between the words "notification or communication" and the words "to be made". That language would be closer to the French version and would exclude the bilateral type of communication; it would make it clear that the intention was to refer to those communications which were required to be made under the draft articles.

31. The CHAIRMAN, speaking as a member of the Commission, said that in his view the question was manifestly one of a notification affecting the law of treaties and the future of the treaty itself: it was a question of a notification relating to such questions as accession, ratification or reservations. Clearly, it had nothing to do

with any notification called for by the terms of a particular treaty and affecting its application.

32. It would hardly be sufficient just to add the word "required" to the English text, for there were notifications that were required and were therefore compulsory, such as the communication of the name of an ambassador under the Convention on Diplomatic Relations, to which the article was not intended to refer and which did not affect the existence of the treaty.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne's suggestion would not meet the situation. Some of the notifications covered by article 29 (*bis*) were not, strictly speaking, required to be made; a State would give notice of termination because it wished to terminate the treaty rather than because it was required to do so.

34. There were only two possibilities open to the Commission: either to drop the reference to the terms of the treaty in the opening phrase, or to adopt language such as that which he himself had proposed.

35. Mr. BRIGGS said that he would regret the deletion of the reference to the terms of the treaty, but would be prepared to accept the wording proposed by the Special Rapporteur.

36. With regard to the words "may otherwise appear from the provisions of the treaty" in the Special Rapporteur's proposal, he pointed out that the Drafting Committee would, at its next meeting, be considering the use of that and similar expressions throughout the draft articles.

37. Mr. CASTRÉN said that the Special Rapporteur's second solution, which was based on Mr. Ago's suggestion, was acceptable to him.

38. Mr. TUNKIN said that he was not certain that the language proposed by the Special Rapporteur would meet the point. In some cases, the other course would not appear from the provisions of the treaty; they would be cases where logic demanded that the matter should be placed on a bilateral basis without recourse to an intermediary.

39. He had in mind cases such as that of the violation of a treaty; in such an instance, the exchange of notes between the two States concerned should take place on a bilateral basis. There would, however, be nothing in the treaty to indicate that fact.

40. Mr. AGO said he believed that the difficulty mentioned by Mr. Tunkin could be settled simply by interpretation, in which common-sense was an indispensable element. But since the article was mainly concerned with communications and notifications relating to the existence of the treaty and not with those relating to the application of the treaty, the simplest course might be to adopt Mr. Tsuruoka's proposal to delete the words "of the treaty or" in the third line, thereby limiting the scope of the article to notifications provided for in the draft articles and leaving the other problems to be solved by interpretation of the treaty.

41. Mr. TUNKIN said he agreed that, in the circumstances, perhaps the best solution would be to drop the reference to the terms of the treaty.

42. Sir Humphrey WALDOCK, Special Rapporteur, said that he would be prepared to accept that solution, which would make article 29 (*bis*) refer only to notifications to be made under the draft articles themselves. The question of notifications or communications under the terms of the treaty itself would then be left to the interpretation of the treaty.

43. The CHAIRMAN put article 29 (*bis*) to the vote, subject to the deletion of the words "the terms of the treaty or of".

Article 29 (bis), as thus amended, was adopted by 16 votes to none.

RECOMMENDATIONS OF THE DRAFTING COMMITTEE
CONCERNING USE OF TERMS AND
CO-ORDINATION OF TERMINOLOGY

44. The CHAIRMAN invited the Commission to consider the Drafting Committee's recommendations on the use of certain terms in the draft articles.

45. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Committee had been disturbed to find that, over a period of five years, the Commission had in some instances used the same terms with different meanings in different articles. The Committee had considered, in particular, the use of the terms "Party", "Contracting State", "Negotiating State", and "States concerned".

46. Article 1 (*f*) (*bis*) defined the term "party" as used in the draft articles but no definition had yet been adopted for the term "contracting State", which appeared in a considerable number of articles. The Committee had noted that the use of the latter term in the articles was far from uniform and that it covered three distinct categories of States: States which had consented to be bound by the treaty, States which had taken part in the drawing up and adoption of the text, and States entitled to become parties to the treaty. The Committee had also noted that the term "States concerned", although sometimes used with the meaning "States in question", was also used in certain cases to indicate the States which had taken part in the drawing up and adoption of the text. The Committee had concluded that the use of the term "States concerned" should be confined to cases where it was the equivalent of the term "States in question". It had further concluded that four distinct categories of States should be distinguished in the drafting of the articles and identified by a uniform terminology. First, "negotiating State", should be defined in article 1 as meaning "any State which took part in the drawing up and adoption of the text of the treaty"; secondly, "State entitled to become a party to the treaty", should be used where appropriate but did not need a definition in article 1; thirdly, "contracting State" should be defined in article 1 as meaning "any State which has consented to be bound by the treaty, whether or not the treaty has entered into force"; and fourthly, "party" should be defined in article 1 as meaning "any State which has consented to be bound by a treaty and for which the treaty is in force".

47. "Negotiating States" required to be distinguished from both "contracting States" and "parties" in certain contexts, notably whenever an article spoke of

the intention underlying the treaty. "States entitled to become parties" was the appropriate term in certain paragraphs of article 29. "Contracting States" required to be distinguished both from "negotiating States" and "parties" in certain contexts where the relevant point was the State's expression of consent to be bound independently of whether the treaty had yet come into force. As to the term "party", the Commission had already decided that, in principle, that term should be confined to States for which the treaty was in force. The Committee had noted that in certain articles, for example article 52, where the invalidity of the treaty was in question, a doubt might appear to exist as to the conformity of the Commission's use of the term in the article with the definition which it had adopted. The Drafting Committee had considered, however, that if the wording of the article specifically attached the term "party" to the "void" treaty and not simply to "the treaty", the use of the term "party" would not be open to objection. The Committee proposed that the definition of "party" adopted at the second part of the seventeenth session should be slightly modified by changing the words "for which the treaty has come into force" to "for which the treaty is in force".

48. The Drafting Committee therefore proposed that the Commission adopt the definitions of "Negotiating State", "Contracting State" and "Party" which he had read out, and further proposed that it adopt a number of consequential amendments to the wording of draft articles 7, 11, 12, 17, 19, 20, 23, 24, 26, 28, 29, 30 (*bis*), 32, 33 and 34 (*bis*), which he would indicate separately.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that "negotiating States" constituted an important category and the definition should be carefully examined. It should also be noted that, in certain contexts, the term "contracting State" covered "party" as well.

50. Mr. AGO said that he wished to draw attention to a change of some importance which the Drafting Committee proposed to make in the definition of a "party". At the second part of the seventeenth session, the Commission had decided that a party was a State "for which the treaty has come into force". The Drafting Committee now proposed that it should be a State "for which the treaty is in force".

51. That was unquestionably a more accurate definition, for it was possible for a treaty to have come into force but to have ceased to be in force. The new definition would have practical consequences for the terms to be used by the Commission in the rest of the articles. Those consequences affected two kinds of situation.

52. The first was the situation where a treaty had apparently come into force but in fact had never done so because it was void *ab initio*. It would be necessary to find language to indicate that a State, though apparently a party to a treaty, was in fact not a party at all.

53. The second was the situation envisaged at several points in the draft, where a State retained certain obligations after it had ceased to be a party to a treaty. The Commission had frequently used the word "party" in such cases, but there again, so as to avoid contradicting itself, it would have to use some other expression such as "a State which has been a party".

54. Mr. RUDA said that the three definitions proposed by the Drafting Committee were satisfactory but he wished to know whether the term "negotiating States" would cover States which, under the terms of article 6, paragraph 2, and even paragraph 3, had been among those that had voted against the adoption of a text requiring a two-thirds majority.

55. Sir Humphrey WALDOCK, Special Rapporteur, said it was a difficult point, but his answer would be in the affirmative. The definition was intended to cover the States responsible for drawing up the text and thus, as a corporate group, for producing the intention to be found in the text. It was not easy to find the right form of words because procedures at international conferences varied widely, and unless a roll-call vote were taken, it might be difficult to establish which States had, in fact, voted against. An explanation should be inserted in the commentary.

56. Mr. RUDA said that that had been his interpretation of the definition. An explanation in the commentary was certainly desirable.

57. Mr. de LUNA suggested that in all three language versions of the new definitions, the words "a State" be substituted for the words "any State".

It was so agreed.

58. The CHAIRMAN put to the vote the Drafting Committee's three definitions as amended.

The Drafting Committee's three definitions were approved by 15 votes to none.

AMENDMENTS CONSEQUENT ON THE ADOPTION OF NEW DEFINITIONS

59. The CHAIRMAN invited the Commission to consider the consequential amendments the Drafting Committee wished to propose to the wording of certain draft articles following the adoption by the Commission of its recommendations concerning the definitions of "negotiating State", "contracting State", and "party".

ARTICLE 7 (Authentication of the text) [9]

60. Mr. BRIGGS, Chairman of the Drafting Committee, said that in the opening paragraph of article 7, the Drafting Committee proposed the substitution of the words "the States participating in its drawing up" for the words "the States concerned" and in subparagraph (a) the substitution of the words "those States" for the words "the States concerned".

The Drafting Committee's amendments to article 7 were approved.

ARTICLE 11 (Consent to be bound by a treaty expressed by signature) [10]

61. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed that, in paragraph 1 (b), the words "the negotiating States" be substituted for the words "the States concerned"; in paragraph 1 (c) the word "negotiation" be substituted for the word "negotiations", and that in paragraph 2 (a) the words "negotiating States" be substituted for the words "contracting States".

The Drafting Committee's amendments to article 11 were approved.

ARTICLE 12 (Consent to be bound by a treaty expressed by ratification, acceptance or approval) [11]

62. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed that in paragraph 1 (b) the words "negotiating States" be substituted for the words "the States concerned" and that in paragraph 1 (d) the word "negotiation" be substituted for the word "negotiations".

The Drafting Committee's amendments to article 12 were approved.

ARTICLE 17 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force) [15]

63. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed that in sub-paragraph (a) the words "these negotiations" be substituted for the words "the negotiations".

The Drafting Committee's amendment to article 17 was approved.⁸

ARTICLE 19 (Acceptance of and objection to reservations) [17]

64. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed first, that in paragraph 2 the words "the negotiating States" be substituted for the words "the contracting States" and that the words "all the parties" be substituted for the words "all the States parties to the treaty" and secondly, that paragraph 4 (c) be redrafted to read: "An act expressing the State's consent to be bound by the treaty and subject to a reservation is effective as soon as at least one other contracting State has accepted the reservation". That new wording did not entail any change of substance. The words "which has expressed its own consent to be bound by the treaty" had been dropped as they were now unnecessary with the adoption of the definition of a contracting State.

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

65. Mr. AGO said that it was impossible to say that an act expressing consent was "subject to a reservation". The intention was to convey the idea that the act expressing consent contained a reservation. It would therefore be better to say "and containing a reservation" instead of "subject to a reservation".

66. Sir Humphrey WALDOCK, Special Rapporteur, said that he was inclined to agree with Mr. Ago. The difficulty was due to the insistence by the French-speaking members of the Commission on the phrase "consent to be bound by the treaty". That being so, the word "which" in the English text approved at the second part of the seventeenth session was ambiguous and had been replaced by the words "and subject to". The problem could be solved, as suggested by Mr. Ago, by substituting the word "containing" for the words "subject to", in the Drafting Committee's new text for paragraph 4 (c).

Mr. Ago's amendment was approved.

⁸ For a later amendment to the text of article 17, see 892nd meeting, paras. 94 and 96.

*The Drafting Committee's amendments to article 19 were approved with that change.*⁹

ARTICLE 20 (Procedure regarding reservations) [18]

67. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that the words "States entitled to become parties to the treaty" be substituted for the words "contracting States" in paragraph 1. That phrase was regarded as more appropriate to describe the recipients of the type of communications in question.

The Drafting Committee's amendment to article 20 was approved.

ARTICLE 23 (Entry into force of treaties) [21]

68. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that the words "negotiating States" be substituted for the words "States which adopted its text" in paragraphs 1 and 2.

*The Drafting Committee's amendments to article 23 were approved.*¹⁰

ARTICLE 24 (Entry into force of a treaty provisionally) [22]

69. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that the words "negotiating States" be substituted for the words "contracting States" in paragraph 1 (b).

*The Drafting Committee's amendment to article 24 was approved.*¹¹

ARTICLE 26 (Correction of errors in texts or in certified copies of treaties) [74]

70. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that the words "negotiating States" be substituted for the words "contracting States" in paragraphs 1, 2 (a) and (c), 4 (a) and 5.

*The Drafting Committee's amendments to article 26 were approved.*¹²

ARTICLE 28 (Depositaries of treaties) [71]

71. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that the words "negotiating States" be substituted for the words "contracting States" in paragraph 1.

The Drafting Committee's amendment to article 28 was approved.

⁹ For a later amendment to the text of article 19, see 892nd meeting, para. 106.

¹⁰ For a later amendment to the title of article 23, see 892nd meeting, para. 109.

¹¹ For a later amendment to the title of article 24, see 892nd meeting, para. 110.

¹² For subsequent reversal of this decision, see 894th meeting, para. 36.

ARTICLE 29 (Functions of depositaries) [72]

72. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that the words "States entitled to become parties to the treaty" be substituted for the words "contracting States" in paragraph 1, sub-paragraphs (b), (e) and (f).

The Drafting Committee's amendments to article 29 were approved.

ARTICLE 30 (bis) (Obligations under other rules of international law) [40]

73. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the following revision of the title and text of article 30 (bis):

"Obligations 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 State to fulfil any obligation embodied in the treaty to which it is subject under any other rule of international law."

74. Mr. AGO said he must again point out that the word "*terminaison*" in the active sense in which it was employed in the English version, did not exist in French and should be changed.

It was so agreed.

*Subject to that amendment, the revised title and text for article 30 (bis) were approved.*¹³

ARTICLE 32 (Specific restrictions on authority to express the consent of the State) [44]

75. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that the words "negotiating States" in the plural be substituted for the words "contracting State".

The Drafting Committee's amendment to article 32 was approved.

ARTICLE 33 (Fraud) [46]

76. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that the words "negotiating State" be substituted for the words "contracting State".

The Drafting Committee's amendment to article 33 was approved.

ARTICLE 34 (bis) (Corruption of a representative of the State) [47]

77. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that the words "negotiating State" be substituted for the words "contracting State" in the text of the new article 34 (bis) as approved at the 865th meeting.

¹³ For a later amendment to article 30 (bis) (French text only), see 893rd meeting, para. 59.

*The Drafting Committee's amendment to article 34 (bis) was approved.*¹⁴

MODIFICATIONS TO ARTICLES APPROVED AT THE FIRST PART OF THE SEVENTEENTH SESSION

78. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that certain modifications to the articles approved at the first part of the seventeenth session (A/CN.4/L.115) were now necessary in the interests of clarity and precision.

ARTICLE 3 (*bis*) (Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations) [4]

79. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the modification to article 3 (*bis*) did not affect the substance. The new text now proposed read :

“ The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rules of the organization. ”

80. It would be noted that the new formulation provided the necessary saving clause to cover cases when there was no relevant rule.

The Drafting Committee's new text for article 3 (bis) was approved.

ARTICLE 6 (Adoption of the text) [8]

81. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that paragraph 1 of the text adopted at the first part of the seventeenth session be kept unchanged, and that paragraphs 2 (*a*) and (*b*), and paragraph 3, which on reconsideration it had decided were unnecessary, be deleted. Those deletions would require some modification of paragraph 2 which it was now proposed should read :

“ 2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of those States participating in the conference, unless by the same majority they shall decide to apply a different rule. ”

*The Drafting Committee's amendments to article 6 were approved.*¹⁵

ARTICLE 7 (Authentication of the text) [9]

82. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed that sub-paragraph (*b*) be deleted and that the remaining text be modified to read :

“ The text of a treaty is established as authentic and definitive :

(*a*) By such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(*b*) Failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text. ”

83. Mr. RUDA, referring to the new sub-paragraph (*b*), asked whether States that had voted against the adoption of the text but had taken part in its formulation were entitled to sign or initial the text or the Final Act.

84. Sir Humphrey WALDOCK, Special Rapporteur, said that in his opinion the question whether or not a State had voted against the adoption of the text was irrelevant. Even if a State had voted against the adoption of the text, it was still entitled to authenticate the text if it so wished.

85. Mr. RUDA said that if that were the case, it would seem more appropriate not to imply, as might be inferred from the definitions just approved, that there were two categories of States, whereas for purposes of the present article there was only one category, namely, the States which had participated in the drawing up of the text. In fact a text had to be adopted before it could be authenticated, signed, or initialled.

86. Sir Humphrey WALDOCK, Special Rapporteur, said that adoption and authentication might take place simultaneously—that was particularly true of small international conferences—and that the Drafting Committee's text was therefore more precise as far as the temporal factor was concerned. The distinction between adoption and authentication as separate stages in procedure had originated in the reports of Sir Gerald Fitzmaurice. According to the definitions just approved there were no “ negotiating States ” until the text had been adopted.

87. Mr. AGO said that it was necessary to bear in mind the definition of “ negotiating State ”. By that expression the Commission meant a State which had taken part not only in the drawing up but also in the adoption of the text of the treaty. At the time when the procedure for the authentication of the text was being established, a State participated in the drawing up of the text but had not yet participated in its adoption, since the text was adopted at the time when the actual text was authenticated. If the Commission used the expression “ negotiating State ” in article 7 in the sense conveyed by its own definition of those words, it would be stating something that was inaccurate.

88. The CHAIRMAN,* speaking as a member of the Commission, said that the logical sequence of operations was first the drawing up of the text, secondly its adoption, and thirdly its authentication.

89. Mr. AGO said that the procedure for authentication might be established by agreement before the text was adopted. There was therefore no other solution than the expression proposed by the Drafting Committee.

The Drafting Committee's new text for article 7 was approved.

¹⁴ For a later amendment to article 34 (*bis*) (French text only), see 893rd meeting, para. 74.

¹⁵ For a later amendment to the text of article 6, see 892nd meeting, para. 87.

* Mr. Briggs.

ARTICLE 12 (Consent to be bound by a treaty expressed by ratification, acceptance or approval) [11]

90. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the deletion from paragraph 1 (a) of the words " or an established rule of an international organization ".

The Drafting Committee's amendment to article 12 was approved.

ARTICLE 18 (Formulation of reservations) [16]

91. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the deletion from sub-paragraph (a) of the words " or by the established rules of an international organization ".

The Drafting Committee's amendment to article 18 was approved.

ARTICLE 26 (Correction of errors in texts or in certified copies of treaties) [74]

92. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the deletion from paragraph 2 (c) of the words " and, in the case of a treaty drawn up by an international organization, to the competent organ of the organization. "

The Drafting Committee's amendment to article 26 was approved.

ARTICLE 29 (Functions of depositaries) [72]

93. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee proposed the deletion from paragraph 1 (b) of the words " or by the established rules of an international organization ".

94. Mr. TSURUOKA said that the words " the competent organ of that organization " were still used in article 19, paragraph 3, whereas everywhere else any reference of that kind had been dropped. In his view it would be useful to retain those words in that paragraph but he wished to know if that was what the Drafting Committee intended.

95. Sir Humphrey WALDOCK, Special Rapporteur, explained that the Drafting Committee had thought it necessary to retain a reference to an international organization in article 19, paragraph 3, because at the initial stage its constituent instrument might not contain rules about the acceptance of and objections to reservations, so that the provisions of the draft articles could usefully fill a gap. Reference to a competent organ of an international organization was needed in article 29, paragraph 2, because of the functions it might have to fulfil as a depositary.

The Drafting Committee's amendment to article 29 was approved.

The meeting rose at 6 p.m.

888th MEETING

Tuesday, 12 July 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

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

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

1. The CHAIRMAN invited the Commission to consider the draft report on the work of its eighteenth session.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the commentaries to the draft articles had been produced under conditions of stress; a good deal of editorial work would have to be done on them by the Secretariat and by himself after the Commission had completed its work.

3. There was, however, a general question on which he wished to have the Commission's guidance: it related to the references to legal literature contained in the footnotes. In the final report, references to Secretariat documents and to reports of previous special rapporteurs would, of course, have to be retained. The question, however, arose whether the Commission would wish to retain in its final report references to authors, for example where a publication contained evidence of practice, such as Hackworth's *Digest*, the *Harvard Research Draft* and Kiss's *Répertoire*.

4. Mr. TUNKIN said he was glad the Special Rapporteur had raised a question on which it was essential that the Commission should take a decision. References to legal literature were appropriate in a Special Rapporteur's report but should be avoided in the Commission's final report. Mention of certain writers could give the impression that the Commission had taken no account of the works of others. Since the Commission was an organ of the United Nations and of the General Assembly, its final report should only contain references to official documents and official compilations of State practice.

5. Mr. BRIGGS said that he could not agree with Mr. Tunkin. References to official documents should be retained, but the footnotes should also indicate the material relied upon both by the Special Rapporteur and by the Commission itself. The works mentioned in those footnotes represented the material subsumed in the commentaries. It should be remembered that the final report would be read by the delegations to the General Assembly, some of which did not include among their members persons with a long training in international law. References in the footnotes to legal writings would be of great assistance to those delegations. If it were decided to confine references to official documents, that would eliminate such essential material as McNair's standard

work on the law of treaties and the *Harvard Research Draft*.

6. Mr. de LUNA said that he was in full agreement with Mr. Tunkin. As an organ of the United Nations, the Commission could not give special prominence to any body of legal theory. The Commission's commentaries had their roots not only in the works consulted by the Special Rapporteur but also in the literature in many different languages on which the individual members had relied in forming their opinions. Although the commentaries had been prepared by the Special Rapporteur, when they received the approval of the Commission they became the Commission's work. Any footnotes included in the final report should, therefore, refer only to official documents and not to the works of writers in individual countries.

7. Mr. AMADO said that he fully agreed with Mr. de Luna. The Commission was not called upon to explain where it had learned how to serve States by formulating rules on the law of treaties; its members had taken the proper steps to prepare themselves for that task and had read all that they should have read in order to produce work that would give satisfaction. Anyone interested in the law of treaties had only to refer to the Commission's *Yearbooks*, and in any case would certainly be in possession of the works of McNair, Lauterpacht and other authorities. There was therefore no necessity, either from its own point of view or from that of States, for the Commission to set out the works it had consulted, or describe in footnotes the technical ground which it had had to cover.

8. Mr. ROSENNE said that, in the final report, references to purely scientific material should be reduced to an absolute minimum and confined to universally recognized authorities. Another reason, not yet mentioned by other speakers, was that citations by the Commission in its reports could give rise to misunderstandings. He had noticed in a recent book review that the reviewer had given as a reason for praising the book the fact that it had been cited several times in one of the Commission's reports. The various reports submitted by the Special Rapporteur, as well as the Commission's own reports for 1962, 1963 and 1964, were exceptionally well documented and had attracted much favourable comment, but there was no need to repeat in the Commission's final report the abundant references contained in those earlier reports.

9. It was necessary not to confuse the Commission's justification for its commentaries with any bibliography which might be prepared by the Secretariat for the diplomatic conference, if such a conference were convened to deal with the law of treaties.

10. Mr. JIMÉNÉZ de ARÉCHAGA said he agreed that reference to literature should be kept to a minimum, but too rigid a rule would have the effect of excluding essential material that did not constitute official publications. He was thinking of such publications as the *Harvard Draft* and McNair's *Law of Treaties*. On the other hand, it would be appropriate for the Commission to decide to drop entirely any reference to works by its own members. Thus, while the final report should be sparing in its references to the literature, the Special Rapporteur should be allowed some latitude in the

matter. It would be difficult to draw up an intelligible commentary on, for instance, article 31 without any references to legal writings.

11. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was not producing a scientific work: it was submitting an official draft to an official organ of the United Nations. The responsibility was the Commission's. Where the Commission had adopted a particular solution, it had done so because that had been its wish. It would not be advisable for it to insert references to technical works on international law; if it did so, it might be accused of discrimination in favour of publications from one part of the world rather than from another. It should therefore avoid any reference to law writers and cite only official works.

12. Sir Humphrey WALDOCK, Special Rapporteur, said he had introduced the subject in a neutral way, but was himself strongly of the view that the Commission's final report should not give any indication of being based on one legal system more than another; it should constitute a purely international work. For his own reports as Special Rapporteur, he had of course consulted the literature in those languages familiar to him, but had relied on the other members of the Commission to fill any gaps in his knowledge, each member naturally basing his views on the training he had received in his own system. At the present final stage of the Commission's work, the report was the Commission's own responsibility and should be based only on official documents, including of course the reports of earlier Special Rapporteurs. There should be no references to legal literature, however admirable in quality. It was significant that, throughout the present session's discussions, he himself had not had occasion to consult the leading doctrinal works on the law of treaties: the whole emphasis had been on the views which the Commission itself had reached.

13. He would suggest that, wherever the need arose in commentaries to refer to doctrinal views, the term used should be "some jurists" rather than "some writers", with the appropriate reference to the Commission's earlier reports, or those of the Special Rapporteur where the doctrinal material was mentioned.

14. Mr. AGO said he fully supported the views of the Special Rapporteur.

15. Mr. RUDA said he also agreed in principle with the Special Rapporteur. As he understood the position, the footnote to paragraph (2) of the commentary to article 31, for example, would contain an appropriate cross-reference to the footnote in the Special Rapporteur's report that gave full details of the doctrinal material in question.

16. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to follow the course suggested by the Special Rapporteur.

It was so agreed.

17. Mr. TSURUOKA said that Mr. Rosenne had raised another question which he (Mr. Tsuruoka) regarded as important. Although he fully approved the decision which had been reached, he felt it was desirable that the Secretariat should fill the gap which would be

caused by the absence of any references of the kind which had been under discussion, by preparing a detailed bibliography for each article.

18. Mr. BAGUINIAN (Secretary to the Commission) said that a bibliography would be prepared for the diplomatic conference, if a conference were convened.

19. Mr. AGO said that the preparation of the kind of bibliography requested by Mr. Tsuruoka would mean a great deal of work and require a thorough knowledge of the legal literature of every country. He was not convinced that it was really necessary to undertake such a task.

20. The CHAIRMAN suggested that the Commission draw the Secretariat's attention to the point, without committing itself and without saying whether it considered it necessary or desirable to undertake such a task.

It was so agreed.

CHAPTER III: LAW OF TREATIES

PART II: INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION I: GENERAL RULES (A/CN.4/L.116/Add.1)

COMMENTARY TO ARTICLE 30 (Validity and continuance in force of treaties) [39]

21. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to follow the same procedure as at previous sessions and to consider each commentary paragraph by paragraph.

It was so agreed.

22. The CHAIRMAN invited the Commission to consider the commentary to article 30.

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

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

Paragraph (4)

23. Sir Humphrey WALDOCK, Special Rapporteur, explained that the references in paragraph (4) to the text of article 30 would be corrected in accordance with the final text of the article.

Paragraph (4) was approved.

Paragraph (5)

24. Sir Humphrey WALDOCK, Special Rapporteur, said that the last two sentences of paragraph (5) referred only to the effect of a change in the legal personality of a party upon a bilateral treaty. He therefore suggested that the penultimate sentence be amended to state that a change of that kind could in certain circumstances be a factual cause of the termination of a bilateral treaty, or of the disappearance of a party to a multilateral treaty, and that the last sentence be amended to state that a bilateral treaty, lacking one of the parties, would simply cease to exist, while a multilateral treaty would just lose a party and, if it terminated, would do so under article 39 (*bis*).

25. Mr. JIMÉNEZ de ARÉCHAGA said that those two sentences, particularly if amended in the manner suggested by the Special Rapporteur, would prejudice

the question of the effects of State succession on the termination of treaties. In his opinion, the whole question of the effects of State succession on the termination of treaties should be reserved.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that a change in the legal personality of a party could be a factual cause of termination but did not constitute a legal ground of termination. An explanation on that point would have to be included in the commentary, because article 30 stated categorically that the only grounds of invalidity and termination were those exhaustively listed in the articles.

27. Mr. JIMÉNEZ de ARÉCHAGA said that the saving clause relating to succession of States should be kept in broad general terms. If it were couched in specific terms, it might give the impression that forms of State succession other than those resulting from a change of personality of the State could never constitute grounds of termination of a treaty.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that unless the commentary contained some reference to the exclusion of the factual causes of termination arising from succession of States and from hostilities, the Commission would be criticized for the categorical terms in which both paragraphs of article 30 were drafted.

29. Mr. ROSENNE said that the discussion had revealed the existence of two different problems. The first was the general problem of the scope of the articles, and the second was the problem of the meaning of article 30. In order to make that meaning clear, it was essential to include the last two sentences of paragraph (5) of the commentary, as proposed by the Special Rapporteur.

30. Mr. AGO said the statement that "In the Commission's view, cases of obsolescence or desuetude are covered by article 38, paragraph (b), under which a treaty may be terminated at any time by consent of all the parties", seemed too strong. It should be toned down so as to state that such cases "may be considered as covered by article 38, paragraph (b)".

31. Sir Humphrey WALDOCK, Special Rapporteur, said he would be prepared to accept that change of language, although the meaning would be the same.

32. Mr. LACHS said he would prefer that the exceptions relating to the effects of State succession and responsibility on treaties should be stated in a special article, either at the beginning or at the end of the draft, since they applied throughout the draft articles.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that the introduction to the final report would refer to the various decisions of the Commission regarding the limitation of the scope of the draft articles. Bearing in mind, however, that the draft articles were intended to become a convention, it was not possible to rely on saving clauses in the introduction. The Commission should be certain of the meaning of the draft articles themselves.

34. The question of the effects of war on treaties was very close to that of the effects of State succession. The Commission had deliberately set aside that question

because the draft articles were intended to deal with the law of treaties in normal times, just as the four Geneva Conventions of 1958 dealt with the law of the sea in time of peace only.

35. The CHAIRMAN, speaking as a member of the Commission, pointed out that the second sentence of paragraph 2 of article 30 read "The same rule applies to suspension of the operation of a treaty". Since hostilities undoubtedly suspended the operation of certain treaties, paragraph (5) of the commentary should include a reservation on that point, similar to the one proposed by the Special Rapporteur regarding the effects of State succession.

36. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that it was desirable to include a sentence in paragraph (5) to cover that point.

37. Mr. AGO said he thought that there should be a reference to hostilities in the commentary, particularly in order to reserve the Commission's position on the matter.

38. On the other hand, he was in some doubt as to whether it should be stated that the draft articles referred only to normal times, in other words, to peace time. It had to be remembered there were treaties which had been expressly concluded to deal with a state of war and such treaties should not be excluded from the scope of the articles.

39. Mr. JIMÉNEZ de ARÉCHAGA suggested that the Commission defer its decision on paragraph (5) until it had dealt with the introduction to the draft report. Since that introduction would deal with the exclusion of certain matters from the scope of the draft articles, a cross-reference to that introduction would perhaps suffice in paragraph (5) of the commentary to article 30.

40. Mr. ROSENNE said that article 0, which limited the scope of the draft articles to treaties between States, was rather a long way away from article 30. The last sentence of paragraph (5) should therefore refer to a bilateral treaty concluded between States. In at least one case—the Judgment of 1962 on the preliminary objections in the *South-West Africa Cases*¹—the International Court of Justice had ruled that the disappearance of one of the parties, the League of Nations, had not terminated the treaty.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that members must make up their minds about the content of article 30 and decide whether or not the Commission had been justified in framing paragraphs 1 and 2 in their present strict and negative form, which was the outcome of very careful consideration at various stages. If the answer were in the negative, the text of the article itself would have to be modified.

42. When drafting the commentary, he had felt bound, as Special Rapporteur, to examine whether or not something had been left out of the article that called for a general reservation to the effect that the provisions of the article were without prejudice to questions of State succession or of the effect on treaties of the outbreak of hostilities. A general reservation of that kind in the

introduction to the draft articles was no solution because they were intended for incorporation in a draft convention and the articles must therefore stand on their own feet.

43. Mr. JIMÉNEZ de ARÉCHAGA said that he must have more time to reflect on the serious issues at stake.

44. Mr. AGO said it seemed to him that the Commission was paying too much attention to such matters as hostilities and State succession. In fact, article 30, even in its paragraph 2, which was the one which caused most of the difficulty, stated that a treaty might be terminated or denounced or withdrawn from only as a result of the application "of the present articles". But war, although it might be the indirect cause of the termination or suspension of a treaty, was not a ground on which a treaty could be terminated. Similarly, State succession was a fact which had consequences where a treaty was concerned, but it was not a ground on which a treaty could be terminated.

45. In his view, the article was absolutely accurate; there was no reason why the Commission, by an ill-advised commentary, should create doubts which would not otherwise have arisen.

46. Mr. ROSENNE said that a reference could be made in the commentary to the explanations given by the Chairman of the Drafting Committee at the 862nd meeting, when the new text of article 30 had been approved.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that that would not suffice. He agreed with Mr. Ago that a cause should not be confused with a ground of termination in the sense attributed to the latter phrase in the draft articles. The same was true of the effect of the outbreak of hostilities on treaty relations. The Commission must be ready with an answer to the kind of criticism any lawyer was likely to advance, particularly against paragraph 2.

48. Mr. TUNKIN said it was obviously important not to prejudice any conclusions on a particular issue that might have to be considered under the topic of State succession, and that it could be inferred from the text of the article that succession was not a ground for withdrawal from a treaty. He doubted whether such a proposition was tenable and the Special Rapporteur seemed to share his doubt.

49. Paragraph 2 of the article was undoubtedly too stringent in respect of State succession, and possibly in respect of the outbreak of hostilities. State succession might lead not to factual but to other causes that could constitute a separate ground for withdrawal from a treaty that was not covered in the draft articles.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that the verb "to terminate" in English was not free of ambiguity. Termination could be a fact or an act of putting an end to something. For example, the expression "termination by agreement of the parties" was not altogether satisfactory because it described not exactly a ground of termination but rather a method of achieving termination. The difficulty had been overcome in the French text now that the word "*terminaison*" had been abandoned.

¹ *I.C.J. Reports 1962*, p. 319.

51. Mr. JIMÉNEZ de ARÉCHAGA said that the problem lay in paragraph 2 of the article. Either the word "only" would have to be dropped or some safeguard would have to be inserted.

52. Mr. AGO said that the English text of paragraph 2 could not be misconstrued because of the words "by a party" in the first sentence.

53. As for Mr. Tunkin's point, there should be no problem because a new State would probably not be regarded as "a party".

54. Sir Humphrey WALDOCK, Special Rapporteur, said that a new State could not plead State succession as a ground for terminating a treaty, but it might be able to claim that the treaty had disappeared or that it was not a party to it.

55. Mr. TUNKIN said that that might be true in some cases but not necessarily always. The whole problem of State succession had been extensively analysed in the works of certain Soviet Union lawyers, more particularly the situation of a new State emerging as a result of a socialist revolution, which was entirely different from its predecessor in social structure and which pursued an entirely different foreign policy. Views might differ on the question of whether such a State was entitled to withdraw from old treaties that it regarded as incompatible with its foreign policy, but it was impossible at that stage for the Commission to pronounce on such general problems without a very full study of the subject.

56. Mr. JIMÉNEZ de ARÉCHAGA said that the practice of new States varied widely. Some claimed that they had the option of choosing which treaties they wished to remain bound by, possibly for a certain time, and which they wished to withdraw from.

57. Mr. AGO said that logical reasoning led to a certain conclusion. If there had only been a change of government, it was not a case of State succession: the State was a party to the treaty and it was bound by the treaty. But if it was a true case of State succession, including the cases which Mr. Tunkin had mentioned where there had been a revolution, it was obvious that the new State was not a party to the treaty. In such circumstances, that State put forward a request to be admitted as a party to the treaty to which the previous State had been a party. The question was not one of the termination of the treaty but of the new State becoming a party to a particular treaty.

58. Members of the Commission were making the problem more complicated than it need be. If their apprehensions were really so lively, the only course would be to delete paragraph 2, which, in the light of other aspects of the matter, would be most unfortunate.

59. Mr. JIMÉNEZ de ARÉCHAGA said that the difficulty to which paragraph 2 had given rise was not as simple as appeared at first sight and certainly called for further thought. Many of the new States considered themselves "parties" to treaties applied or extended to them by the former metropolitan power and any argument based on a strict interpretation of the word "party" begged the question.

60. Mr. TUNKIN said that the decision whether or not to retain paragraph 2 in article 30 could be postponed until the next meeting.

61. Sir Humphrey WALDOCK, Special Rapporteur, said he would advise very strongly against dropping paragraph 2 if paragraph 1 were kept. It would be most disappointing if article 30 disappeared altogether, because it was of real value as an introduction to the whole of part II. It would be preferable, even at that late stage, to make one further effort to devise a safeguard for inclusion in paragraph 2 to meet the objections raised during the discussion. In the circumstances, further consideration of the commentary to paragraph (5) should be adjourned.

*It was so agreed.*²

COMMENTARY TO ARTICLE 30 (*bis*) (Obligations under other rules of international law) [40]

62. Sir Humphrey WALDOCK, Special Rapporteur, said that there was a grammatical mistake in the third sentence of the English text; the words "it was also subjected" should be replaced by the words "they were also subject".

63. Mr. AGO suggested that the opening words of the French text of the article be amended to read "*La nullité d'un traité, le fait d'y mettre fin ou de le dénoncer . . .*". That wording would bring out the active sense of the English word "termination".

It was so agreed.

64. Mr. de LUNA said that, as the word "*terminación*" was perfectly correct in Spanish, the Spanish text could continue to be based on the English.

65. Sir Humphrey WALDOCK, Special Rapporteur, said that no change was necessary in the English text.

The commentary to article 30 (bis), as thus amended, was approved.

COMMENTARY TO ARTICLE 31 (Provisions of internal law regarding competency to conclude a treaty) [43]

Paragraph (1)

66. Mr. de LUNA said that he was not very satisfied with the French text of part of the second sentence, the words "*d'autres enfin renferment des lois fondamentales*".

67. Mr. AGO suggested that the passage be amended to read "*dans d'autres enfin, il y a des lois fondamentales*".

It was so agreed.

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

Paragraph (2)

68. Mr. de LUNA said that the second sentence was not clear in the French text.

69. Mr. AGO said that it would be better to say "*devraient être considérées*" than "*doivent être considérées*".

It was so agreed.

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

Paragraph (3)

70. Mr. ROSENNE suggested that, in the interests of precision, it would be as well to insert the words "At that time" at the beginning of the second sentence.

² For resumption of discussion, see 889th meeting, paras. 1-37.

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

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

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

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

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

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

Paragraph (4)

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

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

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

Paragraph (5)

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

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

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

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

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

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

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

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

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

It was so agreed.³

The meeting rose at 1 p.m.

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

889th MEETING

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

Chairman: Mr. Mustafa Kamil YASSEEN

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

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

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

(continued)

CHAPTER II: LAW OF TREATIES

(continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹ See 888th meeting, para. 61.

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

³ *Ibid.*, p. 224.

⁴ 888th meeting, para. 32.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*⁶

Meaning of word "termination"

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Paragraphs (5) and (6) were approved.

Paragraph (7)

Paragraph (7) was approved.

Paragraph (8)

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

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

It was so agreed.

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

Paragraph (9)

Paragraph (9) was approved.

Paragraph (10)

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

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

⁷ See 888th meeting, paras. 78-80.

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

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

Paragraph (11)

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

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

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

Paragraphs (12) and (13)

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

Paragraph (14)

Paragraph (14) was approved with minor drafting changes.

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

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

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

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

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

It was so agreed.

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

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

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

Paragraph (1)

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

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

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

Paragraph (2)

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

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

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

It was so agreed.

Paragraph (2) as thus amended, was approved.

Paragraph (3)

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

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

Paragraph (4)

Paragraph (4) was approved.

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

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

Paragraph (1)

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

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

It was so agreed.

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

Paragraph (2)

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

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

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

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

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

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

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

It was so agreed.

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

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

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

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

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

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

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

It was so agreed.

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

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

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

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

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

It was so agreed.

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

Paragraph (7)

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

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

It was so agreed.

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

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

Paragraph (9) was approved.

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

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

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

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

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

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

It was so agreed.

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

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

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

⁹ See 863rd meeting, paras. 21-26.

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

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

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

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

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

It was so agreed.

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

Paragraph (5)

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

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

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

Paragraph (6)

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

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

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

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

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

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

The meeting rose at 1 p.m.

890th MEETING

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

Chairman: Mr. Mustafa Kamil YASSEEN

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

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

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

(continued)

CHAPTER II: LAW OF TREATIES (continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

¹ See 889th meeting, paras. 35-37.

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

COMMENTARY TO ARTICLE 35 (Coercion of a representative of the State) (A/CN.4/L.116/Add.1) [48]

Paragraph (1)

18. The CHAIRMAN invited the Commission to consider the commentary to article 35.

19. Speaking as a member of the Commission, he said that the word "*incontestablement*", which was used in the first sentence of the French version of paragraph (1), did not correspond to the English word "necessarily". He himself preferred the French term.

20. Sir Humphrey WALDOCK, Special Rapporteur, suggested that in the English text the word "necessarily" be replaced by the word "unquestionably".

It was so agreed.

21. Mr. AGO said he thought the wording "something like third-degree methods of pressure" used in referring to the example of the 1939 treaty creating a German protectorate over Bohemia and Moravia, was rather too strong.

22. Sir Humphrey WALDOCK, Special Rapporteur said that there was no exaggeration at all in that statement. The Czechoslovak signatories mentioned had been locked up without food and subjected to constant threats until they signed.

23. Mr. AGO said he withdrew his objection.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 35, as amended, was approved.

COMMENTARY TO ARTICLE 36 (Coercion of a State by the threat or use of force (A/CN.4/L.116/Add.1) [49]

Paragraph (1)

24. Mr. LACHS said he thought the references in the third and fourth sentences to "a strong body of opinion which advocated that the validity of such treaties ought no longer to be recognized" and to "the endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals" having "reinforced and consolidated this opinion" were an inadequate statement of the position. The development in question was not a mere public opinion movement—which actually went much further back in history—but the emergence of an actual principle of international law.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that he was prepared to make some adjustment to the wording of those two sentences. It should, however, be remembered that there was considerable discussion as to the precise moment at which the principle of the criminality of aggressive war had become a rule of international law.

26. The CHAIRMAN, speaking as a member of the Commission, said that the third sentence could be redrafted so as to refer to the development of a strong body of opinion which had led to the emergence of a principle of international law.

27. Mr. TUNKIN said that he agreed with Mr. Lachs with regard to the development of the rule of international law on the criminality of aggressive war. The reference in paragraph (1), however, was not to that rule but to the rule concerning the nullity of treaties obtained by means of the threat or use of force.

28. Mr. AGO said that the third sentence should speak not just of the "validity" but of the "validity in law" of such treaties, in order to stress that the validity of the treaty was denied on legal and not on political grounds.

29. Sir Humphrey WALDOCK, Special Rapporteur, said that the point raised by Mr. Lachs could be met by altering the concluding words of the third sentence of paragraph (1) so as to refer to a strong body of opinion which "held that the validity of such treaties could no longer be recognized". He would consider the point raised by Mr. Ago, although in English "validity" implied "validity in law". In the fourth sentence, the concluding words could also be suitably amended.

It was so agreed.

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

Paragraph (2)

30. Mr. ROSENNE said that, at the second part of the seventeenth session, it had been agreed that a passage would be included in the commentary to explain that article 36 also covered the case in which the accession to a multilateral treaty had been obtained by coercion.³

31. Sir Humphrey WALDOCK, Special Rapporteur, said that he would prepare a suitable passage for inclusion in the commentary to meet that point.

32. Mr. LACHS said that paragraph (2) seemed to create the impression that there was very strong opposition to the principle which the Commission had accepted.

33. Mr. AGO suggested that that point could be met by amending the opening words of the second sentence to read "They fear that to recognize . . .".

34. Sir Humphrey WALDOCK, Special Rapporteur, said that he would make the necessary adjustments.

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

Paragraph (3)

35. Mr. BRIGGS said that the language used in the first sentence was perhaps a little unfortunate, since it gave the impression that the Commission was justifying its position on article 36 on the ground that it was no worse than that which it had taken on certain other articles.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that it was the position of the Commission that there could be no complaint against article 36 as being a possible loophole for abuse, any more than there could against any other article in the draft. He would endeavour to find better language, but the idea in the first sentence was correct. The danger of abuse in respect of article 36 was no greater than in respect of the articles on fraud and error.

Paragraph (3) was approved.

³ Yearbook of the International Law Commission, 1966, vol. I, part I, 827th meeting, paras. 60 and 63.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

37. Mr. AGO said that the use in the English text of the first sentence of paragraph (6) of the terms "void" and "voidable" was undesirable because of the unfortunate tendency to mistranslate those terms into French as "nul" and "annulable". The term "annulable" should not be used in international law, since there was no judicial authority to pronounce upon the "annulation". In municipal law, the distinction was made between an act that was "annulable" by a Court decision and an act that was "nul" by operation of the law, and that distinction could not be transposed into international law.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that, in English, the distinction between "void" and "voidable" was clear: in the one case, the act was null and void *ab initio*, whereas in the other the injured party had an option to invoke the invalidity of the act.

39. Mr. JIMÉNEZ de ARÉCHAGA suggested that the point might be met by inserting, after the concluding word "voidable", the additional words "at the instance of the injured party".

40. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept that amendment.

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

Paragraph (7)

41. Mr. TUNKIN proposed the deletion of the words "Under the so-called intertemporal law" from the third sentence, and of the words "under the intertemporal law" from the fourth sentence of the paragraph.

42. Mr. LACHS said he supported Mr. Tunkin's proposal. He agreed with the statement in the third sentence that "a juridical fact must be appreciated in the light of the law contemporary with it", for that was one of the essential features of law. The label "intertemporal law" was one of many used to describe it, and that not very accurately. He would dispense with it.

43. Sir Humphrey WALDOCK, Special Rapporteur, said he could agree to the deletion of those two references to intertemporal law.

44. Mr. de LUNA said that the concluding sentence of paragraph (7) could not be reconciled with the terms of article 45, on the consequences of the emergence of a new peremptory norm of general international law.

45. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the point would be met by amending the words "depriving of validity a peace treaty" to read: "depriving of validity *ab initio* a peace treaty".

It was so agreed

Paragraph (7), as amended, was approved.

The commentary to article 36, as amended, was approved.

COMMENTARY TO ARTICLE 37 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)) (A/CN.4/L.116/Add.1) [50]

Paragraph (1)

46. Mr. AGO suggested that the third sentence be amended to state that the prohibition of the use of force, as codified by the Charter, provided a typical example of a *jus cogens* rule.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that he was prepared to reword the sentence on those lines, but would rather use the expression "an important example".

48. Mr. LACHS said it was unfortunate that paragraph (1) should open with a statement of the views of jurists who opposed the rule embodied in article 37. Professor Schwarzenberger seemed to have recently changed, at least in part, the views expressed by him in 1965 in the article mentioned in the footnote.

49. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that since the paragraph was drafted, the Commission had decided to drop all references to individual writers.

50. Mr. ROSENNE suggested that the order of the two sentences be reversed.

51. Sir Humphrey WALDOCK, Special Rapporteur, said he would consider that suggestion.

52. Mr. BARTOŠ said that the statement in the last sentence of paragraph (1), that there were certain rules and principles from which States were not competent to derogate "at all" by a treaty arrangement, was too categorical. It must be remembered that a rule or principle of international law could be amended by a law-making treaty.

53. Mr. LACHS said that the problem raised by Mr. Bartoš was one of drafting. The last sentence was intended to refer to the fact that States could not derogate from those rules and principles by *inter se* agreements; it did not relate to law-making treaties.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that he would re-examine the wording of the last sentence.

Paragraph (1), as amended, was approved.

Paragraph (2)

55. Mr. AGO proposed the deletion from the first sentence of the words "as yet".

It was so agreed

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

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

56. Mr. ROSENNE said that in 1962 the Commission had included in article 1 a definition of the term, "general multilateral treaty",⁴ which had been used in only one other article and in paragraph (12) of the commentary to articles 18, 19 and 20. The idea had also been in the

⁴ *Yearbook of the International Law Commission, 1962, vol. II, p. 161.*

Commission's mind in connexion with other articles. But at the present session, the article in question had been dropped and the definition of "general multilateral treaty" had consequently been deleted from article 1. Since the fourth sentence of paragraph (4) referred to "a general multilateral treaty", he suggested that the meaning of the term should be explained in the commentary by using some introductory words taken from the 1962 definition.

57. Mr. RUDA said he supported Mr. Rosenne's suggestion.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had experienced considerable difficulty when it had attempted to define the term "general multilateral treaty". He saw no advantage in repeating the attempt in the commentaries. If, at the diplomatic conference, any participant wished to reintroduce into the draft convention a definition of "general multilateral treaty", ample material would be provided by the Commission's earlier reports.

59. The CHAIRMAN, speaking as a member of the Commission, said that he saw no need for such a definition in the commentary. The term was not used in any of the draft articles.

60. Mr. ROSENNE said that there was a logical inconsistency in the statement in the fourth sentence of paragraph (4). If a general multilateral treaty purported to modify a rule of *ius cogens*, it might be void under the very provisions of article 37 and consequently could not effect any modification of the rule.

61. Mr. TUNKIN said that it would create enormous difficulties for the Commission if it were to become involved in a discussion of the relationship between customary law and general multilateral treaties. The purpose of the fourth sentence of paragraph (4) was merely to state the fact that a norm of general international law could be changed by a general multilateral treaty. The emergence of a new rule of international law did not always represent a derogation from an old rule. The process could be one of progressive development: the new rule could include, and go further than, the old rule.

62. Mr. de LUNA said that it was not possible to ignore developments in the law brought about by historical processes within the international community.

63. Sir Humphrey WALDOCK, Special Rapporteur, said it was an undoubted fact that a general multilateral treaty, if it gained sufficient acceptance by States, could have the effect of amending the law. Despite the apparent logical inconsistency, he therefore favoured the retention of the penultimate sentence as it stood.

Paragraph (4) was approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

The commentary to article 37, as amended, was approved.

COMMENTARY TO ARTICLE 38 (Termination of or withdrawal from a treaty by consent of the parties) (A/CN.4/L.116/Add.2) [51]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

64. Mr. BRIGGS proposed that, in the fifth sentence, the opening words, "On the contrary", be deleted.

It was so agreed.

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

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to article 38, as amended, was approved.

COMMENTARY TO ARTICLE 39 (Denunciation of a treaty containing no provision regarding termination) (A/CN.4/L.116/Add.2)[53]

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

65. Mr. BRIGGS said he questioned whether the implication in paragraph (2), that the Declaration of London was limited to treaties of a certain type, accurately reflected a widely held view about the importance of that Declaration. Furthermore, the Commission itself had abandoned the attempt to classify treaties in its draft articles. That being so, he proposed that, beginning at the fifth sentence, the paragraph be modified to read: "Some jurists, basing themselves on the Declaration of London of 1871 and certain State practice, take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is provided for in the treaty or consented to by all the other parties; a number of other jurists however, take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties." It was particularly important to drop the reference at the end of that paragraph to commercial treaties and treaties of alliance.

66. Sir Humphrey WALDOCK, Special Rapporteur, said that although he was satisfied that the passage in question constituted a proper statement of the view generally held about the Declaration of London, which had recently been examined at length in a learned work, it could be deleted.

67. Mr. ROSENNE said that perhaps Mr. Briggs had suggested leaving out too much. The discussion on article 39 had revealed that the Declaration of London was rather more ambiguous than appeared at first sight and that practice varied widely.

68. Mr. TUNKIN said he supported Mr. Briggs' amendment: it would be unwise to discuss the implications of the Declaration at length in the commentary.

Mr. Briggs' amendment was adopted.

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

Paragraphs (3), (4), (5) and (6)

Paragraphs (3), (4), (5) and (6) were approved.

The commentary to article 39, as amended, was approved.

COMMENTARY TO ARTICLE 39 (bis) (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force) (A/CN.4/L.116/Add.2) [52]

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

69. Mr. AGO said that, in the third sentence, the French rendering “*une condition de la validité continue du traité*”, of the English “a continuing condition of the validity of the treaty” was not entirely accurate.

70. Mr. JIMÉNEZ de ARÉCHAGA suggested that Mr. Ago’s point might be met by amending the English text to read “maintenance in force” instead of “validity”. The word “continuing” could then be dropped altogether and the French translation would be simplified.

71. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept that amendment.

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

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 39 (bis), as amended, was approved.

COMMENTARY TO ARTICLE 40 (Suspension of the operation of a treaty by agreement of the parties) (A/CN.4/L.116/Add.2) [54]

Paragraph (1)

72. Mr. ROSENNE said that, in the interests of accuracy, he proposed the substitution of the word “sometimes” for the words “not infrequently” in the second sentence.

73. Sir Humphrey WALDOCK, Special Rapporteur, said that he had no objection to that amendment, though it was not uncommon for treaties to specify that, in certain circumstances or under certain conditions, their operation or that of some of their provisions might be suspended.

Mr. Rosenne’s amendment was adopted.

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

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

The commentary to article 40, as amended, was approved.

COMMENTARY TO ARTICLE 40 (bis) (Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only) (A/CN.4/L.116/Add. 2) [55]

Paragraph (1)

74. Mr. JIMÉNEZ de ARÉCHAGA proposed that the words “as *inter se* suspension of the operation of treaties certainly occurs in practice”, in the last sentence, be deleted, because the discussion in the Commission did not justify such an assertion.

75. Sir Humphrey WALDOCK, Special Rapporteur, said that it had been his impression that certain members

were emphatically of the opinion that *inter se* suspension did occur in practice and that that had been the reason for the inclusion of article 40 (*bis*) in the draft. However, he was prepared to modify slightly the last sentence on some such lines as “The Commission considered that it was desirable to deal with the subject in the present article and to attach to it the safeguards necessary to protect the position of other parties”.

It was so agreed.

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

Paragraph (2)

76. Mr. ROSENNE suggested that some explanation ought to be given at the end of paragraph (2) of the situation about giving notice to the other parties in the case of temporary suspension. Presumably the provisions of articles 51, 50 and 50 (*bis*) applied.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that that was an issue of substance. He was prepared to adjust the last sentence of the commentary in order to draw attention to the fact that no requirement about notification had been inserted in article 40 (*bis*), but questioned whether *inter se* suspension fell under the terms of article 51.

78. Mr. ROSENNE asked how article 40 (*bis*) could operate at all if other parties were not entitled to be notified of an agreement to suspend *inter se*. If he was mistaken, the proviso in sub-paragraph (*a*) of the article was meaningless.

79. Sir Humphrey WALDOCK, Special Rapporteur, said that when he had first begun to draft that kind of article, he had suggested a complete cross-reference to article 67 which would have introduced notification, but when the article was in the Drafting Committee, it had been thought that that was not necessary and the Commission had adopted the article accordingly without the cross-reference.

80. It would be unreal to assume that all the articles in section 3 were subject to the procedural provisions of article 51. Admittedly, there was some similarity between temporary suspension *inter se* and termination by agreement between the parties, but he had never envisaged the formal requirements of article 51 being made applicable to article 40 (*bis*).

81. In the circumstances, without clear instructions from the Commission he was uncertain what could be said in the commentary on the point.

82. Mr. BRIGGS said that, like Mr. Rosenne, he considered that some requirement about notifying the other parties was necessary for temporary suspension *inter se*.

83. Mr. JIMÉNEZ de ARÉCHAGA said he disagreed. If the rights of other parties were likely to be affected, they would certainly make it their business to find out about the suspension.

84. Sir Humphrey WALDOCK, Special Rapporteur, said his personal opinion was that, if the Commission considered that notification should be required in article 40 (*bis*), the requirement ought to be of the kind inserted in article 67 on *inter se* agreements for the modification of multilateral treaties. Presumably the notification

would take the form of a direct notice of the intention to suspend.

85. Mr. ROSENNE said that he would be satisfied if some statement on those lines could be inserted in the commentary, but the matter could not be left in the air.

86. Mr. LACHS said that it would be better to drop the last sentence in paragraph 2 altogether, since an explanation of the kind that Mr. Rosenne was advocating had no legal value unless an express provision concerning notification was inserted in the article itself.

87. The CHAIRMAN appealed to members not to re-open issues of substance at that late stage.

88. Mr. ROSENNE said that, while he appreciated the Chairman's concern, he must point out that article 40 (*bis*) appeared to him to have been adopted under a misapprehension, at least as far as some members were concerned. Certainly he himself had understood that it came within the scope of the procedural provisions in Part II, and that the reference to article 67 was therefore unnecessary. The last sentence in the commentary as drafted seemed to re-open the question.

89. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had surely adopted article 40 (*bis*) with a full understanding of its implications. The provisions of article 51 could obviously not be regarded as applicable to a situation which was very like *inter se* modification.

90. The CHAIRMAN said that the question whether or not something on the point should be added to the commentary would have to be put to the vote.

91. Mr. ROSENNE said he thought that would be most unwise. However, real doubt still persisted on the point which could not be resolved by reference to the articles themselves.

92. Sir Humphrey WALDOCK, Special Rapporteur, said that in order to meet the point raised by Mr. Rosenne, he was prepared to substitute, for the last sentence in paragraph (2) of the commentary, a statement to the effect that, although the third fundamental requirement for *inter se* modification, laid down in article 67 had not been inserted in article 40 (*bis*), the parties to an *inter se* agreement to suspend had a duty to notify the other parties to the treaty.

93. Mr. ROSENNE said that a statement on those lines would be acceptable because it left the substantive issue open.

94. Mr. BARTOŠ said that he reserved the right to abstain in any vote on the question. In his view it was important to mention the fact that action of the kind contemplated in article 40 (*bis*) required notification.

It was agreed that paragraph (2) be amended on the lines proposed by the Special Rapporteur.

The commentary to article 40 (bis), as amended, was approved.

COMMENTARY TO ARTICLE 41 (Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty) (A/CN.4/L.116/Add.3) [56]

95. Mr. ROSENNE said that some explanation ought to be inserted in the commentary to article 41 concerning its relationship with article 63, owing to the Commission's

decision to deal solely with total termination or suspension in article 41 and to transfer the provisions concerning partial suspension to article 63.

96. Sir Humphrey WALDOCK, Special Rapporteur, said that it might not be particularly illuminating in the Commission's final report on the law of treaties to describe in great detail how particular articles had come to be formulated at successive stages. Any reader could find out for himself by reading the reports of the Special Rapporteur or of the Commission. To cover the particular point mentioned by Mr. Rosenne would require the addition of a somewhat long and laborious explanation.

97. Mr. ROSENNE said that he would be satisfied with a very brief statement to the effect that article 41 was now confined to termination or suspension implied from entering into a subsequent treaty.

Mr. Rosenne's amendment was adopted.

The commentary to article 41, as thus amended, was approved.

COMMENTARY TO ARTICLE 42 (Termination or suspension of the operation of a treaty as a consequence of its breach) (A/CN.4/L.116/Add.3) [57]

Paragraph (1)

98. Mr. ROSENNE said that the words "a violation" should be substituted for the words "the violation" in the first sentence, because the article was limited to a "material" breach.

It was so agreed.

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

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

99. Mr. ROSENNE suggested that paragraph (3), which mentioned pronouncements by municipal courts, was neither necessary nor relevant and could be dropped.

100. Mr. BRIGGS said he considered that the paragraph was useful and should be retained.

101. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the last speaker.

Paragraph (3) was approved.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

Paragraph (6)

102. Mr. BRIGGS suggested that, in the fourth sentence, the words "the right to invoke" be inserted before the words "either the termination or the suspension".

It was so agreed.

103. Mr. ROSENNE said that some modification was needed in the last phrase of the fifth sentence, since the obligations of the two sides might not be the same.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraphs (7), (8), (9) and (10)

Paragraphs (7), (8), (9) and (10) were approved.

The commentary to article 42, as amended, was approved.

COMMENTARY TO ARTICLE 43 (Supervening impossibility of performance) (A/CN.4/L.116/Add.3) [58]

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

104. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion of the last example mentioned at the end of the paragraph, namely, the destruction of a dam or hydro-electric installation, because international agreements on such matters would not necessarily disappear with the physical destruction of the installation which would probably have to be rebuilt under the terms of the treaty.

105. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that that particular example had been given much prominence during the discussions at the second part of the seventeenth session in January.⁵ The example was intended to illustrate the case when the operation of certain essential provisions might have to be suspended.

106. Mr. JIMÉNEZ de ARÉCHAGA said that, although he was not convinced by that argument, he would not insist on the reference being dropped.

Paragraph (2) was approved.

Paragraphs (3), (4), and (5)

Paragraphs (3), (4) and (5) were approved.

Paragraph (6)

107. Mr. de LUNA said that some modification would have to be made to paragraph (6) as a result of the adoption by the Commission of article Y, entitled "Cases of State succession and State responsibility".

108. Mr. JIMÉNEZ de ARÉCHAGA suggested that Mr. de Luna's point might be met by the deletion of the fourth to ninth sentences inclusive, beginning with the word "Secondly" and ending with the word "termination", plus the first word of the tenth sentence, "Accordingly". The last sentence would then begin with the words "The extinction".

It was so agreed.

109. Sir Humphrey WALDOCK, Special Rapporteur, said that he would have to adjust the final sentence in the light of the Commission's decision concerning the new article.

It was so agreed.

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

Paragraph (7)

Paragraph (7) was approved.

The commentary to article 43, as amended, was approved.

COMMENTARY TO ARTICLE 44 (Fundamental change of circumstances) (A/CN.4/L.116/Add.3) [59]

Paragraph (1)

110. Mr. BRIGGS proposed the substitution of the words "become inapplicable" for the words "cease to be binding upon the parties" in the second sentence.

Mr. Briggs' amendment was adopted.

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

Paragraph (2)

111. Mr. BRIGGS proposed the deletion of the last sentence in paragraph (2). It contradicted the first sentence in the paragraph and, as negative proof, contributed nothing to the argument.

112. Mr. LACHS said that both the first and last sentences could be dropped.

113. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the last sentence should be dropped, but the first must be kept because the *Free Zones* case was so widely known.

114. Mr. ROSENNE said he wondered whether the word "material" had not by an oversight been omitted from the text of article 44 itself, as a qualification of the word "breach" in paragraph 2 (b). The omission seemed inconsistent with the wording of article 42.

115. Sir Humphrey WALDOCK, Special Rapporteur, said that no change was needed in the wording of the article, because the provision contained in paragraph 2 (b) constituted an exception to the rules set out in paragraph (1). However, paragraph 2 (b) should not be read as implying that a breach was not a breach unless it was a material one.

116. Mr. TUNKIN said he agreed with the Special Rapporteur.

117. Mr. ROSENNE said that he was satisfied with the Special Rapporteur's explanation and would not press the point.

118. Mr. AGO said he noted that, throughout the commentary to article 44, the expression "*rebus sic stantibus*" was variously described as a "theory", a "principle", a "doctrine" or a "clause". Admittedly, precedents could be found in the writings of the best learned authors, but, since the Commission was proposing to codify the principle, it should ensure that its terminology was uniform. His own preference would be for the term "clause".

119. The CHAIRMAN, speaking as a member of the Commission, said that he was wholly opposed to the use of that term.

120. Mr. LACHS said that the phrase "*rebus sic stantibus*" was repeated too often in the commentary and he saw no reason why it should not, in every instance, for reasons he had advanced some time ago, be replaced by the phrase now adopted by the Commission, "fundamental change of circumstances".

121. Mr. BRIGGS said that, in English, the word "doctrine" was the right one to describe a legal theory.

122. Mr. TUNKIN said that the word "doctrine" could be used to describe the views of jurists, but the word "principle" should be used in those parts of the commentary where it was the rule formulated by the Commission that was referred to.

⁵ *Yearbook of the International Law Commission, 1966, vol. I, part I, 832nd meeting, para. 44.*

123. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Briggs. Of course, once a rule had been adopted by the Commission, it could appropriately be described as a "principle". Members would note that, from paragraph (9) of the commentary onwards, he had used the phrase "fundamental change of circumstances". In 1963, the Commission had inserted in its report a clear explanation of the reasons why it had decided not to use the phrase "*rebus sic stantibus*".⁶

124. Mr. de LUNA said that, historically, the notion had first made its appearance as a doctrine evolved by experts in international law. But, once it had begun to produce effects, it was no longer an opinion or a doctrine but a "principle".

125. The CHAIRMAN, speaking as a member of the Commission, said that in his view the term "doctrine" should be used in references to the history of the question; in all other cases, the term "principle" should be used.

126. Mr. RUDA pointed out that in the Spanish text, the words "*Tribunal permanente*" should be replaced by the word "*Corte*".

Paragraph (2) was approved.

Paragraphs (3), (4) and (5)

Paragraphs (3), (4) and (5) were approved.

Paragraph (6)

127. Mr. RUDA proposed the deletion of the full stop at the end of the second sentence and the addition of the words "because a fundamental change of circumstances has occurred with regard to the circumstances existing at the time of the conclusion of the treaty".

128. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ruda's amendment was acceptable.

129. Mr. BRIGGS proposed the substitution of the words "of denunciation" for the words "to break the treaty" in the fifth sentence.

It was so agreed.

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

Paragraphs (7) to (13)

Paragraphs (7) to (13) were approved.

The commentary to article 44, as amended, was approved.

The meeting rose at 12.50 p.m.

⁶ Yearbook of the International Law Commission, 1963, vol. II, p. 209, para. (7).

891st MEETING

Friday, 15 July 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

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

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

(continued)

CHAPTER II: LAW OF TREATIES (continued)

COMMENTARY TO ARTICLE 45 (Establishment of a new peremptory norm of general international law) (A/CN.4/L.116/Add.3) [61]

1. The CHAIRMAN invited the Commission to continue its consideration of the draft report, beginning with the commentary to article 45.

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

2. Mr. LACHS said that the reference in the last sentence should be to "the article" and not to "paragraph 1", since the article had only one paragraph.

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

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

The commentary to article 45, as thus amended, was approved.

COMMENTARY TO ARTICLE 55 (*Pacta sunt servanda*) (A/CN.4/L.116/Add.4) [23]

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

3. Mr. LACHS proposed the deletion from the second sentence of paragraph (2) of the reference to the International Court's advisory opinion on the *Admission of a State to the United Nations (Article 4 of the Charter)*. That case had involved the sovereign right of a State to exercise certain prerogatives of United Nations membership and he doubted its relevance to article 55.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that, although the case seemed to him relevant as an example of the exercise of treaty rights in good faith, he would have no objection to the amendment proposed by Mr. Lachs.

Paragraph (2) as thus amended, was approved.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

Paragraph (5)

5. Sir Humphrey WALDOCK, Special Rapporteur, asked whether the Commission was satisfied with the reference to a possible preamble contained in the last sentence of paragraph (5).

6. Mr. LACHS said that the conditional form in which the sentence had been drafted by the Special Rapporteur was fully satisfactory.

Paragraph (5) was approved.

The commentary to article 55, as amended, was approved.

COMMENTARY TO ARTICLE 56 (Non-retroactivity of treaties) (A/CN.4/L.116/Add.4) [24]

The commentary to article 56 was approved.

COMMENTARY TO ARTICLE 57 (Application of treaties to territory) (A/CN.4/L.116/Add.4) [25]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

7. Mr. LACHS proposed the deletion from the third sentence of the words "the nuances and controversy arising from", which preceded the words "the association of the latter term with the so-called 'colonial clause'".

Mr. Lachs' amendment was adopted.

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

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

Paragraph (6)

8. Mr. de LUNA pointed out that paragraph (6) would have to be revised since the Commission had adopted a special article on State succession and State responsibility.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that he would redraft the paragraph accordingly.

It was so agreed.

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

The commentary to article 57, as amended, was approved.

COMMENTARY TO ARTICLE 58 (General rule regarding third States) (A/CN.4/L.116/Add.4) [30]

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

10. Mr. ROSENNE said he noted that paragraph (2) used the expressions "major multilateral treaty" and "general multilateral treaty of a law-making character". In the absence of a definition of "general multilateral treaty", those expressions were difficult to understand.

11. Sir Humphrey WALDOCK, Special Rapporteur said that he would be prepared to drop the words "of a law-making character" in the penultimate sentence of paragraph (2), although he considered that the use of those words was correct.

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

Paragraph (3)

12. Mr. TUNKIN said that the cases cited in the commentary were not relevant to the text of the article. Article 58 stated that the consent of the third State was required for the treaty to create rights or obligations for that State. The cases cited referred to the rule that a State which was not a party to a treaty was not entitled to invoke it.

13. Sir Humphrey WALDOCK, Special Rapporteur, said that the various paragraphs of the commentary

had been taken from the 1964 commentary and were therefore no longer a direct illustration of article 58, since the text of the article was now different. However, the material in those paragraphs illustrated the *pacta tertiis* rule, which was the rule underlying the series of articles commencing with article 58. He therefore suggested that the material in those paragraphs should be retained in shortened form and that he should make the necessary adjustments to orient it to the new formulation of the article.

It was so agreed.

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

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to article 58, as amended, was approved.

COMMENTARY TO ARTICLE 59 (Treaties providing for obligations for third States) (A/CN.4/116/Add.4) [31]

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

14. Mr. AGO said that the statement in the first sentence, that "the application of this article is illustrated by the Permanent Court's approach to article 435 of the Treaty of Versailles in the *Free Zones* case", was open to criticism. The Permanent Court's decision in 1929 could not be an illustration of the application of the Commission's article 59, which was only now being adopted.

15. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the sentence be amended to read: "The operation of the rule in this article is illustrated...".

It was so agreed.

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

Paragraph (3)

16. Mr. TUNKIN proposed the deletion from the fourth sentence of the words "in its opinion"; that sentence stated a well-established rule of international law and not a mere opinion.

17. He also proposed the deletion of the fifth sentence which read: "The Commission did not consider, however, that it should introduce a specific provision on the question into the present article; for such a provision might involve the interpretation of the Charter for which specific organs of the United Nations are the competent bodies". The reason given in that sentence was not valid; the Commission had not been deterred from making reference to the Charter in other articles of the draft by the consideration that such reference might involve interpretation of the Charter.

18. Mr. AGO said he supported Mr. Tunkin's amendments. The reason given in the fifth sentence was not the correct reason; the second sentence, which read "The Commission recognized that such cases would fall outside the principles laid down in this article, provided that the action taken was in conformity with the Charter", gave a better explanation of the Commission's decision

to submit a separate article containing a general reservation relating to the aggressor State.

19. The CHAIRMAN, speaking as a member of the Commission, said he also supported Mr. Tunkin's amendments. He saw no validity in the argument relating to the interpretation of the Charter. The fact that there was an official method of interpretation did not exclude the possibility of any interested party interpreting a Charter provision.

Mr. Tunkin's amendments were adopted.

20. Mr. TUNKIN proposed that the opening words of the sixth sentence, which read: "Instead, it decided to submit for the consideration of governments the text of a separate article", be replaced by the words "It decided to include in the draft a separate article".

21. Sir Humphrey WALDOCK, Special Rapporteur said that he had drafted the sentence in that form in order to indicate that there had been some division of opinion in the Commission on the question.

22. Mr. BRIGGS said that, as he considered the special article in question rather irrelevant, he preferred the formula drafted by the Special Rapporteur.

23. Mr. ROSENNE said that, strictly speaking, the Commission's draft was submitted to the General Assembly and not to governments. He saw no reason for differentiating between the Commission's decision in that particular matter and its other decisions.

24. Mr. LACHS said he supported Mr. Rosenne's remarks.

25. Sir Humphrey WALDOCK, Special Rapporteur, suggested that an indication be given in the paragraph that some members of the Commission had expressed a different view.

26. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's suggestion was in conformity with the Commission's usual practice.

27. Mr. CASTRÉN proposed that the sixth sentence be amended as proposed by Mr. Tunkin, but that the matter be clarified in the commentary to article Z.

28. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept that proposal.

Mr. Tunkin's amendment was adopted.

Paragraph (3), as amended, was approved.

The commentary to article 59, as amended, was approved.

COMMENTARY TO ARTICLE 60 (Treaties providing for rights for third States) (A/CN.4/L.116/Add.4) [32]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

29. Mr. TUNKIN suggested that the first sentence be amended to indicate that the jurists whose views were given in that sentence regarded the case in question as analagous to that of obligations for third States.

It was so agreed.

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

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

30. Mr. JIMÉNEZ de ARÉCHAGA suggested that, in the penultimate sentence, the passage beginning with the words "its consent should always be required" be replaced by the actual words used in article 61.

It was so agreed.

31. Mr. LACHS suggested that the word "neutral", before the word "form" in the last sentence, be deleted.

It was so agreed.

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

Paragraphs (6), (7) and (8)

Paragraphs (6), (7) and (8) were approved.

The commentary to article 60, as amended, was approved.

COMMENTARY TO ARTICLE 61 (Revocation or modification of obligations or rights of third States) (A/CN.4/L.116/Add.4) [33]

Paragraphs (1), (2) and (3)

Paragraphs (1), (2) and (3) were approved.

Paragraph (4)

32. Sir Humphrey WALDOCK, Special Rapporteur, said that the word "agreement", in the sixth sentence, should be corrected to read "argument".

The commentary to article 61 was approved.

COMMENTARY TO ARTICLE 62 (Rules in a treaty becoming binding through international custom) (A/CN.4/L.116/Add.4) [34]

Paragraph (1)

33. Mr. TUNKIN proposed that, in the second sentence, the wording "comes to be generally accepted by other States as customary international law..." be expanded to read "comes to be generally accepted by other States, and becomes binding on those States by way of custom".

34. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept that amendment.

35. Mr. TUNKIN proposed the deletion of the third sentence, which read: "Or a multilateral treaty, formulating new general norms of international law and drawn up between a large number of States, may be ratified only by some of the negotiating States and yet come to be generally accepted as enunciating rules of customary law". That case was indistinguishable from the first one given in the previous sentence. There were in fact only two cases: that of treaties declaratory of rules of general international law and that of treaties which gained general acceptance and thereby became part of general international law.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that he would have no objection to the deletion of the third sentence although it did in fact represent a third case, that in which some States had refrained from ratifying the treaty but had afterwards by their acts indicated their acceptance of its principles. That case was a little different from the case of a State which

was a complete stranger to the treaty but acted in accordance with its principles.

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

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

37. Mr. BRIGGS suggested that the sixth sentence, which read "As the theory of treaties creating objective régimes was controversial, the Commission concluded that to recognize it would be premature at the present stage of the development of international relations", be reworded so as to state that the Commission had decided to leave that question aside.

38. Mr. BARTOŠ said he too felt that the sentence should be amended, since it raised theoretical problems by implying that the Commission should "recognize" the theory of treaties creating objective régimes.

39. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the sentence be reformulated on some such lines as: "Since to lay down a rule recognizing the creation of objective régimes by treaty might be unlikely to meet with acceptance, the Commission decided to leave this question aside in drafting the articles."

It was so agreed.

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

The commentary to article 62, as amended, was approved.

COMMENTARY TO ARTICLE 46 (Separability of treaty provisions) (A/CN.4/L.116/Add.5) [41]

Paragraph (1)

40. Mr. AGO proposed that the end of the third sentence, which read "and without destroying one of the considerations which induced the parties to accept the treaty as a whole", be deleted.

Mr. Ago's amendment was adopted.

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

Paragraph (2)

41. Mr. ROSENNE said that the word "inessential", in the last sentence, was inappropriate and should be changed.

42. Sir Humphrey WALDOCK, Special Rapporteur, said he would modify the end of the sentence.

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

Paragraphs (3), (4) and (5)

Paragraphs (3), (4) and (5) were approved.

Paragraph (6)

43. Mr. JIMÉNEZ de ARÉCHAGA said that, according to the first sentence in paragraph (6), paragraph 4 of article 46 made "the question of the separability of the clauses subject to the conditions contained in paragraph 3". But paragraph 4 of article 46 (A/CN.4/L.115) did not make that clear. He therefore proposed that it be amended by introducing a proviso to the effect that it was subject to the provisions of paragraph 3. There should be no question of the injured State taking

advantage of the situation to invoke a truncated version of the treaty to its own advantage.

44. Mr. TUNKIN said that he had his doubts about that proposal.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that, as he had understood the Commission's intention, paragraph 4 was meant to be governed by the provisions of paragraph 3.

46. Mr. de LUNA said he agreed with Mr. Jiménez de Aréchaga.

47. Mr. BRIGGS said he supported Mr. Jiménez de Aréchaga's proposal for the amendment of paragraph 4 of article 46. There was nothing either in that paragraph or in paragraph 1 to justify the statement in the first sentence of paragraph (6) of the commentary. The position should indeed be as stated in that sentence, but it was essential to amend the text of the article in order to make that position clear.

48. Mr. AGO said that paragraph 3 of article 46 stated the general rule which was valid in any situation where separability applied. Consequently, paragraph 4 was necessarily governed by the general rule stated in paragraph 3. If it were not so, the Commission would be suggesting that, in the situation envisaged in paragraph 4, separability was possible even in cases where the clauses were not separable, which would be absurd.

49. Mr. BARTOŠ said that he was in some doubt as to how to interpret the passage in paragraph (6) of the commentary in which the Commission expressed the view that a State which was the victim of fraud or corruption "should have the option either to invalidate the whole treaty or to denounce the principal clause to which the fraud or corruption related". In his opinion, it was a question of invalidating either the whole treaty or certain of those clauses that had been vitiated, not of denunciation, which was a unilateral act depending on the will of one of the parties.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that his understanding of the position was borne out by paragraph (6) of the commentary to article 33 in the 1963 report, which stated: "The Commission considered that where the fraud related to particular clauses only of the treaty, it should be at the option of the injured party to invoke the fraud as invalidating its consent to the whole treaty or to the particular clauses to which the fraud related. On the other hand, even in cases of fraud the severance of the treaty could only be admitted under the conditions specified in article 46, because it would be undesirable to set up continuing treaty relations on the basis of a truncated treaty the provisions of which might apply in a very uneven manner as between the parties".¹

51. Mr. BARTOŠ said that, according to paragraph 4 of article 46, there was no difference in the nature of a State's right to claim that a treaty was invalid. It was not a question whether the treaty should or should not be denounced, but of requiring that either the whole treaty or particular clauses should be declared invalid.

¹ *Yearbook of the International Law Commission, 1963, vol. II, p. 195.*

52. Mr. AMADO suggested that the words "to denounce" in the second sentence of paragraph (6) be deleted; there was no reason to include those words at that point.

53. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept Mr. Amado's suggestion.

54. The CHAIRMAN, speaking as a member of the Commission, said that unfortunately he could not agree with Mr. Briggs. Paragraph 3 was general in scope and applied to all cases of separability. It would be impossible to envisage a case of separability that was not subject to that paragraph without creating injustice, which it was the Commission's purpose to prevent. His view was that the article was well drafted, that its paragraph 3 was general in scope, and that paragraph 4 manifestly hinged on paragraph 3.

55. Mr. ROSENNE said that the discussion had revealed that the sense of paragraph 4 of the article was not altogether clear, and that was made worse by the omission from the commentary of any express reference to cases of breach. He had understood that the provisions of paragraph 2 of the article were not subject to the conditions laid down in paragraph 4. Paragraph 2 had been framed in that way so as to meet the point made by Mr. Castrén at the Monaco session.² It was therefore not correct to state that all cases of separability were governed by paragraph 3.

56. The CHAIRMAN, speaking as a member of the Commission, said that the injured State was given the choice between invalidation of the whole treaty and separability. If it said that it was in favour of separability such separability was unquestionably governed by paragraph 3.

57. Sir Humphrey WALDOCK, Special Rapporteur, said he would have thought that the article itself was clear. Under paragraph 4 there could be no derogation from the rule set out in paragraph 3, and paragraph 4 simply provided two alternative courses for the State. However, if it were the wish of the Commission, he would be prepared to explain the point in the commentary.

58. Mr. TSURUOKA said that, although the Special Rapporteur's explanation seemed to be satisfactory, some allowance should be made for Mr. Rosenne's misgivings. If a misunderstanding had arisen among the experts in the Commission, then the drafting was at fault. If a few words could be added explaining the relationship between the two paragraphs, without damage to the general structure of the draft, it would be to the advantage of the Commission to add them.

59. Mr. JIMÉNEZ de ARÉCHAGA said that unless paragraph 4 of the article were slightly modified to reflect what he believed to be the unanimous view of the Commission, it would be misconstrued.

60. Mr. AGO said that he had no objection to the idea of adding a few words to make the article more explicit; the relationship between paragraphs 3 and 4 was clear, but it could be made clearer.

61. Mr. Rosenne, however, had raised the question of article 42. In the circumstances of a breach of a treaty provided for in article 42, it was apparently possible to arrive at the conclusion that the right to suspend or to terminate the operation of the treaty, in whole or in part, was not governed by the rules stated in paragraph 3. Such a conclusion was odd; it would mean that the application of certain rules could be partially suspended in cases where the clauses to be suspended were not separable from the remainder of the treaty. It would surely be rather surprising if, in response to the violation of a treaty, it were possible to suspend part of it in cases where separation was impossible in practice.

62. Sir Humphrey WALDOCK, Special Rapporteur, said that if any change were needed at all in the text of article 46, it would suffice to insert the words "subject to paragraph 3" at the beginning of paragraph 4.

63. Mr. TUNKIN said that, in his opinion, no change was needed in the article, because in article 42 the word "material" qualified the word "breach" in paragraphs 1, 2 and 3.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that reference was made in article 42 to suspension in whole or in part, but it would probably be going too far to argue that the principle of separability would automatically apply in cases of breach, which raised problems of sanction and reprisal. He had understood the Commission in article 42 to have made an exception deliberately to the provisions concerning separability; that was particularly important for cases of a violation of a multilateral treaty by one party.

65. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the Special Rapporteur. Under the rules of law governing reprisal, a State was entitled to suspend the execution of a particular clause vis-à-vis a State committing a material breach, even if the strict conditions laid down in article 46 about separability had not been met.

Paragraph (6), as amended, was approved.

The commentary to article 46, as amended, was approved.

AMENDMENT TO ARTICLE 46 (Separability of treaty provisions) (A/CN.4/L.115) [41]

66. Mr. ROSENNE said he still considered that paragraph 4 of the article should be amplified so as to explain the situation regarding breach.

67. The CHAIRMAN formally proposed that, in order to clarify the point raised by Mr. Jiménez de Aréchaga, the words "subject to paragraph 3" be inserted in the text of paragraph 4 of article 46³ as suggested by the Special Rapporteur.

The Chairman's amendment to article 46 was adopted.

COMMENTARY TO ARTICLE 47 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty) (A/CN.4/L.116/Add.5) [42]

Paragraphs (1), (2) and (3)

Paragraphs (1), (2) and (3) were approved.

² Yearbook of the International Law Commission, 1966, vol. I, part I, 843rd meeting, para. 5.

³ As adopted at the Monaco Session. See Yearbook of the International Law Commission, 1966, vol. I, part I, 843rd meeting, para. 13.

Paragraph (4)

68. Mr. ROSENNE said that the word “*préclusion*” did not exist in French and should be replaced by the word “*forclusion*”.

69. Mr. AGO said it was true that the only French word which had some similarity with the English ‘*estoppel*’ was “*forclusion*”, but it was a word which had a clearly defined meaning in procedure.

70. Mr. JIMÉNEZ de ARÉCHAGA said that the term “*preclusión*” existed in Spanish and was a perfectly proper one to use in that context.

71. The CHAIRMAN, speaking as a member of the Commission, said that in his view it was a dangerous practice to make use in a legal text of expressions borrowed from a foreign language. The terms used in the commentaries should be those employed by the Special Rapporteur, which were familiar in English usage.

72. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the words “*as ‘préclusion’*” be dropped.

It was so agreed.

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

Paragraph (5)

Paragraph (5) was approved.

The commentary to article 47, as amended, was approved.

COMMENTARY TO ARTICLE 50 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) (A/CN.4/L.116/Add.5) [63]

The commentary to article 50 was approved.

COMMENTARY TO ARTICLE 50 (*bis*) (Revocation of notifications and instruments provided for in articles 51 and 50) (A/CN.4/L.116/Add.5) [64]

The commentary to article 50 (bis) was approved.

COMMENTARY TO ARTICLE 51 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) (A/CN.4/L.116/Add.6) [62]

The commentary to article 51 was approved.

COMMENTARY TO ARTICLE 52 (Consequences of the invalidity of a treaty) (A/CN.4/L.116/Add.6) [65]

73. Mr. BRIGGS said that some explanation was needed in the commentary of the sense in which the term “*party*” was used in the article.

74. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the necessary explanation be inserted in the commentary to article 1.

It was so agreed.

Paragraph (1)

75. Mr. CASTRÉN proposed that paragraph (1) be deleted, since there was now a special article Y in which the Commission expressly excepted State responsibility.

76. Mr. ROSENNE said he thought that paragraph (1) should be retained, with the insertion of a cross-reference in the last sentence to the new article Y.

77. Mr. AGO said that it would be better to retain the reference to responsibility because the problem would immediately occur to the reader in connexion with the consequences of the invalidity of a treaty.

78. However, as it was not absolutely certain that the question of responsibility necessarily arose in cases of fraud and coercion, it was undesirable to prejudge the matter, and he would therefore prefer to see the word “*raise*” in the second sentence replaced by the words “*may raise*”.

79. Mr. BARTOŠ said he agreed with Mr. Rosenne and Mr. Ago. It should be made quite clear that the article did not deal with questions of responsibility and redress, and that the Commission had deliberately excluded that matter from the scope of the article.

80. Sir Humphrey WALDOCK said it was very important to retain paragraph (1), since otherwise it might be thought that the Commission had overlooked questions of responsibility arising from acts which were the cause of invalidity. A cross-reference to the new article Y could be inserted.

81. The word “*may*” could be substituted for the word “*clearly*” in the second sentence to meet Mr. Ago’s point.

It was so agreed.

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

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

82. Mr. JIMÉNEZ de ARÉCHAGA proposed that, in the fourth sentence, the expression “*status quo*” be expanded to “*status quo ante*”.

It was so agreed.

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

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to article 52, as amended, was approved.

COMMENTARY TO ARTICLE 53 (Consequences of the termination of a treaty) (A/CN.4/L.116/Add.6) [66]

Paragraph (1)

83. Mr. BARTOŠ said that he was doubtful whether the second sentence in paragraph (1), “*it is limited to the consequences of a treaty’s termination*”, should be retained. The question of responsibility or redress had very properly been excluded, but either could be a consequence of the termination of a treaty.

84. Sir Humphrey WALDOCK, Special Rapporteur, said that the simplest course was to delete the sentence.

It was so agreed.

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

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

85. Mr. AGO said that, although he agreed with the wording of the last sentence of paragraph (3) of the

commentary, he was not sure whether the Commission's intention was brought out so clearly in the wording of the article itself. It might be better to transpose the words "of the parties" and "or any legal situation", since otherwise the words "legal situation" might appear to have a wider meaning and create the misunderstanding mentioned by the Special Rapporteur at the end of the paragraph.

86. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the phrase be amended to read:

"any right, obligation or legal situation of the parties created through the execution of the treaty".

It was so agreed.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that that amendment would entail a similar amendment to paragraph 1 (b) of the article.

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

Paragraphs (4), (5), (6) and (7)

Paragraphs (4), (5), (6) and (7) were approved.

The commentary to article 53, as amended, was approved.

AMENDMENT TO ARTICLE 53 (Consequences of the termination of a treaty) (A/CN.4/L.116/Add.6) [66]

88. The CHAIRMAN invited the Commission formally to adopt the amendment proposed by the Special Rapporteur to paragraph 1 (b) of article 53, as adopted at the 865th meeting.

The Special Rapporteur's amendment to article 53 was adopted.

COMMENTARY TO ARTICLE 53 (bis) (Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law) (A/CN.4/L.116/Add.6) [67]

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

89. Mr. AGO said that the word "annulation" in the second sentence of the French text was quite inappropriate; the word "nullité" should be used.

90. Sir Humphrey WALDOCK, Special Rapporteur, said that as far as the English text was concerned, the word "invalidation" was correct because the sentence referred to the law rendering a treaty invalid from a certain moment. However, if Mr. Ago wished, he would be prepared to substitute the word "annulment".

It was so agreed.

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

Paragraph (3)

91. Mr. TUNKIN proposed the deletion of the first half of the second sentence, reading "since both or all the parties have *ex hypothesi* participated in the violation of a peremptory norm of general international law"; the sentence would then begin with the words "The Commission did not consider...". The assertion in that first half of the sentence was not borne out by the facts. A peremptory norm of *jus cogens* was usually

violated by one party, for example, by imposing a treaty upon another State.

92. Sir Humphrey WALDOCK, Special Rapporteur, said that article 53 (bis) did not deal with the question of unequal treaties, but with the case when the provisions of a treaty were in conflict with a rule of *jus cogens*. It must be presumed that the parties knew the law and what constituted an infringement of it.

93. If the Commission subscribed to the view taken by Mr. Tunkin, the article itself was incorrectly drafted because in the preceding article allowance had been made for a certain adjustment of interests between the parties, but under article 53 (bis) that was prohibited. If the parties put their signature to a provision that infringed a rule of *jus cogens*, they could not seek protection under the law.

94. Mr. JIMÉNEZ de ARÉCHAGA suggested that the difficulty might be overcome by substituting the words "in the agreement in conflict with" for the words "in the violation".

95. Mr. TUNKIN said that there might be cases where all the parties were equally responsible for violating a peremptory norm of international law, but the point was somewhat academic and the possibility could certainly not be treated on the same footing as the imposition of a treaty by a powerful State on another State.

96. The CHAIRMAN, speaking as a member of the Commission, said that, so far as the party which had imposed it was concerned, the treaty would be void on two counts: it would be in conflict with a rule of *jus cogens* and it would have been concluded as a result of coercion. From that point of view there was a marked distinction between the State responsible for the coercion and the State that was a victim of it.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that the Chairman had raised an entirely different point, namely, when the actual conclusion of a treaty violated *jus cogens*.

98. Mr. Tunkin's point could be met by the insertion of the words "in these cases" after the words "The Commission did not consider that", in the second part of the sentence. The first part of the sentence could be dropped, leaving it to be implied that paragraph 1 was an application of the principle *in pari delicto*.

It was so agreed.

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

Paragraph (4)

Paragraph (4) was approved.

The commentary to article 53 (bis), as amended, was approved.

COMMENTARY TO ARTICLE 54 (Consequences of the suspension of the operation of a treaty) (A/CN.4/L.116/Add.6) [68]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

99. Mr. AGO said that it should be made clear, both in paragraph 1 (b) of the article and in paragraph (3)

of the commentary, that it was the legal relations between the parties that were referred to.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that the words "between the parties" could be inserted after the words "legal relations" in paragraph 1 (b) of the article itself⁴ and in paragraph (3) of the commentary.

It was so agreed.

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

Paragraph (4)

Paragraph (4) was approved.

The commentary to article 54 was approved.

AMENDMENT TO ARTICLE 54 (Consequences of the suspension of the operation of a treaty) [68]

101. The CHAIRMAN formally proposed that paragraph 1 (b) of article 54 be amended by the insertion of the words "between the parties" after the words "legal relations".

The Chairman's amendment to article 54 was adopted.

The meeting rose at 1 p.m.

⁴ See 865th meeting, para. 87.

892nd MEETING

Monday, 18 July 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

Representation of the Commission at the twenty-first session of the General Assembly

1. The CHAIRMAN invited the Commission to appoint a member to represent it at the twenty-first session of the General Assembly.

2. Mr. de LUNA, supported by Mr. BRIGGS, Mr. BARTOŠ, Mr. JIMÉNEZ de ARÉCHAGA, Mr. TUNKIN, Mr. PESSOU, Mr. LACHS, Mr. TSURUOKA, Sir Humphrey WALDOCK and Mr. CASTRÉN, proposed that the Commission appoint the Chairman to represent it at the General Assembly.

It was so decided.

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

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

(resumed from the previous meeting)

CHAPTER II: LAW OF TREATIES (continued)

INTRODUCTION (A/CN.4/L.116/Add.7)

3. The CHAIRMAN invited the Commission to continue its consideration of the draft report.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that it would be helpful if the Commission could start with the introduction to chapter II (A/CN.4/L.116/Add.7), as that would give him time to draft any necessary additions before members left Geneva. For example, he had been uncertain whether to mention in the introduction such matters as most-favoured-nation clauses, which the Commission had decided not to deal with in the draft articles.

5. Mr. BRIGGS said that the Commission must also decide what recommendation it wished to put forward to the General Assembly under article 23 of its Statute, about the convening of a diplomatic conference on the law of treaties.

6. Mr. ROSENNE said that mention should be made in the introduction to chapter II, as had been done in its reports on its fifteenth¹ and sixteenth² sessions, of the main issues which the Commission had decided to leave aside.

7. Some mention should also be made of the fact that the Commission had continued its work on the law of treaties on the lines laid down by the General Assembly in its resolutions 1765(XVII), 1902(XVIII) and 2045(XX) and had complied with the General Assembly's request to take into account the discussions on the law of treaties in the Sixth Committee.

8. Finally, in paragraph 22 a reference should be inserted to paragraph 58 of the Commission's report on its fifteenth session, with an indication that the Commission had taken note of the recommendation by the Sub-Committee on the Succession of States and Governments, that the problems of State succession in the matter of treaties should be dealt with under that topic and not covered in the draft articles on the law of treaties.

9. Mr. TUNKIN said he agreed with Mr. Rosenne's second and third suggestions.

10. Mr. LACHS said that, in his opinion, it was only necessary to mention the main points not covered in the draft articles, such as most-favoured-nation clauses, since otherwise the length of the introduction was going to make the report top-heavy.

11. He doubted whether paragraph 3 need be retained. The account of what had taken place at the Commission's third session was not strictly relevant to the work of the past five years.

12. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that mention should be made of points not covered in the draft and of the relevant decisions by the General Assembly. But he also needed guidance from the Commission on whether, as appeared to have been contemplated earlier in the session, some statement was desirable which would anticipate the kind of arguments that could be expected from many governments and lawyers against any attempt to draw up a convention on the law of treaties as such, and would reinforce the Commission's own recommendation on the subject.

¹ *Yearbook of the International Law Commission, 1963*, vol. II, p. 189.

² *Yearbook of the International Law Commission, 1964*, vol. II, p. 176.

13. The CHAIRMAN said that the Secretariat had prepared a draft recommendation, under article 23 of the Commission's Statute, which clearly suggested that the draft should constitute the basis for a conference of plenipotentiaries.

14. Mr. TUNKIN said that at that juncture the Commission should refrain from arguing a theoretical issue which had already been debated on a number of occasions in the Sixth Committee. It would suffice merely to insert in the introduction the Commission's own brief recommendation for a diplomatic conference on the law of treaties.

15. The CHAIRMAN, speaking as a member of the Commission, said that, like Mr. Tunkin, he considered that there was no need for the Commission to quote arguments in support of its decision. It had already discussed the question and had on several occasions set forth the arguments in favour of its decision to prepare a draft convention on the law of treaties.

16. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Tunkin. The Commission's recommendation would be the stronger if it were not argumentative.

17. Mr. WATTLES, Deputy Secretary to the Commission, said that the Secretariat had prepared a tentative draft, consisting of two paragraphs, concerning the Commission's recommendation to the General Assembly. It was modelled on recommendations of a similar character made in the past and read:

"(1) At its — meeting on — July 1966 the Commission decided, in conformity with article 23, paragraph 1 (d), of its Statute, to recommend that the General Assembly should convoke an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject.

(2) The Commission wishes to refer to the titles given to parts, sections and articles of its draft, which it considers helpful for an understanding of the structure of the draft and for promoting ease of reference. It expresses the hope, as it did in regard to its draft articles on consular relations,³ that these titles, subject to any appropriate changes, will be retained in any convention which may be concluded in the future on the basis of the Commission's draft articles."

18. The CHAIRMAN said he thought the Secretariat's draft was acceptable and might be approved.

It was so agreed.

19. Mr. ROSENNE said there was one more point he wished to raise, and that was the general problem of the presentation of the report. Both the Commission and the Drafting Committee had devoted much time and thought to the concordance of the three language versions of the text, English, French and Spanish. It would be extremely helpful, both for governments and for a diplomatic conference, if the three language versions of the text of each article could be printed side by side in the Commission's report to the General Assembly.

³ Yearbook of the International Law Commission, 1961, vol. II, p. 92, para. 35.

20. Mr. de LUNA said that he fully supported Mr. Rosenne's suggestion that the text of the draft articles in the three languages should be included in the report. His own experience, both in the Sixth Committee and at the Conference on the Law of the Sea, had demonstrated the convenience of adopting that course, which facilitated rapid reference to the text of the articles in all three languages.

21. The CHAIRMAN said that adoption of that suggestion would depend on the co-operation of the Secretariat, which was not yet in a position to give a final decision; it would do so later.

22. Mr. TSURUOKA said it was essential that the English, French and Spanish versions of the draft articles should agree completely: as it was, there were unfortunately discrepancies between them.

23. The CHAIRMAN said that he had received a list of discrepancies from Mr. Tsuruoka and had handed it to the Secretariat, which would take them into account.

The introduction to chapter II, as amended, was approved.

24. The CHAIRMAN invited the Commission to resume its consideration of the commentaries to the draft articles.

COMMENTARY TO ARTICLE 65 (General rule regarding the amendment of treaties) and TO ARTICLE 66 (Amendment of multilateral treaties) (A/CN.4/L.116/Add.8) [35] and [36]

25. Mr. TUNKIN said that paragraph (1) ought to be deleted, as it was inappropriate to set out the arguments of authors who regarded the amendment or modification of treaties as a purely political issue. If the Commission wished to elaborate the point, it would have to be done at great length, and it was most undesirable, in the commentary to articles 65 and 66, to cast any kind of doubt on the proposition that modification must be carried out in accordance with the rules of international law. The reference to Article 19 of the Covenant of the League of Nations was particularly dangerous because of the way in which certain German authors had used that article to justify the actions of the Hitlerite régime.

26. Sir Humphrey WALDOCK said he agreed that paragraph (1) could be dropped, although he doubted whether its implications were as far-reaching as Mr. Tunkin supposed. It was only a greatly condensed version of an earlier commentary.

Paragraph (1) was deleted.

27. Mr. JIMÉNEZ de ARÉCHAGA proposed that further consideration of the commentary be postponed so as to allow the Commission ample time to review the final texts of the draft articles themselves.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Jiménez de Aréchaga's proposal was acceptable on the understanding that final adoption of the draft articles would be held over until the next meeting.

It was so agreed.

29. The CHAIRMAN invited the Commission to consider the revised draft articles (A/CN.4/L.117 and Add.1).

TITLE OF THE DRAFT

30. Mr. AGO asked what the definitive title of the draft was to be.

31. The CHAIRMAN, speaking as a member of the Commission, said that in his view, it should be "Draft Convention on the Law of Treaties".

32. Mr. AGO said that he would prefer "Draft Articles on the Law of Treaties".

33. Mr. BRIGGS said that the title should read "Draft Articles: Law of Treaties".

34. Sir Humphrey WALDOCK, Special Rapporteur, said that the title should be modelled on that used for the Commission's draft articles on the law of the sea.

35. Mr. ROSENNE said he agreed with the Special Rapporteur, but wondered whether the word "draft" was suitable in view of the fact that the Commission had recommended that the articles be incorporated in a convention.

36. Mr. TUNKIN said he agreed with the Chairman, but must point out that the articles did not yet constitute a draft convention.

37. The CHAIRMAN, speaking as a member of the Commission, said that the title "Draft Convention" would be more realistic. The title "Draft Articles" would give the impression that the Commission was submitting only part of a draft and would thus detract from the significance of its work.

38. Mr. AGO said that that was correct, in the sense that the Commission had in fact prepared a draft convention; but in similar circumstances, perhaps for reasons of modesty, the Commission had always used the title "Draft Articles". Moreover, it had used the words "the present articles" in the provisions which it had adopted. The use of the expression "the present Convention" instead of "the present articles" marked the transfer from the Commission to a conference. If it simply said "Articles on the Law of Treaties", the Commission would be giving the impression that its text was the definitive version.

39. Mr. ROSENNE said that he would not insist on the deletion of the word "draft" but thought that, in view of the likelihood of opposition to the Commission's recommendation that the draft articles should form a convention, it would be unwise to designate them at that juncture as a draft convention.

40. It should be borne in mind that one of the weightiest criticisms levelled in the Sixth Committee against the Commission's draft articles on arbitral procedure had been that they had no beginning or end and were therefore not in the form of a draft convention.

41. Mr. BARTOŠ pointed out that, under article 22 of its Statute, the Commission was called upon to prepare a "Final Draft", and under article 23 of its Statute, might "recommend to the General Assembly . . . to recommend the draft to Members with a view to the conclusion of a convention". In other words, the final decision rested with the General Assembly.

42. Although it would not be wrong to use the title "Draft Convention", he would prefer "Draft: Law of Treaties"; but he would accept the majority view.

43. The CHAIRMAN, speaking as a member of the Commission, said that the Commission had always kept before it the idea that it was preparing a convention. He supported Mr. Bartoš's suggestion.

44. Mr. AMADO said that, although the Chairman's suggestion of anticipating a convention was well-intentioned, it would be better not to complicate matters. The existing title was perfectly clear and acceptable and should be retained.

45. Sir Humphrey WALDOCK, Special Rapporteur, proposed that the title should read "Draft Articles on the Law of Treaties".

46. Mr. TSURUOKA and Mr. AGO supported the Special Rapporteur's proposal.

The Special Rapporteur's proposal was adopted.

NUMBERING OF THE ARTICLES

47. Mr. AGO asked whether the Commission proposed to alter the numbering of the articles forthwith.

48. Mr. CASTRÉN said that the provisional numbering should be retained, as several articles contained cross-references to other articles.

49. Mr. WATTLES, Deputy Secretary to the Commission, said that the Secretariat had assumed that all the articles would be re-numbered consecutively according to the final order approved by the Commission. A table of concordance would have to be attached to the report.

50. Mr. TSURUOKA said that there seemed to be no reason why the Commission should not alter the numbering of the articles there and then.

51. Mr. AGO said that the question was not without importance: as soon as the draft was in final form, experts on international law, both within and without the Commission, would be publishing studies on the subject-matter of the articles which the Commission had adopted and it was therefore essential that, from the outset, they should be able to refer to the final numbering.

52. Mr. WATTLES, Deputy Secretary to the Commission, said that in its resolution 2045 (XX), paragraph 5(b), the General Assembly had asked the Secretary-General to do something slightly different from what had been done in previous years, namely, to transmit to governments, at least one month before the opening of its twenty-first session, the final drafts prepared by the Commission up to that time, and in particular, the draft articles on the law of treaties. As it would not be possible to print the complete text of the Commission's report by mid-August, the Secretariat had accordingly contemplated preparing a Commission document for general distribution containing the full text of the draft articles on the law of treaties, with a brief introductory note explaining that the complete text of the report would be issued in due course. A simple table of concordance giving the old and new numbers and titles of the articles could be annexed to that document for reference purposes.

53. Mr. BRIGGS said that it might even be necessary to give in parentheses the original numbers of the draft articles, since those numbers would have been used in all the summary records of the eighteenth session.

54. Mr. ROSENNE said that editorial problems could be left to the Secretariat. A footnote should be attached to each article indicating the number or numbers under which it had been discussed. It would be difficult to draw up a table of concordance because in some cases parts of articles had been transferred to some other part of the draft.

55. Mr. BARTOŠ said that the matter could safely be entrusted to the Secretariat. It was the Commission, however, that was responsible for the report, and the numbering of the articles formed an integral part of the report. The Commission should therefore take a decision, which would be binding on the Secretariat, first, that the articles should be given their final numbering and, secondly, that, in order to facilitate research, footnotes should be provided giving the number attached to each article at the time it was discussed in the Commission.

56. The CHAIRMAN proposed that the Secretariat be instructed to take the various points raised in the discussion into account when preparing the Commission's documents.

It was so agreed.

FINAL TEXT OF ARTICLES (A/CN.4/L.117 and Add. 1)

PART I. INTRODUCTION

ARTICLE 0 (The scope of the present articles) [1]⁴

Article 0 was adopted.

ARTICLE 1 (Use of terms) [2]

Sub-paragraph (a)

Sub-paragraph (a) was adopted without comment.

Sub-paragraph (d)

57. Mr. AGO said that the repetition of the word "international" in paragraph 1 (*d*) was rather awkward; it would be enough to say "the act whereby a State establishes on the international plane . . ."

58. Mr. BRIGGS said that the point had been discussed in the Drafting Committee, which had decided that it was necessary to stress the "international" character of the act because it was an aspect that some governments seemed to have failed to understand.

59. The CHAIRMAN, speaking as a member of the Commission, said that the words "on the international plane" added nothing to the precision of the text.

60. Mr. PESSOU said that the repetition of the word "international" was tautological; an international act was necessarily an act performed by States.

61. Mr. de LUNA said he agreed that parliamentary ratification and international ratification were sometimes confused, but it should be enough to say "the international act". The words "on the international plane" were unnecessary; it was obvious that when a State

established its consent, it did so on the international and not on the internal plane.

62. Sir Humphrey WALDOCK, Special Rapporteur, said that in the context of sub-paragraph (*d*) it was wise to press the point home that the acts referred to in that sub-paragraph were international acts establishing a State's consent to be bound on the international plane.

63. Mr. BARTOŠ said that he agreed with Mr. Ago. An act of State such as ratification was an act of State authority which took effect on the international plane. There was therefore no need to use the word "international" twice.

64. Mr. TSURUOKA said that he was in favour of repeating the word "international", as that removed any risk of misunderstanding without detracting too much from the elegance of the phrasing.

65. Mr. ROSENNE said it was important to retain the adjective "international" in both places. Far from being tautological, it was essential to the whole structure of part I of the draft articles.

66. Mr. AMADO asked what purpose was served by the words "so named".

67. Mr. AGO said that his only desire had been to achieve greater elegance of form, but he was ready to accept the sub-paragraph as it stood.

68. Mr. PESSOU said that Mr. Amado's question was very much to the point; the words "so named" were redundant, in relation not only to the words "Ratification", "Accession", "Acceptance" and "Approval" but also to the word "mean".

69. Sir Humphrey WALDOCK, Special Rapporteur, said that in his opinion sub-paragraph (*d*), as drafted, was correct and should remain unchanged.

Sub-paragraph (d) was adopted.

Sub-paragraphs (e), (f), (f)(bis), (f)(ter), (f) (quater) and (f) (quinquies)

Sub-paragraphs (e), (f), (f)(bis), (f)(ter), (f) (quater) and (f) (quinquies) were adopted without comment.

Sub-paragraph (f) (sexies)

70. Mr. AGO said that he was in some doubt as to whether the expression "inter-governmental organization" covered organizations like the International Labour Organisation, which was not entirely inter-governmental. It might be better to say "inter-State organization".

71. Mr. BARTOŠ pointed out that, even in the International Labour Organisation, it was the States that were represented, not the governments, employers and workers.

72. The CHAIRMAN, speaking as a member of the Commission, said that he too would prefer the expression "inter-State organization", but "inter-governmental organization" was the one in common use.

73. Mr. BRIGGS said that, in the course of a long discussion on the matter in the Drafting Committee, some objections had been raised to the word "inter-governmental", but there were serious objections to the use of the word "inter-State" as well. He himself

⁴ *Yearbook of the International Law Commission, 1965, vol. I, p. 244, para. 10.*

thought that the word "inter-governmental" should be retained.

74. Mr. JIMÉNEZ de ARÉCHAGA pointed out that the word "inter-governmental" was used in connexion with the international organizations concerned in Article 57 of the Charter.

Sub-paragraph (f)(sexies) was adopted without amendment.

Paragraph 1 was adopted.

Paragraph 2 was adopted without comment.

Article 1 was adopted.

ARTICLE 2 (Treaties and other international agreements not within the scope of the present articles) [3]

75. Sir Humphrey WALDOCK, Special Rapporteur, said that since, in article 1, the word "treaty" had been defined for the purposes of the draft articles as an "international agreement concluded between States" it was illogical to use the word "treaty" in article 2 to refer to international agreements concluded between States and other subjects of international law. He therefore proposed that in the title of article 2 the words "Treaties and other" be deleted, that in sub-paragraph (a) the word "treaties" be replaced by the words "international agreements", and that in sub-paragraph (b) the words "treaties or" be deleted.

The Special Rapporteur's amendment was adopted.

Article 2, as thus amended, was adopted.

PART II: CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION I—CONCLUSION OF TREATIES

ARTICLE 3 (bis) (Treaties which are constituent instruments of international organizations or are adopted within international organizations) [4]

Article 3 (bis) was adopted without comment.

ARTICLE 3 (Capacity of States to conclude treaties) [5]

Article 3 was adopted without comment.

ARTICLE 4 (Full powers to represent the State in the conclusion of treaties) [6]

Paragraph 1

76. Mr. TSURUOKA said that the expression "instrument of full powers" occurred both in paragraph 1(a) and in the introductory sentence to paragraph 2. But the Commission had already defined "full powers" as "a document emanating from the competent authority of a State", so that the words "an instrument of" were redundant and should be deleted.

77. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Tsuruoka's point was well taken, since, according to the Commission's own definition, the expression "full powers" applied to a document and not to the legal act itself.

Mr. Tsuruoka's amendment was adopted.

Paragraph 1, as amended, was adopted.

Paragraph 2

78. Mr. BARTOŠ said that he understood the words "for the purpose of adopting the text of a treaty" in

sub-paragraph (c), to mean that the treaty had been concluded or adopted by the international conference or organ in question.

79. Sir Humphrey WALDOCK, Special Rapporteur, suggested that at the end of sub-paragraph (c) the words "in that conference or organ" should be added after the words "a treaty", since the sense of those two words by themselves was too general and would give sub-paragraph (c) a much wider meaning than that, for instance, of sub-paragraph (b), which limited the category of treaties which Heads of diplomatic missions were empowered to adopt.

80. Mr. ROSENNE said that the reference to international organizations in sub-paragraph (c) seemed to him to be inconsistent with the provisions of article 3 (bis). In other articles, the Commission had decided to delete any reference to treaties which were constituent instruments of international organizations, and to refer to article 3 (bis) in the commentary.

81. Sir Humphrey WALDOCK, Special Rapporteur, said he disagreed with Mr. Rosenne. The reference in sub-paragraph (c) to representatives accredited to an organ of an international organization was in the form of a general proposition whose application would, in individual cases, be subject to the relevant rules of the organization concerned, in accordance with the provisions of article 3 (bis).

82. Mr. TUNKIN said he agreed with the Special Rapporteur.

The Special Rapporteur's amendment to sub-paragraph (c) was adopted.

Paragraph 2, as amended, was adopted.

Article 4, as amended, was adopted.

ARTICLE 4 (bis) (Subsequent confirmation of an act performed without authority) [7]

Article 4 (bis) was adopted without comment.

ARTICLE 6 (Adoption of the text) [8]

Paragraph 1

83. Mr. AGO proposed that the words "by the unanimous agreement" be replaced by the word "unanimously".

84. Sir Humphrey WALDOCK, Special Rapporteur, said he thought that the word "agreement" in the English text was undesirable, as it might be construed as referring to the text of the treaty itself. Mr. Ago's point might perhaps be met by replacing the words "the unanimous agreement" by the words "the unanimous vote".

85. Mr. JIMÉNEZ de ARÉCHAGA said that the expression "unanimous vote" could hardly be applied to the adoption of bilateral treaties. The words "the unanimous agreement" would cover both the adoption of multilateral treaties as the result of a vote, and the adoption of bilateral treaties.

86. Mr. ROSENNE suggested that the best solution would be to replace the words "*par l'accord unanime*" in the French text by the words "*à l'unanimité*", and to leave the English text unchanged.

87. Sir Humphrey WALDOCK, Special Rapporteur, suggested that, if there were objections to the expression "the unanimous vote", the word "agreement" might be replaced by the word "consent".

The Special Rapporteur's amendment was adopted.

Paragraph 1, as thus amended, was adopted.

Paragraph 2

Paragraph 2 was adopted without comment.

Article 6, as amended, was adopted.

Article 7 (Authentication of the text) [9]

Article 7 was adopted without comment.

88. Mr. AGO suggested that, in the final text, in order to avoid confusion, the Secretariat omit all reference to articles which had been deleted.

ARTICLE 11 (Consent to be bound by a treaty expressed by signature) [10]

Article 11 was adopted without comment.

ARTICLE 12 (Consent to be bound by a treaty expressed by ratification, acceptance or approval) [11]

Article 12 was adopted without comment.

ARTICLE 13 (Consent to be bound by a treaty expressed by accession) [12]

Article 13 was adopted without comment.

ARTICLE 15 (Exchange or deposit of instruments of ratification, accession, acceptance or approval) [13]

89. Mr. TSURUOKA, drawing attention to the words "de leur notification" in the French version of subparagraph (c), said that the subject of the sentence was "les instruments de . . .", but one could not notify an instrument; the most that one could do was to deliver it.

90. Mr. BARTOŠ said that although Mr. Tsuruoka was right grammatically, in practice the existence of an instrument was sometimes notified by attaching a copy of it to the notification. Since it was difficult to find an expression to cover both meanings, it would be better to leave the sentence as it was.

91. Sir Humphrey WALDOCK, Special Rapporteur, suggested that, in the title of article 15 and in the first and second lines, the order of the words "ratification, accession, acceptance or approval" be changed to "ratification, acceptance, approval or accession", since that was the order in which the various types of instrument were dealt with in the articles which followed.

The Special Rapporteur's amendment was adopted.

Article 15, as amended, was adopted.

ARTICLE 16 (Consent relating to a part of a treaty and choice of differing provisions.) [14]

Article 16 was adopted without comment.

ARTICLE 17 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force.) [15]

92. Mr. AGO said that he was in some doubt as to whether the French words "de nature à" were really equivalent to the English words "calculated to". A better translation would be "ayant pour but de".

93. Mr. AMADO said that he too disliked the translation "de nature à" and would suggest "destinés à".

94. Mr. AGO said that, in his opinion, there was an element of intent in the words "calculated to", which should be translated by "tendant à".

95. Mr. de LUNA said he agreed; the words "encaminados a" were already used in the Spanish text.

96. Sir Humphrey WALDOCK, Special Rapporteur, suggested that in the English text also the words "calculated to" be replaced by the words "tending to".

Mr. Ago's and the Special Rapporteur's amendments were adopted.

97. Mr. ROSENNE said he thought that the meaning of the French words "réduire à néant" was much stronger than that of the English word "frustrate".

98. The CHAIRMAN, speaking as a member of the Commission, said that he was fully satisfied with the rendering "réduire à néant".

Article 17, as amended, was adopted.

SECTION 2—RESERVATIONS TO MULTILATERAL TREATIES

ARTICLE 18 (Formulation of reservations) [16]

99. Mr. TSURUOKA said that, in subparagraph (c) and in article 69, the expression "object and purpose" appeared in the singular whereas in articles 40 and 42 it appeared in the plural. Both singular and plural had the same meaning, but it would be better to adopt a uniform practice.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that the question raised by Mr. Tsuruoka had been discussed in the Drafting Committee which had decided that the singular form, "the object and purpose", should be used in every case. If the plural form still appeared in the English text of a number of articles, it was merely because the Drafting Committee had approved the text of those articles before it had taken that decision.

Article 18 was adopted without amendment.

ARTICLE 19 (Acceptance of and objection to reservations) [17]

Paragraph 1

Paragraph 1 was adopted without comment.

Paragraph 2

101. Mr. TSURUOKA, referring to the word "parties" at the end of paragraph 2, said he agreed that in practice "the parties" and "the negotiating States" usually turned out to be exactly the same. In logic, however, had it not been the Commission's intention to speak of "the negotiating States" rather than of "the parties"?

102. Sir Humphrey WALDOCK, Special Rapporteur, said there might be a case for replacing the words "all the parties" by the words "all the contracting States", but not by the words "all the negotiating States", though personally he thought that the words "all the parties" should be retained.

103. Mr. LACHS said that Mr. Tsuruoka had raised an important question of substance, namely, whether

a reservation to a treaty required acceptance by States which were not themselves bound by the treaty. If so, without being bound by the provisions of an international instrument, a State could prevent other States from becoming parties to it. He agreed with the Special Rapporteur that the words “by all the parties” should be retained.

104. Mr. AGO said that it was absolutely essential to retain the word “parties”, since it was a matter of the application of a treaty and a treaty could be applied only between the parties. The negotiating States, at a given moment, had given their consent to the application of the treaty as between all the parties, but when the treaty came to be applied, there were only “the parties”.

105. Mr. TSURUOKA said that, as in practice both expressions amounted to the same thing, he would support the majority view. There was no problem where ten States had drafted a treaty and all intended to ratify it; but supposing the treaty came into force after three States had ratified it, would those three then be able to accept the reservation, and thereby prevent the other States from entering into treaty relations? That was the special case that occasioned him some doubt.

106. Mr. AGO suggested that, in paragraph 2, the words “by the treaty” be inserted after the words “to be bound”.

It was so agreed.

Paragraph 2, as thus amended, was adopted.

Paragraphs 3-5

Paragraphs 3-5 were adopted without comment.

Article 19, as amended, was adopted.

ARTICLE 20 (Procedure regarding reservations) [18]

Article 20 was adopted without comment.

ARTICLE 21 (Legal effects of reservations) [19]

Article 21 was adopted without comment.

ARTICLE 22 (Withdrawal of reservations) [20]

Article 22 was adopted without comment.

SECTION 3 — ENTRY INTO FORCE

ARTICLE 23 (Entry into force of a treaty) [21]

107. Mr. AGO said that it would be better to transpose the title of the article, “Entry into force of a treaty”, and the title of section 3, “Entry into force”.

108. Mr. TSURUOKA pointed out that the French and English versions of the title did not correspond exactly; the English referred to “a treaty”, but the French to “*des traités*”.

109. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the titles in question be amended to read:

“Section 3 — Entry into force of treaties”; and
“Article 23 — Entry into force”.

The Special Rapporteur's amendment was adopted.

Article 23 as thus amended was adopted.

ARTICLE 24 (Entry into force of a treaty provisionally) [22]

110. Mr. AGO said that, as in article 23, the words “of a treaty” in the title should be omitted.

Mr. Ago's amendment was adopted.

Article 24, as amended, was adopted.

The meeting rose at 1 p.m.

893rd MEETING

Monday, 18 July 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

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

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

(continued)

CHAPTER II: LAW OF TREATIES *(continued)*

FINAL TEXT OF ARTICLES (A/CN.4/L.117 and Add.1)
(continued)

PART III. OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION I — OBSERVANCE OF TREATIES

1. The CHAIRMAN invited the Commission to continue its consideration of the final text of the draft articles (A/CN.4/L.117 and Add.1).

ARTICLE 55 (*Pacta sunt servanda*) [23]

Article 55 was adopted without comment.

SECTION 2 — APPLICATION OF TREATIES

ARTICLE 56 (Non-retroactivity of treaties) [24]

2. Mr. BRIGGS said that by an oversight the words “its provisions do not bind” had been left out of the English text. They should be inserted after the word “established, . . .”.

Article 56 was adopted.

ARTICLE 57 (Application of treaties to territory) [25]

Article 57 was adopted without comment.

ARTICLE 63 (Application of successive treaties relating to the same subject-matter) [26]

3. Mr. CASTRÉN proposed the deletion of paragraph 5. Now that the Commission had adopted a special article Y (A/CN.4/L.117/Add.1) which reserved the question of the international responsibility of States, the paragraph was no longer necessary.

4. Mr. JIMÉNEZ de ARÉCHAGA said that paragraph 5 should be retained, because the reservation it contained concerning cases of breach was useful.

5. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 5 was necessary in order to obviate any misunderstanding about the rule laid down in paragraph 4 (c), which might be interpreted as sanctioning the conclusion of a later treaty incompatible with an earlier one. Members would recollect the discussions on "interdependent" treaties.¹

6. The CHAIRMAN, speaking as a member of the Commission, said he saw no objection to retaining the paragraph, which could even be useful in a particular case.

Article 63 was adopted.

SECTION 3—INTERPRETATION OF TREATIES

ARTICLE 69 (General rule of interpretation) [27]

7. Mr. PESSOU asked what was the meaning of the word "their" in the expression "in their context" in paragraph 1. Which noun did it refer to?

8. The CHAIRMAN said he agreed with Mr. Pessou that one could not use the expression "in their context" in French.

9. Mr. BARTOŠ said that he understood the expression to mean "in the context of the treaty", not "in the context of the terms of the treaty".

10. The CHAIRMAN said it was important to get the matter right and he would call on the Special Rapporteur to explain the position.

11. Sir Humphrey WALDOCK, Special Rapporteur, said that as far as the English text was concerned, the meaning of paragraph 1 was clear. Of course the wording he had originally put forward in his third report, in what had then been article 70, had been more explicit. It had read: "The terms of a treaty shall be interpreted in good faith in accordance with the natural and ordinary meaning to be given to each term in its context in the treaty and in the context of the treaty as a whole."²

12. Mr. BRIGGS said that the Special Rapporteur's 1964 text had made it plain that the terms of a treaty must be interpreted in their context in a particular clause and also in the context of the treaty as a whole, but during the present session the Commission had decided to express those two elements in a single phrase. The only question was whether the French translation of paragraph 1 was accurate.

13. Mr. BARTOŠ pointed out that paragraph 2 consisted of an explanation of the meaning of the expression "the context of the treaty".

14. Mr. JIMÉNEZ de ARÉCHAGA said that paragraph 1 as it stood could very well be construed in the sense indicated by Mr. Pessou, Mr. Bartoš and the Chairman.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had decided that the words "in the light of the object and purpose of the treaty" would to a large extent cover the idea of the context of

the treaty as a whole, and for that reason the text had been abbreviated. Certainly in English, if no reference were made to the object and purpose of the treaty, the natural way of expressing the idea would be to use language of the kind he had suggested in 1964.

16. Mr. PESSOU said that his inquiry had been prompted only by concern over the drafting. He was anxious to see all possible sources of ambiguity removed, since it was on ambiguous wording that the abuse of treaties was generally founded.

17. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion, the expression "the context of the treaty" naturally included the context of the articles, the context of the terms of the treaty. But "the context of the terms of the treaty" did not include the context of the treaty. If the Commission spoke of "the context of the treaty", that would be much more comprehensive and much more accurate.

18. Mr. BRIGGS said that if that were the case, it might be better to revert to the Special Rapporteur's original formulation, which would include both ideas.

19. Mr. BARTOŠ said that, since the reference was to the context of the treaty, and the terms of the treaty were an integral part of the treaty, he would suggest that the words "in their context" be replaced by the words "in its context".

20. Mr. JIMÉNEZ de ARÉCHAGA said he preferred the 1964 formula, "the context of the treaty".

21. Sir Humphrey WALDOCK, Special Rapporteur, said that he had found it difficult to accept the wording approved by the Commission at its sixteenth session, and when the matter had been discussed at the present session, Mr. Reuter had criticized the phrase on the grounds that in French it was quite meaningless; even in English the words "the context of the treaty" were not free of ambiguity, because the phrase might be understood to mean more than the text of the treaty itself and to include other elements.

22. Mr. TUNKIN said the Commission should leave the text unchanged, as it had been elaborated only after long and careful discussion of the point at issue.

23. Mr. AGO said that the words "in their context" meant "in the context of the terms of the treaty" and not "in the context of the treaty". The confusion in the Commission had arisen from the use in the French text of paragraph 2 of the faulty expression "*contexte du traité*" and that confusion could only be removed by deleting the words "*du traité*" and thereby bringing the French text into line with the English.

24. Mr. JIMÉNEZ de ARÉCHAGA said that paragraph 1 as now worded was restrictive, and seemed to suggest that the process of interpretation must be carried out by reference to the context of a particular provision rather than of the treaty as a whole. The 1964 text had been satisfactory and had provoked no serious objection from governments. The change introduced at the present session was unjustified.

25. Sir Humphrey WALDOCK, Special Rapporteur, said it was unfortunate that Mr. Jiménez de Aréchaga had not been present when the problem had been re-examined by the Commission. The introductory

¹ See 857th and 858th meetings.

² *Yearbook of the International Law Commission, 1964*, vol. II, p. 52.

phrase to paragraph 2, reading "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes" could not be more clear, nor could it be misconstrued in the narrow sense attributed to paragraph 1 by Mr. Jiménez de Aréchaga.

26. Mr. LACHS said that the words "the terms of the treaty in their context" could not be misunderstood, particularly as the word "terms" was in the plural. The wording finally arrived at in paragraph 1 had been carefully weighed, and any change introduced at that stage would probably be for the worse.

27. The CHAIRMAN, speaking as a member of the Commission, said that the Commission must have the assurance that interpretation would be in the light of the treaty as a whole and not of a particular article or passage.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that it was essential to delete the words "*du traité*" in the French text of the introductory phrase of paragraph 2; otherwise it would not correspond with the English text.

29. Mr. TSURUOKA said that, with the text as it stood, he understood paragraph 1 as interpreted by the Chairman.

30. Mr. AMADO said he believed that the confusion arose from the way the word "context" was used by journalists and even occasionally by serious writers. Some of them went so far as to talk about "the context of the circumstances", treating "context" as the equivalent of "group". Although he was as anxious as any of his colleagues to adopt a solid, substantial text, he thought that in the case of paragraph 1 the best course was to adopt the text as it stood.

31. Mr. JIMÉNEZ de ARÉCHAGA said that he could accept the present text of paragraph 1, as interpreted by the Chairman.

32. The CHAIRMAN, speaking as a member of the Commission, said that, on the substance, he understood Mr. Amado to share the views of those who opposed the expression "in their context"; the terms of the treaty should be interpreted in the light of the treaty as a whole and not of a single article. The only difference of opinion between him and the other members related to the question whether that idea should be expressed in the text, or whether it should be agreed that it was already implicit in the text.

33. Mr. BARTOŠ said that the question was one of major importance. Any interpretation of the terms of a treaty must be made in the whole context in which those terms were placed: otherwise they would lose all meaning.

34. Mr. CASTRÉN said he must point out that the text now being criticized had been adopted by sixteen votes to none, with no abstentions. He saw no difficulty in that text, which was clear when all the paragraphs were read, but he subscribed to the interpretation given by the Chairman.

Article 69 was adopted without amendment.

ARTICLE 70 (Supplementary means of interpretation) [28]

Article 70 was adopted without comment.

ARTICLE 72 (Interpretation of treaties expressed in two or more languages) [29]

35. Mr. PESSOU proposed that the word "expressed", both in the title and in paragraph 2, be replaced by the word "established".

36. Mr. AGO, supporting Mr. Pessou's proposal, said that it applied to both the French and the English texts.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that the word "established" would not be appropriate in paragraph 2 because it might convey the impression that the version of the treaty referred to was that of the text negotiated and adopted, the one in which the agreement had originally been established. To modify paragraph 2 in that way would be restrictive because there could be other authenticated versions of the treaty. The words "drawn up" would also be unsuitable for paragraph 2 because it was common for the original agreement to be drawn up in one language and for another authentic text to be drawn up in another language.

38. Mr. JIMÉNEZ de ARÉCHAGA suggested that the word "expressed" was unnecessary in paragraph 2.

39. Mr. AGO said that the problem dealt with in the article as a whole was that of the interpretation of a treaty authenticated in several languages. It was for that reason that the word "established" or "authenticated" should be used in the title.

40. Mr. TSURUOKA said he supported Mr. Jiménez de Aréchaga's suggestion simply to delete the word "expressed" in paragraph 2.

41. Mr. BARTOŠ said he agreed with Mr. Ago's interpretation that article 72 stated two completely different ideas. In the case dealt with in paragraph 1, the texts in several languages were all authentic, like the instruments adopted by big diplomatic conferences, or certain instruments adopted by the General Assembly of the United Nations. In the case dealt with in paragraph 2, one or two language versions were authoritative. The paragraph concerned official translations, versions which were not generally considered authentic and only became authentic if the parties agreed. That was why different terms must be used in paragraph 1 and paragraph 2. If paragraph 1 used the term "authenticated", then paragraph 2 should speak of a version which had been "drawn up", because it dealt with a translation of an authentic text.

42. Mr. AGO suggested that paragraph 2 be amended to open with the words "A version of the treaty in a language" and that the title of the article be amended to read "Interpretation of treaties established in two or more languages".

43. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the word "established"—"*établi*" in the French—be substituted for the word "expressed" in the title of the article and that the word "expressed" be deleted in paragraph 2.

It was so agreed.

Article 72, as thus amended, was adopted.

SECTION 4—TREATIES AND THIRD STATES

ARTICLE 58 (General rule regarding third States) [30]

Article 58 was adopted without comment.

ARTICLE 59 (Treaties providing for obligations for third States) [31]

Article 59 was adopted without comment.

ARTICLE 60 (Treaties providing for rights for third States) [32]

Paragraph 1

44. Mr. PESSOU said that he could accept paragraph 1, though it was hard to understand how, for example, two riparian States could meet for the purpose of according a right to two other riparian States, without having invited them to the meeting to determine the legal status of the river of which all were riparian States. The paragraph was not altogether realistic, as he had already had occasion to point out in 1964 during the discussion of the original article 62.³

Article 60 was adopted.

ARTICLE 61 (Revocation or modification of obligations or rights of third States) [33]

Article 61 was adopted without comment.

ARTICLE 62 (Rules in a treaty becoming binding through international custom) [34]

Article 62 was adopted without comment.

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

ARTICLE 65 (General rule regarding the amendment of treaties) [35]

45. The CHAIRMAN, speaking as a member of the Commission, said that it would perhaps be more correct to use the words "modification" and "modified" instead of "amendment" and "amended".

46. Sir Humphrey WALDOCK, Special Rapporteur, said that he failed to understand why the Chairman should have difficulty in accepting the wording used in the titles and texts of the four articles in part IV when, after long discussion, the Commission had agreed to make a distinction between amendment and modification.

47. Mr. de LUNA recalled that the Commission had discussed the question at length and that it had been finally agreed to speak not of "revision" but of "modification" and "amendment", and to draw a clear distinction between the latter two terms.

48. Mr. BARTOŠ said that, as a member of the Commission which had drawn up the rules of procedure of the General Assembly, he remembered that the question of "amendment" had been the subject of a discussion in which French jurists had participated and which had led to the adoption of rule 131. The term "to amend" had been accepted as describing a certain kind of action, but the result of that action was not an amendment: it could be an addition, a deletion or a modification. When an amendment had been adopted, a vote was taken on the proposal as "modified" by the "amendment".

49. Mr. AGO suggested that the last sentence of the French text be brought into line with the English by replacing the words "*cet accord*" by "*un tel accord*" so as to show clearly that the reference was to the assent

mentioned in the first sentence and not to the treaty itself.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's amendment to the French text was acceptable.

51. Mr. BRIGGS pointed out that the second sentence in article 65 would have to be corrected, as it was the rules laid down in part II and not those in part I that applied, following the re-arrangement now approved by the Commission.

52. Mr. ROSENNE suggested that reference should also be made to the rules in part VII.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that it would suffice to refer to the general rules in part II.

It was so agreed.

Article 65, as amended, was adopted.

ARTICLE 66 (Amendment of multilateral treaties) [36]

Article 66 was adopted without comment.

ARTICLE 67 (Agreements to modify multilateral treaties between certain of the parties only) [37]

54. Mr. de LUNA suggested that, in paragraph 1 (b) (ii), the words "the objects and purposes" be replaced by the words "the object and purpose".

55. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the phrase "objects and purposes", in paragraph 1 (b) (ii), should be in the singular.

Article 67, as thus amended, was adopted.

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

Article 68 was adopted without comment.

PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES
SECTION 1—GENERAL PROVISIONS

ARTICLE 30 (Validity and continuance on force of treaties) [39]

56. Mr. AGO suggested that, in the French version of the title of Part V and of the text of paragraph 1 of article 30, the words "*défaut de validité*" be replaced by the word "*nullité*".

57. Mr. PESSOU pointed out that the second sentence of paragraph 1 would then read somewhat strangely: "*Un traité dont la nullité est établie en vertu des présents articles est nul*".

58. Mr. AGO suggested that the difficulty might be overcome by rearranging the sentence to read: "*Est nul un traité dont la nullité est établie en vertu des présents articles*".

It was so agreed.

Article 30, as amended in the French text only, was adopted.

ARTICLE 30 (bis) (Obligations under other rules of international law) [40]

59. Mr. AGO suggested that, in the second line of the French text, the word "*ni*" be replaced by the word "*ou*".

It was so agreed.

³ *Yearbook of the International Law Commission, 1964, vol. I, p. 94, para. 74.*

Article 30 (bis), as amended in the French text only, was adopted.

ARTICLE 46 (Separability of treaty provisions) [41]

60. Mr. TSURUOKA asked why the word "clauses" was used in paragraph 3, when the Commission had always referred to "provisions".

61. Sir Humphrey WALDOCK, Special Rapporteur, said that, in view of the frequency with which the word "provide" was used in the article, it had been thought that to use the word "provisions" would be inelegant.

62. Mr. ROSENNE said that use of the word "provisions" would also involve a change of substance. The intention was to refer to clauses as units, not to the provisions of the treaty as a whole.

63. Mr. BARTOŠ said that there was a distinction between the two terms. A provision was a contractual rule which could have several separate clauses. A "clause" was intermediate between a rule and a condition, and offered the possibility in certain cases of taking advantage of, or obtaining protection from, certain situations.

64. Mr. TSURUOKA said that he would not discuss that distinction but must point out that there was a discrepancy between the title and the text of the article.

65. Sir Humphrey WALDOCK, Special Rapporteur, said he thought it was perfectly legitimate to speak of treaty provisions in the title. It would be best to leave the text as it was.

66. Mr. AGO said that, in order to bring the French text into line with the English, it would be necessary to insert, before the words "*de ses clauses particulières*" in paragraph 4, the word "*seulement*".

It was so agreed.

67. Mr. JIMÉNEZ de ARÉCHAGA said that, in accordance with the Commission's decision at the 891st meeting, the words "Subject to paragraph 3" should be inserted at the beginning of paragraph 4.⁴

It was so agreed.

Article 46, as amended, was adopted.

ARTICLE 47 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty) [42]

Article 47 was adopted without comment.

SECTION 2—INVALIDITY OF TREATIES

68. Mr. AGO said that, in the French text of the title, the words "*défaut de validité*" should be replaced by the word "*nullité*".

It was so agreed.

ARTICLE 31 (Provisions of internal law regarding competence to conclude a treaty) [43]

69. The CHAIRMAN, speaking as a member of the Commission, said that, according to his information, the correct translation in French of 'competence to conclude' was "*compétence pour conclure*".

70. Mr. AGO said that the third line of the French text should read "*ne peut être invoqué*" instead of "*ne peut pas être invoqué*".

It was so agreed.

⁴ 891st meeting, para. 67.

Article 31, as amended in the French text only, was adopted.

ARTICLE 32 (Specific restrictions on authority to express the consent of the State) [44]

Article 32 was adopted without comment.

ARTICLE 34 (Error) [45]

71. Mr. AGO said that the second sentence of paragraph 2 had been inaccurately translated into French. The words "*les circonstances ont été telles que cet Etat avait été averti de la possibilité d'une erreur*" should be replaced by "*les circonstances étaient de nature à avertir cet Etat de la possibilité d'une erreur*", thereby bringing the French into line with the English.

72. Mr. JIMÉNEZ de ARÉCHAGA said that the wording of paragraph 2 was taken from a judgment of the International Court of Justice;⁵ the French version of the paragraph should therefore be checked against the French text of the judgment of the Court.

73. Mr. AGO said that, whatever the source of the French text, it did not mean the same thing as the English and should be corrected.

It was so agreed.

Article 34, as amended in the French text only, was adopted.

ARTICLE 33 (Fraud) [46]

Article 33 was adopted without comment.

ARTICLE 34 (bis) (Corruption of a representative of the State) [47]

74. Mr. AGO said that, for reasons of euphony, the words "*par la corruption*", in the second line of the French text, should be replaced by the words "*au moyen de la corruption*".

It was so agreed.

Article 34 (bis), as amended in the French text only, was adopted.

ARTICLE 35 (Coercion of a representative of a State) [48]

Article 35 was adopted without comment.

ARTICLE 36 (Coercion of a State by the threat or use of force) [49]

Article 36 was adopted without comment.

ARTICLE 37 (Treaties conflicting with a peremptory norm of general international law (*ius cogens*)) [50]

Article 37 was adopted without comment.

SECTION 3—TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

75. The CHAIRMAN, speaking as a member of the Commission, said that the word "*Fin*" in the title of section 3 referred to the treaty, not to its operation; the title in French should therefore be amended to read "*Fin des traités et suspension de leur application*".

It was so agreed.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that no change was required in the English text; the same juxtaposition occurred elsewhere.

⁵ *Case concerning the Temple of Preah Vihear, Judgment of 15 June 1962, I.C.J. Reports 1962, p. 26.*

ARTICLE 38 (Termination of or withdrawal from a treaty by consent of the parties) [51]

Article 38 was adopted without comment.

ARTICLE 39 (*bis*) (Reduction of the parties to a multi-lateral treaty below the number necessary for its entry into force) [52]

77. Mr. TSURUOKA said he noted that, in the title, the word "necessary" had been translated into French by the words "*spécifié dans le traité*".

78. Mr. AGO proposed that, in the French text, it be replaced by the word "*exigé*".

It was so agreed.

Article 39 (bis), as amended in the French text only, was adopted.

ARTICLE 39 (Denunciation of a treaty containing no provision regarding termination) [53]

79. Mr. AGO said that, as it was a question of denunciation, the word "*fin*" in the title and first line of the French text should be replaced by the word "*extinction*".

It was so agreed.

Article 39, as amended in the French text only, was adopted.

ARTICLE 40 (Suspension of the operation of a treaty by consent of the parties) [54]

80. Mr. AGO said that, in sub-paragraph (*b*) of the French text, the words "*en tout moment*" should be replaced by the words "*à tout moment*".

It was so agreed.

Article 40, as amended in the French text only, was adopted.

ARTICLE 40 (*bis*) (Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only) [55]

81. Sir Humphrey WALDOCK, Special Rapporteur, said that, in accordance with the Commission's previous decision, the expression "objects and purposes" in sub-paragraph (*b*) should be in the singular.

It was so agreed.

82. Mr. AGO proposed the deletion of the word "*prises*" in sub-paragraph (*b*) of the French text.

It was so agreed.

Article 40 (bis), as amended, was adopted.

ARTICLE 41 (Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty) [56]

Article 41 was adopted without comment.

ARTICLE 42 (Termination or suspension of the operation of a treaty as a consequence of its breach) [57]

83. The CHAIRMAN, speaking as a member of the Commission, proposed that the French version of the title be altered to read "*Fin d'un traité ou suspension de son application comme conséquence de sa violation*".

It was so agreed.

84. Mr. AGO suggested that, in the French text of paragraph 2, "*l'Etat en défaut*" would be preferable to "*l'Etat fautif*", "*lésée*" to "*affectée*" and "*situation*" to "*position*".

85. Mr. TSURUOKA said that wherever possible the English verb "to affect" in its various forms should be translated by the same French word throughout the draft articles.

86. Mr. AMADO proposed that, in the French text, the word "*affectée*" be replaced by the word "*atteinte*".

It was so agreed.

87. Mr. AGO said that some other word than "*répudiation*" should be used in paragraph 3 (*a*) of the French text for the English word "repudiation".

88. The CHAIRMAN, speaking as a member of the Commission, proposed that it be replaced by the word "*rejet*".

It was so agreed.

89. Mr. de LUNA said that he was in some doubt as to whether the expression "objects or purposes" in paragraph 3 (*b*) should be in the singular or in the plural.

90. Mr. JIMÉNEZ de ARÉCHAGA said that, if the expression "objects and purposes" were put in the singular, the sense would be altered.

91. Sir Humphrey WALDOCK, Special Rapporteur, said that it was possible to use the singular; it would of course be necessary to delete the words "any of".

It was so agreed.

Article 42, as amended, was adopted.

ARTICLE 43 (Supervening impossibility of performance) [58]

Article 43 was adopted without comment.

ARTICLE 44 (Fundamental change of circumstances) [59]

92. Mr. AGO suggested that, in the French text, the words "*pour s'en retirer*" be replaced by the words "*pour se retirer d'un tel traité*".

It was so agreed.

Article 44, as amended in the French text only, was adopted.

ARTICLE 64 (Severance of diplomatic relations) [60]

93. Mr. JIMÉNEZ de ARÉCHAGA said he thought it had been understood that article 64 should be placed after article 43, not after article 44.

94. Sir Humphrey WALDOCK, Special Rapporteur, said that the decision to place it after article 44 was deliberate. Articles 43 and 44 were closely related; some cases of subsequent impossibility of performance could equally well be held to be cases of fundamental change of circumstances. Severance of diplomatic relations was a different matter and the article dealing with it should therefore follow article 44.

Article 64 was adopted.

ARTICLE 45 (Establishment of a new peremptory norm of general international law) [61]

95. The CHAIRMAN said there was an error in the English text of the title of article 45: the word "Establishment" should read "Emergence".

96. Mr. AGO suggested that, in both the English and the French texts, the words “in conflict with”—in French, “*qui est en conflit avec*”—should be used instead of “incompatible”.

It was so agreed.

Article 45, as amended, was adopted.

SECTION 4 — PROCEDURE

ARTICLE 51 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) [62]

Paragraph 1

97. Mr. AGO, referring to the French text, suggested that, since the Commission had always used the expression “*alléguer un motif*”, rather than “*alléguer une cause*”, to render the English “allege a ground”, it should continue to do so.

It was so agreed.

98. Sir Humphrey WALDOCK, Special Rapporteur, referring to the use of the word “party” in the article, said that it would have been clumsy to add anything to the word “party” to indicate the slightly different sense in which it was used in article 51 as compared with the ordinary sense of a party to a treaty in force. It seemed best to explain the matter in the commentary to the article on definitions and he had accordingly done so.

Paragraph 2

99. Mr. TSURUOKA said that, when the Commission was approving article 29 (*bis*), he had stated that article 51 would have to be altered accordingly.⁶ So far as the time limit was concerned, it seemed desirable that article 51, paragraph 2, should be brought into line with article 19, paragraph 5.

100. Sir Humphrey WALDOCK, Special Rapporteur, suggested that in that case, the beginning of paragraph 2 be altered to read “If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months from the receipt of the notification by the other party . . .” or “the other parties”, as in paragraph 1.

101. Mr. JIMÉNEZ de ARÉCHAGA said that the interpolation seemed scarcely necessary, since article 29 (*bis*) covered the point.

102. Mr. TUNKIN said that there would be difficulties in practice. How, for example, would the State sending the notification know when each State had received it?

103. Mr. TSURUOKA said that Mr. Tunkin’s remark was perfectly true where practice was concerned, but what was at issue in the article was the protection of the interests of both sides. The party receiving the notification had to be aware of its contents before it could make its objection; if three months had elapsed without that party taking any action, then it was responsible and must accept the consequences of the measure taken by the other party.

104. The CHAIRMAN, speaking as a member of the Commission, said that by inserting a reference to article 29 (*bis*), the notification could be required to be express.

105. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the best solution would be to omit the words “by the other party” altogether. The opening passage would then read “If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification”.

It was so agreed.

106. Mr. AGO proposed that the French text read: “*Si après un délai qui, sauf en cas d’urgence particulière, ne saurait être inférieur à trois mois dès la réception de la notification, . . .*”.

It was so agreed.

107. Mr. ROSENNE said that, in article 29 (*bis*), the words “receipt” and “received” were used in the sense of receipt by the depositary and by the State. The word “receipt” in article 51, paragraph 2, would therefore be ambiguous.

108. Sir Humphrey WALDOCK, Special Rapporteur, said that there was no ambiguity if paragraph 1 was read in conjunction with paragraph 2.

Article 51, as amended, was adopted.

ARTICLE 50 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) [63]

Article 50 was adopted without comment.

ARTICLE 50 (*bis*) (Revocation of notifications and instruments provided for in articles 51 and 50) [64]

109. Mr. AGO proposed that the French text be brought in line with the English text by using the wording “*Une notification ou un instrument*”.

It was so agreed.

Article 50 (bis), as amended in the French text only, was adopted.

SECTION 5 — CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

110. Mr. AGO proposed that the words “*la fin*” in the French text of the title of section 5 and of the titles of articles 53 and 53 (*bis*) be replaced by the words “*l’extinction*”.

It was so agreed.

ARTICLE 52 (Consequences of the invalidity of a treaty) [65]

111. The CHAIRMAN pointed out that the number “34 (*bis*)” should be inserted after the number “33” in paragraph 3.

Article 52, as thus amended, was adopted.

ARTICLE 53 (Consequences of the termination of a treaty) [66]

112. The CHAIRMAN said that, in view of the amendment adopted at the 891st meeting, the beginning of paragraph 1 (*b*) should be amended to read: “does not affect any right, obligation or legal situation of the parties . . .”.

Article 53, as thus amended, was adopted.

⁶ 887th meeting, para. 15.

ARTICLE 53 (*bis*) (Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law) [67]

113. Sir Humphrey WALDOCK, Special Rapporteur, said that the same change would have to be made to the beginning of paragraph 2 (*b*) as had just been made to paragraph 1 (*b*) of article 53.

114. Mr. AGO said he was not sure whether the term "nullity" used in the English text was the correct term.

115. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had decided that "nullity" was the proper term.

Article 53 (bis), as amended, was adopted.

ARTICLE 54 (Consequences of the suspension of the operation of a treaty) [68]

116. Mr. WATTLES (Deputy Secretary to the Commission) said that, in accordance with the Commission's decision at the 891st meeting, the words "between the parties" should be inserted after the words "legal relations" in paragraph 1 (*b*).

117. Mr. AGO said that, in paragraph 2, the word "calculated" should be replaced by the word "tending".

It was so agreed.

Article 54, as amended, was adopted.

PART VI. CASE OF AN AGGRESSOR STATE

118. Sir Humphrey WALDOCK, Special Rapporteur, said that the title of part VI should be changed to "Miscellaneous Provisions", since the part now contained two articles, Y and Z.

ARTICLE Y (Cases of State succession and State responsibility) (A/CN.4/L.117/Add.1) [69]

Article Y was adopted without comment.

ARTICLE Z (Special provision regarding an aggressor State) [70]

119. Sir Humphrey WALDOCK, Special Rapporteur, said that the title of article Z should now read "Case of an aggressor State".

Article Z as thus amended was adopted.

PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

ARTICLE 28 (Depositaries of treaties) [71]

Article 28 was adopted without comment.

ARTICLE 29 (Functions of depositaries) [72]

Article 29 was adopted without comment.

ARTICLE 29 (*bis*) (Notifications and communications) [73]

Article 29 (bis) was adopted without comment.

ARTICLE 26 (Correction of errors in texts or in certified copies of treaties) [74]

120. Mr. AGO asked whether the reference in paragraph 4 to "the negotiating States" was correct; paragraph 3, in the French text at any rate, referred to the agreement of the contracting States.

121. Sir Humphrey WALDOCK, Special Rapporteur, said that there were really two situations. In one, a correction might be made very soon after the conclusion of the treaty, in which case the reference would be to the "negotiating States"; in the other, the error might not be discovered till some time later, in which case the reference might well be to the "contracting States".

122. Mr. WATTLES (Deputy Secretary to the Commission) said he had been informed that, for the purposes of the French text, it was necessary to specify in paragraph 3 whose agreement was required, whence the apparent difference between the English and French texts.

123. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the last phrase in paragraph 3 be amended to read "which the negotiating States agree should be corrected".

124. Mr. JIMÉNEZ de ARÉCHAGA said that, in that case, if a contracting State agreed that there was an error and a negotiating State did not agree, the proposed procedure would be inapplicable.

125. Mr. LACHS said that paragraph 5 was more a matter for the parties than for the negotiating States.

126. Mr. ROSENNE said that certified copies of treaties were usually in the hands of States, whereas the original remained in the hands of the depositary. He therefore did not understand what paragraph 5 was intended to convey.

127. Sir Humphrey WALDOCK, Special Rapporteur, said that the situation was surely quite simple. A certified copy was issued by a depositary for the use of the States concerned. If a depositary discovered an error, he had to notify every State to which the certified copy had been issued.

128. The question of "negotiating" and "contracting" States was a difficult one because whichever expression was used would seem to exclude States in the other situation. If the error was discovered immediately the text had been drawn up, the reference was obviously to "negotiating States". But to use the expression "negotiating States" might appear to be giving those States a right of veto. If the error was discovered much later it might be a matter for "contracting States", but that term might exclude States from participating in the correction which were entitled to do so.

129. Mr. TUNKIN said that he could see no difficulty in paragraph 5; it referred to the copy made by the depositary, which would, of course, send corrections to all the negotiating States.

130. In paragraph 4, however, the problem was more serious, since the corrected text replaced the defective text *ab initio*, and a question of substance might be involved. It was therefore important to know to whom it was sent. The answer was that, before the treaty was in force, it was sent to the "negotiating States"; after the treaty was in force, it was sent to all the parties.

131. Sir Humphrey WALDOCK, Special Rapporteur, said that "contracting States" would perhaps be the best expression in paragraphs 3 and 4.

132. Mr. JIMÉNEZ de ARÉCHAGA said that it would also have to be used in paragraphs 1 and 2 (*c*).

133. Mr. TUNKIN said that "contracting States" would be inappropriate in paragraph 4, since it could happen that, at the time the error was discovered, there were no contracting States in the sense of States which had given their final consent to be bound by the treaty.

134. Mr. BARTOŠ said that he agreed with Mr. Tunkin. It was essential to know the result of the negotiations, for it was on the result of the negotiations that the participation of the States that were entitled to participate as contracting parties depended. If they discovered an error, they could change their attitude and decide to participate. That, at all events, was the argument that had been put forward on several occasions at major international conferences. Until the treaty came into force, the rights all belonged to the States which had been invited to participate, and which had participated.

135. Mr. JIMÉNEZ de ARÉCHAGA suggested that the Special Rapporteur be asked to prepare a new draft, in consultation with the Drafting Committee.

136. Sir Humphrey WALDOCK, Special Rapporteur, said that the best course seemed to be to leave the text as it stood; whatever change was made one situation was bound to be excluded.

137. Mr. AGO said that it might be better to use the same expression, "the negotiating States" throughout, even in paragraph 3, so as to avoid any inconsistency with paragraphs 1 and 2.

Article 26 was adopted without amendment.

ARTICLE 25 (Registration and publication of treaties) [75]

Article 25 was adopted without comment

138. The CHAIRMAN said that the Commission had concluded its final reading of the draft articles. He invited the Commission to vote on the draft articles as a whole.

The draft articles on the law of treaties, as a whole, were adopted unanimously.

139. The CHAIRMAN said the Commission was to be congratulated on its achievement, which was certainly an epoch-making event in its history and had only been made possible by the untiring work of the Special Rapporteur.

DRAFT RESOLUTION PROPOSED BY MR. AMADO

140. Mr. AMADO proposed that the Commission adopt the following draft resolution:

"The International Law Commission

"Having adopted the draft articles on the law of treaties,

"Desires to express to the Special Rapporteur, Sir Humphrey Waldock, its deep appreciation of the invaluable contribution he has made to the preparation of the draft throughout these past years by his tireless devotion and incessant labour, which have enabled the Commission to bring this task to a successful conclusion."

The resolution was adopted by acclamation.

141. Mr. AMADO said that he would not dwell on the Special Rapporteur's, Sir Humphrey Waldock's, all-embracing knowledge of the law, of the sources of law, of doctrine and practice, or on his respect for legal precedent. Among the outstanding features of his character was a total freedom from any doctrinaire or

partisan approach. His primary concern had always been the stability of the law, but at the same time he realized that the law was subject to change: he held that the law was the law as it was and as it could be, not the law as dreamers thought it ought to be. As a result of his objectivity, the Commission had never had to wrestle with any disputes other than those occasioned by its anxiety to serve the interests of States even better. The Commission did not give lessons in law; it tried to help States to derive the maximum benefit from their contacts within the international community.

142. Another of Sir Humphrey's distinguishing characteristics was his complete lack of vanity and his unflinching modesty, which was especially noticeable in the respect which he showed for the opinions of others.

143. For him (Mr. Amado), it had been an outstanding cultural experience to watch a scholar who was so sure of what he believed to be right, yet so ready to listen to what others believed to be right, and to follow the evolution of his thinking, in the face of counter-arguments, through to his conclusions. On very many occasions indeed, Sir Humphrey had proved to be right and the Commission had agreed with him in the end. He also wished to pay a tribute to Sir Humphrey's kindness, even temper, equanimity and infinite patience.

144. The name of Sir Humphrey Waldock would thenceforward be associated with a work that would remain as a landmark in history, a milestone in the march of the law. Members of the Commission were honoured to have collaborated with him in the achievement of such outstanding success, and proud that a little of his fame should be reflected on them.

145. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been deeply touched by the resolution and by the extremely generous terms in which Mr. Amado had referred to him. It was clear that every member of the Commission considered it to be a great occasion and that fact in itself gave him all the satisfaction he could ever have desired.

The meeting rose at 6.15 p.m.

894th MEETING

Tuesday, 19 July 1966, at 9 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

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

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

(resumed from the previous meeting)

CHAPTER II: LAW OF TREATIES (*continued*)

COMMENTARY TO ARTICLE 65 (General rule regarding the amendment of treaties) AND TO ARTICLE 66 (Amend-

ment of multilateral treaties) (A/CN.4/L.116/Add.8) (resumed from the 892nd meeting) [35 and 36]

1. The CHAIRMAN invited the Commission to resume its consideration of the commentaries to the draft articles. He pointed out that paragraph (1) of the commentary to articles 65 and 66 had been deleted.¹

Paragraph (2)

2. Mr. ROSENNE proposed the deletion of the words "especially in the case of technical conventions", in the eighth sentence, because the humanitarian conventions given as examples in the next sentence were not of a technical character.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that although the statement was correct, he was prepared to delete those words.

It was so agreed.

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

Paragraphs (3) to (8)

Paragraphs (3) to (8) were approved.

Paragraph (9)

4. Mr. TUNKIN said that paragraph (9) would need to be shortened as it was unnecessary to set out the views of individual jurists at such length.

5. Sir Humphrey WALDOCK, Special Rapporteur, said he would shorten the text.

Paragraph (9), as thus amended, was approved.

Paragraph (10)

6. Mr. TUNKIN proposed the deletion of the third sentence, which read "A refusal to bring a particular party or parties into consultation has usually been a political decision taken on political grounds and the question whether it was legally justified in the particular case has been left unresolved".

7. Sir Humphrey WALDOCK, Special Rapporteur, said that the purpose of that sentence had been to reply to the argument of certain jurists that there was no law to regulate the situation when a group of parties succeeded in effecting an amendment of a treaty régime without consulting the other parties. However, he was prepared to drop the sentence.

It was so agreed.

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

Paragraph (11)

Paragraph (11) was approved.

Paragraph (12)

8. Mr. ROSENNE proposed the deletion of the last sentence because the constituent instruments of international organizations were dealt with in article 3 (*bis*).

It was so agreed.

Paragraph (12), as thus amended, was approved.

Paragraph (13)

9. Mr. BRIGGS proposed the insertion of the word "unamended" before the word "treaty" in the opening

phrase of the fifth sentence, "Any State party only to the treaty", in order to make the meaning absolutely clear.

It was so agreed.

Paragraph (13), as thus amended, was approved.

Paragraph (14)

Paragraph (14) was approved.

Paragraph (15)

10. Mr. JIMÉNEZ de ARÉCHAGA said he thought the explanation of the Commission's decision, given in the last sentence, was too drastic. It had not wished to exclude altogether the possibility of the principle *nemo potest venire contra factum proprium* being applied.

11. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that he had qualified the word "rule" with the word "absolute". He would have thought that that met Mr. Jiménez de Aréchaga's objection.

Paragraph (15) was approved.

The commentary to articles 65 and 66, as amended, was approved.

COMMENTARY TO ARTICLE 67 (Agreements to modify multilateral treaties between certain of the parties only) (A/CN.4/L.116/Add.8) [37]

The commentary to article 67 was approved.

COMMENTARY TO ARTICLE 68 (Modification of treaties by subsequent practice) (A/CN.4/L.116/Add.8) [38]

Paragraph (1)

12. Mr. ROSENNE said that no mention should be made of the *Case concerning the Temple of Preah Vihear*, which had been primarily of importance in connexion with the article on error. To refer to it in the commentary on article 68 was unnecessary and might be confusing.

13. The reference to the recent arbitration between France and the United States should be kept, however, but with the substitution of the words "a bilateral air transport services agreement" for the words "the interpretation of an air transport services agreement", since otherwise the passage quoted from the tribunal's decision might be misunderstood.

14. He agreed with the statement in the last sentence but considered that something ought to be said in the introduction to chapter II indicating that the Commission had not dealt with the problem of the relationship between conventional and customary law, except in article 37, on the emergence of a new preemptory norm. It was a major point and might be overlooked if it were only mentioned in the commentary to article 68.

15. A statement should also be inserted in the introduction to chapter II, as had been done in the reports on the past three sessions, indicating that the draft articles on the law of treaties contained elements of progressive development as well as of codification.

16. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the reference to the *Temple* case, although he considered it to be correct, could be dropped; admittedly, the implications of the Court's reasoning were complex and by no means easy to analyse.

¹ 892nd meeting, para. 26.

17. Mr. Rosenne's other amendments were acceptable.
 18. Mr. TUNKIN said he disliked the wording "inconsistent with" in the first sentence.

19. In the second sentence the word "decisive" was too strong and the words "of the provisions" should be inserted after the word "meaning", in the interests of clarity.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that the words "which its provisions do not envisage" could be substituted for the words "inconsistent with its provisions" in the first sentence. Mr. Tunkin's amendments to the second sentence were acceptable.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

21. Mr. TUNKIN said that the last sentence was redundant and should be deleted because acquiescence was already sufficiently covered in the explanation given in the two preceding sentences.

It was so agreed.

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

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 68, as amended, was approved.

COMMENTARY TO ARTICLE 28 (Depositaries of treaties) (A/CN.4/L.116/Add.9) [71]

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

22. Mr. AGO said that the last sentence of paragraph (2) gave the impression that the Commission had envisaged only the case where the depositary was a State, though in practice the depositary was often not a State. He therefore proposed that the beginning of the sentence be recast to read: "Of course, if the depositary is a State, it may, in its capacity as a party to the treaty, express" . . .

23. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's point could be met by substituting the words "a State when it" for the words "a State which".

It was so agreed.

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

The commentary to article 28, as amended, was approved.

COMMENTARY TO ARTICLE 29 (Functions of depositaries) [72]

The commentary to article 29 was approved.

COMMENTARY TO ARTICLE 26 (Correction of errors in texts or in certified copies of treaties) (A/CN.4/L.116/Add.9) [74]

Paragraph (1)

24. Mr. ROSENNE suggested the substitution of the word "sometimes" for the words "not uncommonly" in the first sentence.

It was so agreed.

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

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

25. Mr. JIMÉNEZ de ARÉCHAGA, referring to the last sentence, said that there was some inconsistency in the text of article 26 itself which ought to be removed, even at that late stage in the session.² Under paragraph 1 of the article, all the negotiating States had to agree that the text contained an error and that already created certain problems, but under paragraph 2, when the error had been corrected, the correction had to be communicated to the contracting States only.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that the distinction between the rights of States which had signed the text and thus had an interest in it, and those which had committed themselves by becoming contracting States or parties, had troubled him during the past five years because of the difficulty of establishing at what point in time the interests of those which had signed the text should be overridden by the interests of the latter group of States. The Commission had still not devised an entirely satisfactory solution.

27. Mr. JIMÉNEZ de ARÉCHAGA said that, at the previous meeting, Mr. Tunkin had made the useful suggestion that the whole system contemplated in article 26 should be restricted to the parties, once the treaty had entered into force.³ Up till that point in time, the rights of negotiating States should certainly be protected.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that any change would mean having to tamper with the text of the article. The rule set out there was already somewhat arbitrary, because some multilateral treaties could enter into force with very few signatures, and it was extremely difficult to devise any rule that would be workable in every case.

29. Mr. AGO said that, all things considered, it might perhaps be better to use the expression "contracting States" throughout the article.

30. Sir Humphrey WALDOCK, Special Rapporteur, said that it would be going too far to substitute the word "parties" for the words "negotiating States", but to refer throughout the article to "contracting States" would be a reasonable compromise.

31. Mr. de LUNA said that he was not satisfied with the present wording. The term "negotiating States" was used throughout the article, except in paragraph 2 (b), where the term "contracting States" appeared. That formulation would lead, among other results, to the paradoxical result that the copy of the text corrected after consulting the negotiating States, under paragraph 2 (a), would be communicated not to those States but, under paragraph 2 (b), to the contracting States.

32. Mr. AGO said that, at the previous meeting, he had suggested using the same expression "negotiating States" throughout the article,⁴ but all things considered,

² See 887th meeting, paras. 44-58 and 70.

³ 893rd meeting, para. 130.

⁴ 893rd meeting, para. 137.

he now felt that Mr. Jiménez de Aréchaga was right and that the expression was too vague.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that the article would be less open to criticism if it referred to contracting States, because it must be assumed that in fact a depositary would consult the negotiating States; but it was important to avoid framing a rule that would make it a matter of right for the negotiating States to be consulted.

34. Mr. ROSENNE said that some explanation would need to be inserted in the commentary of any change introduced in the article.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that he could insert in the commentary a statement to the effect that, in practice, depositaries were likely to notify negotiating States of an error and of the proposal to correct it, but that article 26 laid down the rights of the actual parties in that regard.

AMENDMENT TO ARTICLE 26 (Correction of errors in texts or in certified copies of treaties) [74]

36. The CHAIRMAN said that the trend of opinion in the Commission seemed to be in favour of substituting the words "contracting States" for the words "negotiating States" throughout, and he therefore proposed that article 26 be amended accordingly.

The Chairman's amendment to article 26 was adopted.

Paragraph (4), as amended, was approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

Paragraph (7)

37. Mr. ROSENNE suggested the deletion of the second sentence and of the word "but" at the beginning of the third sentence.

It was so agreed.

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

Paragraph (8)

38. Mr. ROSENNE suggested the deletion of the second sentence in paragraph (8); it had now become unnecessary in view of the explanation given by the Special Rapporteur at the previous meeting during the discussion on article 26.⁵

39. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne's amendment was acceptable.

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

The commentary to article 26, as amended, was approved.

COMMENTARY TO ARTICLE 29 (*bis*) (Notifications and communications) (A/CN.4/L.116/Add.9) [73]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

40. Mr. AGO said that he disliked the use of the word "achevée" in the French text of paragraph (3). He also felt that, in order to make its intentions clear, the Com-

mission should perhaps draw a distinction between, on the one hand, the point of time at which the State making the notification could be regarded as having performed its obligation, and, on the other, the point of time at which the notification produced its effects in respect of the party notified.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that it would be undesirable to refer to an obligation in the first sentence of paragraph (3), because in fact there was no such obligation to notify. The stipulation simply was that the notification must be carried out in accordance with the procedure laid down in article 29 (*bis*).

42. Mr. AGO said he therefore suggested that the passage in the first sentence be amended to read: "the point of time at which the notification by the transmitting State was to be regarded as completed with respect to that State".

It was so agreed.

43. Sir Humphrey WALDOCK, Special Rapporteur, said it was important that the commentary should be correct because article 29 (*bis*) was a progressive provision, given the prevailing uncertainty over the exact position of depositaries in the matter of notifications and communications.

Paragraph (3), as amended, was approved.

Paragraph (4)

44. Mr. de LUNA said that he was one of a number of members who considered that a depositary was not a mere channel of communication between the parties. That minority view ought to be reflected in paragraph (4).

45. Sir Humphrey WALDOCK, Special Rapporteur, said he would make the necessary change.

46. Mr. ROSENNE proposed the substitution of the word "some" for the words "a few" in the third sentence.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were approved.

*The commentary to article 29 (*bis*), as amended, was approved.*

COMMENTARY TO ARTICLE 25 (Registration and publication of treaties) (A/CN.4/L.116/Add.9) [75]

47. Mr. ROSENNE suggested that in paragraph (1) the third sentence would be more exact if it were made clear that the Secretariat's practice referred to was in pursuance of article 10 of the regulations for the registration and publication of treaties and international agreements.

48. In paragraph (2) the second sentence should be deleted, because it was the Commission's policy to refrain from interpreting the provisions of the Charter.

49. In paragraph (3) reference should also be made to General Assembly resolution 364 B (IV) of 1 December 1949.

50. Sir Humphrey WALDOCK, Special Rapporteur, said he accepted Mr. Rosenne's amendments.

The commentary to article 25, as thus amended, was approved.

⁵ 893rd meeting, para. 127.

COMMENTARY TO ARTICLE 2 (International agreements not within the scope of the present articles (A/CN.4/L.116/Add.10) [3]⁶

The commentary to article 2 was approved.

COMMENTARY TO ARTICLE 3 (bis) (Treaties which are constituent instruments of international organizations or which are adopted within international organizations) (A/CN.4/L.116/Add.10) [4]

The commentary to article 3 (bis) was approved.

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1 — CONCLUSION OF TREATIES

COMMENTARY TO ARTICLE 3 (Capacity of States to conclude treaties) (A/CN.4/L.116/Add.10) [5]

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

Paragraph (5)

51. Mr. BRIGGS asked that the footnote to paragraph (5), which had also appeared in the Commission's report on its fourteenth session, be deleted, because at various stages he had reserved his position or had abstained from voting on a number of other articles. Anyone wishing to ascertain his views could read the summary records.

It was so agreed.

52. Sir Humphrey WALDOCK, Special Rapporteur, asked whether members considered that he ought to have laid more stress on the change introduced in paragraph 2 of article 3 where reference was now made to the limitations on the treaty-making power of States members of a federal union.

53. Mr. JIMÉNEZ de ARÉCHAGA suggested that it be indicated in paragraph (5) that several members of the Commission had criticized the previous version of paragraph 2 for not giving enough prominence to the role of international law on the capacity of States members of federal unions to conclude treaties, and that the text had been modified to its present permissive form in consequence.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that it was hardly necessary to go into detail about the precise origin of the text or certain underlying political considerations. He had sought to show what had been the outcome of the discussion in the Commission, and paragraph 2 of the article now provided that the limits of the competence of such States to conclude treaties must be ascertained from the federal constitution.

55. Mr. TUNKIN said that he was strongly opposed to re-opening the discussion on a substantive issue. Paragraph (5) of the commentary as drafted by the Special Rapporteur faithfully reflected the content of the revised paragraph 2, the meaning of which was perfectly clear: the Commission could certainly not discuss issues of interpretation.

56. Mr. JIMÉNEZ de ARÉCHAGA said that the vote on paragraph 2 had been very close and it would have

been more objective at least to record that vote. Perhaps the best solution would be to give a brief history of the article.

57. Mr. TUNKIN said that, while he had no objection to summarizing the history of the article in the commentary, it was important to render accurately the trend of opinion in the Commission and Mr. Jiménez de Aréchaga's interpretation that the new paragraph 2 was a departure from the 1962 text was unacceptable. The agreement reached in the Commission had certainly not been that the capacity of member States of federal unions to conclude treaties depended upon rules of international law or was restricted thereby. The capacity depended solely on the constitution of the federal union and could only be limited by the provisions of that constitution.

58. The CHAIRMAN, speaking as a member of the Commission, said the suggestion to summarize the history of the article in the commentary seemed to him a very sensible one.

59. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph (3) of the commentary could if necessary be expanded a little in order to explain the view taken by some members, but it would certainly not be appropriate to do so in paragraph (5), in which he had summarized the final agreement reached.

60. The CHAIRMAN suggested that the Special Rapporteur be asked to modify paragraph (3) in that sense.

It was so agreed.

61. Mr. AGO proposed the deletion of the words "by the federal government itself, or" in the fourth sentence of paragraph (5). He also proposed the deletion of the word "inherent" in the fourth sentence of paragraph (3).

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 3, as amended, was approved.

COMMENTARY TO ARTICLE 4 (Full powers to represent the State in the conclusion of treaties) (A/CN.4/L.116/Add.10) [6]

The commentary to article 4 was approved.

COMMENTARY TO ARTICLE 4 (bis) (Subsequent confirmation of an act performed without authority) (A/CN.4/L.116/Add.10) [7]

The commentary to article 4 (bis) was approved.

COMMENTARY TO ARTICLE 6 (Adoption of the text) (A/CN.4/L.116/Add.10) [8]

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

62. Mr. ROSENNE said that the footnote to paragraph (4) was unnecessary and should be deleted, since the practice of the United Nations Secretariat regarding the convening of conferences was well established and the footnote was not quite accurate.

It was so agreed.

⁶ For amendment of title, see 892nd meeting, para. 75.

63. Mr. TUNKIN said that the phrase "the groups and interests", in the third sentence, was inappropriate and should be changed.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that that phrase had been taken from a United Nations document but it could be replaced by the words "the States".

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

The commentary to article 6, as amended, was approved.

COMMENTARY TO ARTICLE 7 (Authentication of the text) (A/CN.4/L.116/Add.10) [9]

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

65. Mr. AGO asked what was the meaning of the phrase in the first sentence, "a corporate act of authentication performed by officials of an organization".

66. Sir Humphrey WALDOCK, Special Rapporteur, said that the act of authentication was often carried out by the executive head or other officer of an international organization.

67. The CHAIRMAN, speaking as a member of the Commission, suggested that the word "corporate" be deleted.

It was so agreed.

68. Mr. AGO said he still questioned whether the term "officials" in the same sentence was the appropriate one. Perhaps the expression "the competent authorities" would be better.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that an act of authentication might be performed by the president of an international conference. Perhaps the difficulty could be overcome by using the word "officers".

70. Mr. ROSENNE proposed that the words "a competent authority" be substituted for the words "officials"; that should meet Mr. Ago's objection.

Mr. Rosenne's amendment was adopted.

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

Paragraph (5)

Paragraph (5) was approved.

The commentary to article 7, as amended, was approved.

COMMENTARY TO ARTICLE 11 (Consent to be bound by a treaty expressed by signature) (A/CN.4/L.116/Add.10) [10]

The commentary to article 11 was approved.

COMMENTARY TO ARTICLE 18 (Formulation of reservations) AND TO ARTICLE 19 (Acceptance of and objection to reservations) (A/CN.4/L.116/Add.16) [16, 17]

Introduction—Paragraphs (1) to (16)

71. Mr. ROSENNE said that there should be some reference in the introduction to the Secretary-General's

report on Depositary Practice in Relation to Reservations (A/5687), which had brought much new practice to the notice of the Commission. Such a reference might be inserted in paragraph (2).

72. Reference was made in paragraph (2) to the General Assembly and to the International Court of Justice; but the Commission itself had also been consulted in the 1950-1951 period. The divergent views referred to in the paragraph were also reflected in the Commission's work at that time. He therefore suggested that the words "and by the Commission" be inserted after the words "Genocide Convention".

73. Sir Humphrey WALDOCK, Special Rapporteur, said that, although there was a reference to the Commission in paragraph (5), he accepted Mr. Rosenne's suggestion. A reference to the Secretary-General's report he had mentioned would also be inserted.

The introduction, as thus amended, was approved.

Paragraphs (17) to (22)

74. Mr. ROSENNE, referring to footnote 11, suggested that there should also be a reference to the report by the observer for the Commission on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists (A/CN.4/124),⁷ as Pan-American documents were not readily available outside the American continent.

It was so agreed.

Paragraphs (17) to (22), as amended, were approved.

The commentary to articles 18 and 19, as amended, was approved.

COMMENTARY TO ARTICLE 20 (Procedure regarding reservations) (A/CN.4/L.116/Add.11) [18]

The commentary to article 20 was approved.

COMMENTARY TO ARTICLE 21 (Legal effects of reservations) (A/CN.4/L.116/Add.11) [19]

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

75. Mr. CASTRÉN, with regard to the second sentence, said that, since only a few governments had submitted comments in the matter, the reference should be to the comments of "certain" governments.

It was so agreed.

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

The commentary to article 21, as amended, was approved.

COMMENTARY TO ARTICLE 22 (Withdrawal of reservations) (A/CN.4/L.116/Add.11) [20]

The commentary to article 22 was approved.

COMMENTARY TO ARTICLE 23 (Entry into force)⁸ (A/CN.4/L.116/Add.11) [21]

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

⁷ Yearbook of the International Law Commission, 1960, vol. II, p. 20.

⁸ For amendment of title, see 892nd meeting, para. 109.

Paragraph (4)

76. Mr. ROSENNE suggested that the second sentence of paragraph (4) be deleted as it was both controversial and unnecessary to the development of the argument.

77. Sir Humphrey WALDOCK, Special Rapporteur, suggested that it might be better if the words “used to express this rule is not intended to indicate that the treaty itself undergoes several successive ‘entries into force’ as each new party becomes bound” were dropped. The second and third sentences would then be combined and would read “The phrase ‘enters into force for that State’ is the phrase normally employed . . .”.

It was so agreed.

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

The commentary to article 23, as thus amended, was approved.

COMMENTARY TO ARTICLE 24 (Entry into force provisionally)⁹ (A/CN.4/L.116/Add.11) [22]

The commentary to article 24 was approved.

COMMENTARY TO ARTICLE 16 (Consent relating to a part of a treaty and choice of differing provisions (A/CN.4/L.116/Add.12) [14]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

78. Mr. ROSENNE said that the example given in paragraph (3) was perhaps unfortunate. It would be better to mention instead the General Act for the Pacific Settlement of International Disputes of 26 September 1928.

79. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the first sentence of paragraph (3) be amended to read “Paragraph 2 takes account of a practice which is not very common but which is sometimes found, e.g. in the General Act for the Pacific Settlement of International Disputes”.

80. Mr. JIMÉNEZ de ARÉCHAGA said that international organizations should not be systematically excluded, even as examples; the draft articles, with certain qualifications, did apply to treaties within international organizations.

81. Mr. ROSENNE said that in that case both examples should be mentioned.

It was so agreed.

Paragraph (3), as amended, was approved.

The commentary to article 16, as amended, was approved.

COMMENTARY TO ARTICLE 17 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force) (A/CN.4/L.116/Add.12) [15]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

82. Mr. BRIGGS said that it should be made clear to what obligation the words “subject to the obligation” in paragraph (3) referred.

83. Sir Humphrey WALDOCK, Special Rapporteur, said that the point would be clarified.

84. Mr. CASTRÉN said that paragraph (3) referred to “the case considered by the Permanent Court”. Either the case should be specified, or the example should be dropped.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that the case was the case mentioned in paragraph (1)

86. Mr. LACHS said that since such cases were covered by paragraph (3), all that was needed was a general reference to “the case in which”.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

The commentary to article 17, as amended, was approved.

COMMENTARY TO ARTICLE 72 (Interpretation of treaties established in two or more languages) (A/CN.4/L.116/Add.14) [29]¹⁰

Paragraphs (1) to (5)

Paragraphs (1) to (5) were approved.

Paragraph (6)

87. Mr. ROSENNE suggested the omission of the words “or unskilful drafting” in the fifth sentence.

It was so agreed.

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

Paragraph (7)

Paragraph (7) was approved.

Paragraph (8)

88. Mr. AGO said that there was a discrepancy between the English and French texts of the fourth sentence. The English text showed that the Commission was referring to the opinion of “some jurists”, but the French text attributed that opinion to the Commission itself. The French text should be brought into line with the English.

It was so agreed.

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

Paragraph (9)

89. Mr. ROSENNE proposed that paragraph (9) be deleted; it was unnecessary and might be confusing.

90. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had decided that the article should confine itself to basic principles and not go into details regarding the techniques that could be applied in the case of plurilingual treaties. Paragraph (9) had been inserted with a view to anticipating a suggestion that there should be a kind of residuary rule about the language version in which the treaty was actually drafted.

91. Mr. CASTRÉN said he was in favour of retaining paragraph (9), precisely for the reasons given by the Special Rapporteur. The paragraph showed that the Commission had considered the problem but had not deemed it appropriate to formulate a rule in the matter.

⁹ For amendment of title, see 892nd meeting, para. 110.

¹⁰ For amendment of title, see 893rd meeting, para. 43.

92. Mr. LACHS said that he shared the Special Rapporteur's view; the paragraph should be retained, except for its second sentence.

93. Mr. JIMÉNEZ de ARÉCHAGA said that the whole point of the paragraph was in the second sentence.

94. Mr. ROSENNE said he withdrew his proposal.
Paragraph (9) was approved.

The commentary to article 72, as amended, was approved.

COMMENTARY TO ARTICLE 12 (Consent to be bound by a treaty expressed by ratification, acceptance or approval) (A/CN.4/L.116/Add.17) [11]

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

95. Mr. JIMÉNEZ de ARÉCHAGA said that the sixth sentence, beginning with the words "This does not mean", seemed to be a survival from a previous report.

96. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that that was so. The sentence should be omitted.

It was so agreed.

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

Paragraph (5)

97. Mr. TUNKIN suggested that the last sentence of paragraph (5) be deleted, as it raised an issue of substance and might be confusing.

98. Sir Humphrey WALDOCK, Special Rapporteur, said that the sentence was an account of what had happened in 1962, when the Commission had stated in the opening paragraph the residuary rule in favour of ratification. It could very well be omitted.

99. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion of the whole of paragraph (5), since States would be well aware of the matter which it raised.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that, in that event, it would be necessary to omit the word "resulting" at the beginning of paragraph (6).

Mr. Jiménez de Aréchaga's amendment and the Special Rapporteur's consequential amendment were adopted.

Paragraph (5) was deleted.

Paragraph (6)

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

Paragraphs (7) to (11)

Paragraphs (7) to (11) were approved.

Paragraph (12)

101. Mr. ROSENNE proposed that the end of the first sentence be amended to read "... to examine the treaty when it is not necessarily obliged by its domestic law or practice to submit it to the State's constitutional procedure for obtaining ratification", and that the word "parliamentary" be deleted because there were countries where ratification was not a parliamentary procedure.

102. Sir Humphrey WALDOCK, Special Rapporteur, said that he could accept that proposal, except for the

words "by its domestic law or practice" which would make the text too heavy.

Paragraph (12), as thus amended, was approved.

The commentary to article 12, as amended, was approved.

COMMENTARY TO ARTICLE 13 (Consent to be bound by a treaty expressed by accession) (A/CN.4/L.116/Add.17) [12]

103. The CHAIRMAN said that, since article 9 had been deleted, the words "under the conditions set out in article 9" at the end of paragraph (1) should be deleted.

It was so agreed.

The commentary to article 13, as thus amended, was approved.

ANNEX ON PARTICIPATION IN A TREATY

104. Sir Humphrey WALDOCK, Special Rapporteur, said that the annex on "Participation in a treaty" had been added in order to explain why articles 8 and 9 had been dropped, and it had seemed to him better to include such an explanation after the commentary to article 13 rather than in the introduction to the draft.

105. Mr. BRIGGS said that, although he had no objection to such an explanation being given, he thought that the annex gave undue prominence to the Commission's decision not to include certain articles.

106. Mr. TUNKIN proposed that the first two paragraphs of the annex be deleted since they suggested, incorrectly, that there was no gap in the text. The position of the Commission was stated sufficiently clearly, especially in paragraph (6).

107. Sir Humphrey WALDOCK, Special Rapporteur, said that it had not been his intention in paragraph (1) to suggest that there was no lacuna, but rather to explain that, apart from the question of general multilateral treaties, the subject-matter of article 9 was largely covered elsewhere in the draft. In his first report he had submitted elaborate proposals on the subject of participation in a treaty,¹¹ but he had not, of course, then known what action the Commission would take on the closely related topic of the amendment of treaties. If, however, the Commission considered that the remainder of the annex was clear, paragraphs (1) and (2) could be deleted.

108. Mr. BRIGGS said that, even if paragraphs (1) and (2) were deleted, he still thought that there was too much reference in the subsequent paragraphs to the concept of general multilateral treaties. The Commission had abandoned its attempt to define that concept, and it did not appear in the draft. Paragraphs (4), (5) and (6) should therefore be shortened. All that was needed was a bare reference to the fact that articles 8 and 9 had been omitted, and that article 13 had been drafted with that omission in mind.

109. Mr. TUNKIN said that he thought it desirable to retain a reference to that question so that the attention of the conference could be drawn to it.

110. Mr. LACHS said he agreed that it was advisable to draw attention to a legal issue which was of such

¹¹ Yearbook of the International Law Commission, 1962, vol. II, p. 27.

importance in the law of treaties, even though it might not be thought ripe for solution. Certain changes should, however, be made in the text, particularly in the fourth sentence of paragraph (6), which should be reworded to read "At its present session, it concluded that, in the light of the division of opinion, it would not be possible to formulate any general provision regarding the right of States to participate in treaties."

Mr. Lachs's amendment was adopted.

111. Mr. ROSENNE said that in his view the annex was in the right place, and he was in favour of retaining paragraphs (4) and (5). It was true that difficulties had been experienced in including the concept of general multilateral treaties in the text of the articles, but some mention of the 1962 definition of "multilateral treaties" should be made in the commentary as an indication of what the Commission had had in mind.

112. In the sixth sentence of paragraph (6), the passage reading "notably in connexion with the extended participation in League of Nations treaties, and recently in the Special Committees on the Principles of International Law concerning friendly relations among States", should be deleted; there was no need to single out the General Assembly and the Special Committees, as the matter had been debated regularly since 1946.

113. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the discussions in the Special Committees were of recent date.

114. Mr. ROSENNE said that in that case only the first half of the passage in question should be deleted.

It was so agreed.

115. Sir Humphrey WALDOCK, Special Rapporteur, said it seemed to be generally agreed that the two opening paragraphs were unnecessary; Mr. Tunkin's proposal could therefore be adopted and the annex would begin with paragraph (3).

116. It was essential to include some reference to general multilateral treaties, as the matter had been the subject of much discussion, and had also been commented on by governments. Moreover, had it not been for the difficulties which the Commission had experienced in connexion with the concept of general multilateral treaties, it would have been thought logical to include an article on participation.

Mr. Tunkin's amendment was adopted.

117. Mr. AGO said that the use of the word "Annex" in the title, "Annex on participation in a treaty", could give the impression that there was an annex to the text of article 13, since the Commission always reproduced the text of articles. It would be better to say "Question of participation in a treaty".

It was so agreed.

The annex on participation in a treaty, as amended, was approved.

COMMENTARY TO ARTICLE 15 (Exchange or deposit of instruments of ratification, accession, acceptance or approval) (A/CN.4/L.116/Add.17). [13]

Paragraph (1)

118. Mr. BRIGGS suggested that the words "of the procedure" in the second sentence be deleted.

It was so agreed.

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

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

The commentary to article 15, as thus amended, was approved.

CHAPTER III: SPECIAL MISSIONS (A/CN.4/L.116/Add.13)

119. The CHAIRMAN invited the Commission to consider the chapter on Special Missions, beginning with paragraph 18; paragraphs 1 to 17 had already appeared in the Commission's report on the work of its seventeenth session (A/6009, p. 11).

Paragraphs 1 to 17 were adopted.

Paragraph 18

120. Mr. ROSENNE said that the reference in paragraph 18 to "only a small number of States", and the similar passage in paragraph 34, were somewhat pejorative and should be either omitted or toned down.

121. Mr. BARTOŠ, Special Rapporteur, said that it was not possible to ignore the fact that only a small number of States had submitted comments, although all the States in the Sixth Committee had undertaken to do so.

122. Mr. AGO suggested that the passage should read "a limited number of States".

It was so agreed.

Paragraph 18, as thus amended, was approved.

Paragraphs 19 to 21

Paragraphs 19 to 21 were approved.

Paragraph 22

123. Mr. BRIGGS said that he did not understand what the second sentence of paragraph 22 was intended to convey. Surely all the provisions of the articles would be binding? The implication that only some of them would be was questionable.

124. Mr. BARTOŠ, Special Rapporteur, said that the second sentence could be deleted and, in the last sentence, the concluding words "though of a contractual nature were binding on States which accepted the instrument", could be replaced by the words "were not of a residuary nature".

125. Mr. TUNKIN said that the reference to "binding provisions" and "provisions of a residuary nature" was certainly somewhat misleading. It would be better to state simply that the Commission had asked the Special Rapporteur to draft articles on the assumption that if, at a later stage, the Commission came to the conclusion that States would not be allowed to derogate from certain of the provisions by mutual agreement, those provisions would be specified.

126. Sir Humphrey WALDOCK said that he fully supported Mr. Tunkin. It would be unwise even to indicate that the Commission made a distinction between different kinds of obligation.

127. Mr. BARTOŠ, Special Rapporteur, said that the Commission had asked him to formulate the idea that certain rules were not open to derogation by mutual consent and were in principle of a residuary nature. Perhaps the end of the last sentence could be reworded on the following lines: "and indicate which of the provisions were, exceptionally, not of a residuary nature".

128. Mr. TUNKIN said that he agreed in substance, but was strongly opposed to the use of the words "residuary nature" in that context. If those words were omitted, the rest would be acceptable.

129. Mr. AGO proposed that the remainder of paragraph 22, from the words "of the draft articles on special missions" in the first sentence, be replaced by the wording "cannot in principle constitute peremptory norms from which States may not derogate by mutual agreement. The Special Rapporteur was asked to submit to the Commission a draft article conveying that idea and indicating specifically which of the provisions should, in his opinion, constitute exceptions to that principle".

130. Sir Humphrey WALDOCK said that the use of the word "peremptory" would suggest a reference to *jus cogens*, but was the reference really to *jus cogens*? Surely it was intended to refer to the ordinary situation where the parties to a convention considered that certain provisions were so necessary to the essential working of the convention that no derogation could be allowed? Again, Mr. Ago had used the word "States"; but the reference must be to "parties", since otherwise there would again be a suggestion of *jus cogens*.

131. Mr. AGO said that he was prepared to drop the word "peremptory" from his amendment.

132. Mr. BARTOŠ, Special Rapporteur, said that the Commission had agreed in principle not to formulate any *jus cogens* rules in the draft articles but that certain treaty rules would be binding on the parties, so long as the treaty remained in force.

133. Mr. ROSENNE suggested the deletion of the word "thorough" at the beginning of paragraph 22 and of the word "due" at the beginning of paragraph 23. The Commission would naturally have examined the comments thoroughly and given them due attention.

134. Mr. BRIGGS said that the approach in the paragraph was so alien to his thinking that he felt obliged to make his position clear. He thought there was a confusion between peremptory rules and ordinary treaty rules which were binding on States. A treaty was binding on a State which was a party to it and all its rules were obligatory, in the sense that it was not allowed unilaterally to derogate from the principles of that treaty that had become binding on it.

135. There was a second question: whether or not all the rules in the draft articles were regarded as sufficiently important that no derogation by agreement between States could be permitted. That situation was illustrated in a number of conventions where certain rules were regarded as fundamental, although not in the sense that they were more obligatory than the less fundamental rules. Under the Vienna Convention on Diplomatic Relations, for instance, there was no objection to two

States agreeing not to grant diplomatic privileges and immunities to persons below a certain rank.

136. He thought that that confusion in the approach led to the assumption that there were going to be certain peremptory rules of international law. The phraseology should make it clear that what the Commission was dealing with was a future convention and that the Commission would decide which rules States would be allowed to modify by agreement *inter se*. The usual method of doing that was by using the proviso "Unless otherwise agreed by the parties".

137. Mr. TUNKIN said he agreed with Mr. Briggs. In order to make the paragraph clear, and to tone down the language, the second sentence should begin with some such wording as "In his opinion, the rules, if any . . ."

138. Mr. AGO suggested the insertion in his amendment of the words "if any" after the word "provisions".

139. Mr. BARTOŠ, Special Rapporteur, said he could accept Mr. Ago's amendment, since the Commission had agreed that certain provisions, when included in the treaty, would be binding on the parties. He could also accept Mr. Rosenne's amendment to delete the word "thorough" in the first sentence of paragraph 22 and the word "due" in the first sentence of paragraph 23.

140. Mr. TUNKIN said he noted that, not only in paragraph 22, but also in paragraphs 23, 24, 26, 29, 31 and 32, the Special Rapporteur was asked to submit various texts to the Commission "at its next session". But in fact it was "before" or "in time for" the next session that such texts should be submitted.

141. Mr. BARTOŠ, Special Rapporteur, suggested that the words "at its next session" be deleted wherever they occurred in that context.

It was so agreed.

Mr. Ago's, Mr. Rosenne's and the Special Rapporteur's amendments were adopted.

Paragraph (22), as amended, was approved.

Paragraph 23

Paragraph 23, as already amended by Mr. Rosenne and the Special Rapporteur, was approved.

Paragraph 24

Paragraph 24, as already amended by the Special Rapporteur, was approved.

Paragraph 25

142. Mr. TUNKIN said that, according to the second sentence, reciprocity was a condition governing the provisions of any treaty. But there was no obligation on States to apply the principle of reciprocity; they could apply it if they so wished.

143. Mr. BARTOŠ, Special Rapporteur, said that, in his view, all provisions should be applied on a basis of reciprocity.

144. Mr. TUNKIN said he agreed that the principle of reciprocity was a principle relating to any part of international law, though the actual effect of the principle might be different, depending on whether or not it was explicitly mentioned. In the present context, a State was

not obliged to apply a treaty on the basis of the principle of reciprocity, and might indeed disregard the principle, if it so wished. One State party to the treaty, for instance, while observing that another State party was not abiding by all the provisions of the treaty, might nevertheless decide to continue to abide by all the provisions itself.

145. Mr. CASTRÉN suggested that, in the second sentence, the phrase “ that reciprocity was a condition governing the provisions of any treaty ” be replaced by the phrase “ that all treaty provisions were subject to the condition of reciprocity ”.

146. Mr. BARTOŠ, Special Rapporteur, said that there could be special favours or unilateral concessions in some cases, but the general rule was that of reciprocity.

147. Mr. BRIGGS said that, unlike the French text, the English text of the second sentence did not contain any suggestion that the principle of reciprocity had to be applied.

148. Sir Humphrey WALDOCK suggested that the word “ governing ” be replaced by the word “ underlying ”.

It was so agreed.

Paragraph 25, as thus amended, was approved.

Paragraph 26

Paragraph 26, as already amended by the Special Rapporteur, was approved.

Paragraph 27

Paragraph 27 was approved.

Paragraph 28

149. Mr. ROSENNE proposed that paragraph 28 be deleted because it referred to the final recommendations which the Commission would make when it had completed its work on the draft articles on special missions, and any reference to final recommendation at the present stage was premature.

150. Mr. BARTOŠ, Special Rapporteur, said that a number of governments had made specific proposals; the Israel Government, in particular, had asked the Commission to consider the question. If the Commission were to delete the paragraph, it would appear to have disregarded the comments by governments. The present text, on the other hand, did not prejudice the Commission's position, since the Commission had decided to deal with the matter at its next session.

151. Mr. AGO said that, if paragraph 28 were retained, the word “ body ” would have to be deleted, as it was ambiguous and could give the impression that it meant some existing organ of an international organization, rather than a conference. Perhaps it would be better to refer to the method of adoption of the instrument.

It was so agreed.

152. Mr. ROSENNE said that he fully understood the considerations which had led the Special Rapporteur to include paragraph 28 in the draft report. He believed, however, that governments, in making the comments to which the Special Rapporteur had just referred, had been drawing attention to the implications of the Commission's final recommendation and not referring to a matter on which they wished to receive a preliminary report at the present stage.

153. Nevertheless, if the Special Rapporteur attached particular importance to paragraph 28, he would have no objection to its being retained.

154. Mr. TUNKIN proposed that the opening words of the second sentence, “ Owing to the diversity of views on the point ”, be deleted, as there was in fact no diversity of views on the point in question.

155. Mr. BARTOŠ, Special Rapporteur, said that he could agree to that amendment, although different views had in fact been expressed, in particular by Mr. Rosenne.

Mr. Tunkin's amendment was adopted.

Paragraph 28, as amended, was approved.

Paragraph 29

156. Mr. TUNKIN proposed that the second and third sentences be amended to read simply : “ After discussing the matter, the Commission instructed the Special Rapporteur to draft a preamble and submit it to the Commission ”.

Mr. Tunkin's amendment was adopted.

Paragraph 29, as amended, was approved.

Paragraph 30

Paragraph 30 was approved.

Paragraph 31

Paragraph 31, as already amended by the Special Rapporteur, was approved.

Paragraph 32

Paragraph 32, as already amended by the Special Rapporteur, was approved.

Paragraph 33

157. Mr. BARTOŠ, Special Rapporteur, said that paragraph 33 should be deleted, since it already appeared in the general section of the report.

It was so agreed.

Paragraph 33 was deleted.

Paragraph 34

158. Mr. ROSENNE said that the last sentence was redundant and should be deleted.

It was so agreed.

Paragraph 34, as amended, was approved.

Chapter III, as amended, was approved.

CHAPTER IV: OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (A/CN.4/L.116/Add.15)

A. Organization of future work

159. Mr. ROSENNE proposed that the second sentence of the first paragraph be amended to read : “ The Commission, while not wishing to prejudice the freedom of action of its membership in 1967, nevertheless recognizes that, since it is a continuing body, it must make arrangements to ensure the continuation of work

on the topics selected for codification and progressive development.”

It was so agreed.

Section A, as thus amended, was approved.

B. *Date and place of the nineteenth session*

Section B was approved.

C. *Co-operation with other bodies*

Section C was approved.

D. *Representatives at the twenty-first session of the General Assembly*

Section D was approved.

E. *Seminar on International Law*

160. Mr. BARTOŠ, Special Rapporteur, said that it was his understanding that the Commission had recommended that further seminars on international law should be organized.

161. Mr. de LUNA, Rapporteur, said that a suitable sentence could be added at the end of the section.

It was so agreed.

Section E, as amended, was approved.

Chapter IV, as amended, was approved.

CHAPTER II: LAW OF TREATIES (*resumed from paragraph 118*)

COMMENTARY TO ARTICLE 69 (General rule of interpretation) AND TO ARTICLE 70 (Supplementary means of interpretation) (A/CN.4/L.116/Add.18) [27, 28]

162. The CHAIRMAN said that, for addenda 18, 19 and 20 to the draft report, the Commission had before it only the English text. The text of article 70 had been inadvertently omitted from the first of those documents and should be inserted immediately after the text of article 69 on page 2.

Paragraphs (1) to (5)

163. Mr. RUDA asked whether the Commission adhered to its decision to drop the footnote references to documentation.

164. The CHAIRMAN said it was agreed that all such references should be deleted.

Paragraphs (1) to (5) were approved.

Paragraph (6)

165. Mr. ROSENNE said that it would be worthwhile to explain somewhere in the commentary exactly what phrases were used in the text of the draft articles to indicate whether, in respect of a given article, the rules of interpretation should or should not be applied. The explanation might be included in paragraph (6) of the commentary on article 69, or, perhaps, better still in the introduction.

166. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been intending to include an explanation of the type suggested by Mr. Rosenne. The Commission had adopted certain phrases for dealing, on the one hand, with cases where what was involved was genuinely an interpretation of the treaty and, on the other hand,

with cases where what was involved was the establishment of an intention on the basis of matters altogether outside the treaty; and an explanation of the phrases used might perhaps be inserted at the end of the commentary to articles 69 and 70.

167. He would like to know whether the Commission as a whole believed that the articles could stand as they were, or whether it favoured some clarification of the relationship between the articles on interpretation and the particular phrases used in the different types of case to which he had referred.

168. Mr. TUNKIN said that he would wish to know the exact text of the clarification which the Special Rapporteur was proposing to make, as the point raised by Mr. Rosenne involved an important question of substance, which had been discussed at length in the Commission.

169. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the clarification, if required, should be very brief. The Commission might merely point out that there were certain articles—for instance, article 11—in which the phrase “the treaty provides” was used; and that that phrase automatically involved the full interpretation of the treaty according to the Commission’s rules. But in the phrase “it is otherwise established”—which was also used in article 11—the word “established” meant established not merely on the basis of an interpretation, but in a general way and on the basis of any relevant evidence.

170. Mr. TUNKIN said he feared it would be very dangerous for the Commission to try to explain in the commentary a relationship to which it had not directly referred in the articles themselves. It seemed that the assumption underlying Mr. Rosenne’s proposal was that treaties would have to be interpreted in any case. He could not accept that assumption, since, if the text of a treaty was clear, no interpretation was required at all; if it was ambiguous, that was another matter.

171. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the question raised by Mr. Rosenne was an extremely delicate one. He did not think that he would be prepared to draft an explanation on the lines proposed by Mr. Rosenne without submitting it to the approval of members of the Commission, and it would be impossible to have a sufficient discussion of the question at the present stage of the session. Moreover, as the draft articles would in any case have to stand on their own, he thought it would be wiser not to take up Mr. Rosenne’s proposal at all.

It was so agreed.

Paragraph (6) was approved.

Paragraphs (7) to (15)

Paragraphs (7) to (15) were approved.

Paragraph (16)

172. Mr. TUNKIN proposed that the eighth, ninth, tenth and eleventh sentences of paragraph (16), beginning with the words “The practice of an individual State . . .” and ending with the words “analogous to an interpretative agreement” be deleted, as the problem of the relevance of the practice of individual States was no

longer referred to in any other part of the draft articles or the commentaries.

173. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Tunkin. A reference to the practice of individual States as a supplementary means of interpretation, which was not in any way authentic, had originally been included in the commentary to article 70, but had since been deleted. It would only be logical therefore also to delete from the commentary to article 69 the three sentences to which Mr. Tunkin had referred.

Mr. Tunkin's amendment was adopted.

Paragraph (16), as thus amended, was approved.

Paragraph (17)

174. Mr. TUNKIN proposed that paragraph (17) be deleted, as it referred to a very complicated question of substance which was not dealt with in the articles on interpretation and had little bearing on the text of the articles concerned.

175. Sir Humphrey WALDOCK, Special Rapporteur, said he thought that paragraph (17) did have a certain usefulness, first because the problem of the effect of the practice of organs of an international organization on the interpretation of its constituent instruments was a matter which was being widely discussed at the present time, and secondly, because the paragraph explained why the Commission had decided not to refer to that problem in its draft articles.

176. Mr. de LUNA said he agreed with Mr. Tunkin that paragraph (17) should be deleted. The problem it referred to had serious political implications, and it would be better for the Commission not to mention it at all.

Mr. Tunkin's amendment was adopted.

Paragraph (17) was deleted.

Paragraph (18)

Paragraph (18) was approved.

Paragraph (19)

177. Mr. LACHS suggested that the last sentence of paragraph (19) be deleted, as the *Admissions to the UN Opinion* of the International Court of Justice was irrelevant to the arguments advanced in that paragraph, and the reference to the *Legal Status of Eastern Greenland* case was sufficient.

178. Sir Humphrey WALDOCK, Special Rapporteur, said he did not altogether agree that the reference to the *Admissions to the UN Opinion* was irrelevant, but he had no strong objection to its being dropped.

Mr. Lachs's amendment was adopted.

Paragraph (19), as thus amended, was approved.

Paragraph (20)

179. Mr. BRIGGS proposed that the fourth sentence, beginning with the words "The Commission accordingly considered whether...", which was redundant, be deleted.

Mr. Briggs's amendment was adopted.

180. Mr. ROSENNE said he thought it was wrong, in the first sentence, to refer only to the International

Court of Justice and the Permanent Court, and he proposed that the first line of the first sentence be re-worded to read: "There are many dicta in the jurisprudence of international tribunals stating".

Mr. Rosenne's amendment was adopted.

Paragraph (20), as amended, was approved.

Paragraph (21)

181. Mr. ROSENNE suggested that the reference to the *South-West Africa* case be deleted, as it had nothing to do with supplementary means of interpretation or *travaux préparatoires* and had been included merely to demonstrate that interpretations which were manifestly absurd or unreasonable were inadmissible.

Mr. Rosenne's amendment was adopted.

Paragraph (21), as thus amended, was approved.

Paragraph (22)

Paragraph (22) was approved.

The commentary to articles 69 and 70 (A/CN.4/L.116/Add.18), as amended, were approved.

COMMENTARY TO ARTICLE 63 (Application of successive treaties relating to the same subject-matter) (A/CN.4/L.116/Add.19) [26]

Paragraphs (1) to (6)

Paragraphs (1) to (6) were approved.

Paragraph (7)

182. Mr. ROSENNE said he thought it would be useful to re-introduce, either in paragraph (7) or in one of the following paragraphs, footnote 71 from the Commission's report on its sixteenth session, which contained definitions of the terms "integral treaties" and "interdependent treaties", taken from Sir Gerald Fitzmaurice's earlier report.¹²

183. Sir Humphrey WALDOCK, Special Rapporteur, said the footnote had been omitted in error, and would be restored in the final text of the report.

Paragraph (7) was approved.

Paragraphs (8) to (13)

Paragraphs (8) to (13) were approved.

The commentary to article 63 was approved.

COMMENTARY TO ARTICLE 64 (Severance of diplomatic relations) (A/CN.4/L.116/Add.19) [60]

Paragraph (1)

Paragraph (1) was approved.

Paragraphs (2) and (3)

184. Mr. ROSENNE pointed out that, while the second sentence of paragraph (2) stated that the Commission itself in 1963 had been "disinclined to deal with the severance of diplomatic relations in the context of the termination of treaties", the Commission had at its present session put the matter back into the context of the termination of treaties. There should accordingly be some adjustment either in the text of paragraph (2) or

¹² *Yearbook of the International Law Commission, 1964*, vol. II, p. 188.

at the end of paragraph (3) to deal with that particular point.

185. Sir Humphrey WALDOCK, Special Rapporteur, said that an appropriate adjustment would be made.

Mr. Rosenne's amendment was adopted.

Paragraphs (2) and (3), as thus amended, were approved.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to article 64, as amended, was approved.

PART I. INTRODUCTION

COMMENTARY TO ARTICLE 0 (The scope of the present articles) (A/CN.4/L.116/Add. 20) [1]

The commentary to article 0 was approved.

COMMENTARY TO ARTICLE 1 (Use of terms) (A/CN.4/L.116/Add. 20) [2]

The commentary to article 1 was approved.

PART VI. MISCELLANEOUS PROVISIONS

COMMENTARY TO ARTICLE Z (Case of an aggressor State) (A/CN.4/L.116/Add. 20) [70]

The commentary to article Z was approved.

COMMENTARY TO ARTICLE Y (Cases of State succession and State responsibility) (A/CN.4/L.116/Add. 20) [69]

The commentary to article Y was approved.

CHAPTER I: ORGANIZATION OF THE SESSION (A/CN.4/L.116)

186. Mr. ROSENNE said that chapter I should contain some reference to the fact that, at the invitation of the Legal Counsel of the United Nations, the Commission had devoted one meeting to a discussion on the role of the Commission at the present stage in codifying international law relating to trade.

Mr. Rosenne's amendment was adopted.

Chapter I, as thus amended, was approved.

187. The CHAIRMAN put the draft report as a whole to the vote.

The draft report of the Commission on the work of its eighteenth session (A/CN.4/L.116 and Add.1-20, A/CN.4/L.117 and Add.1), as approved, was adopted unanimously.

188. Mr. TUNKIN said that, although he had voted for the report, he wished to place on record his regret that the draft articles on the law of treaties did not include any provisions on the general participation of States in general multilateral treaties, and that, although the commentaries on the draft articles were in general excellent, they did not adequately reflect the practice of States, and placed undue emphasis on pronouncements by the International Court of Justice.

189. Mr. BARTOŠ explained that he had voted for the report in the same spirit as Mr. Tunkin.

190. The CHAIRMAN, speaking as a member of the Commission, said that his vote in favour of the report did not mean the abandonment of the views expressed by him on various questions during the discussions.

191. Mr. LACHS said he was gratified to observe that many of his views had been reflected in the decisions of the Commission, though not all of them had been accepted. In particular, he regretted that the report contained no rule as to the open and universal character of some multilateral treaties, a subject on which opinion in the Commission was, unfortunately, seriously divided. Although, in the interests of unanimity, he had subscribed to the report as a whole, he still maintained his views on that and other issues, views which, like every other member of the Commission, he had expressed fully and freely.

Closure of the session

192. Mr. AGO said he hoped those expressions of regret would not detract in any way from the enthusiasm with which all the members of the Commission had adopted the report; everyone, in the past five years, had had to sacrifice some of his opinions.

193. The Commission owed a debt of gratitude to its Chairman. When the members had elected Mr. Yasseen, they had done so in the belief that he was the man they needed to accomplish the delicate mission of directing the Commission's work in its most difficult stage, the adoption of the draft articles on the law of treaties. Experience had shown that their belief was justified. The Chairman, with skill, wisdom and firmness, combined with courtesy and tact, had piloted the Commission through a long session safely to its final destination, the unprecedented achievement represented by the draft articles on the law of treaties.

194. Mr. Yasseen had had the good fortune to preside over a Commission in a state of grace. It was very rare to encounter such a striking example of friendly co-operation and mutual understanding, and he questioned whether the new Commission would encounter the same spirit. That question must be present in many minds, since some of the ablest and most active members of the Commission would, for one reason or another, not be returning, and the Commission could not but regret their departure.

195. Mr. LACHS said that as the present session, at which the International Law Commission was concluding an important chapter in its life, would be the last for some members, including himself, he wished not only to endorse what had been said by Mr. Ago, but also to express his gratitude for the privilege of having been able to share with men of learning and wisdom a common task of such magnitude and importance.

196. Throughout those months and weeks, the Commission had been engaged in the important task of codifying and developing first and foremost the Law of Treaties. What had been achieved was of no mean value. It was sometimes said that the work of lawyers was done on the fringes of life and that they identified themselves with the past. But the proceedings in the Commission and in its Drafting Committee had demonstrated how misleading was that judgment in the case of the International Law Commission. Lawyers from different parts of the world, representing different cultures, different philosophies and backgrounds, different thoughts, had managed to find common ground. That was the explana-

tion of the achievements of the Commission. It had been able to create something durable by helping to evolve or develop rules to fit the changing needs of life and by adjusting the law to the impact of the dynamic developments of the present age.

197. That work must go on, for only if law corresponded to the needs of life would it be able to play its part as an essential factor in inter-State relations, as a major element in civilization. On leaving the International Law Commission, he wished once again to reassert his belief in the power of law and in its civilizing influence in a world where it was so frequently disregarded and violated.

198. Mr. TUNKIN said that members had reason to be satisfied with the work done during the Commission's term of office. The draft articles on the law of treaties which the Commission had adopted dealt with a very important branch of international law and undoubtedly constituted the most complicated draft it had ever produced.

199. He subscribed to every word that Mr. Amado had said about their Special Rapporteur, Sir Humphrey Waldock, at the previous meeting. He also wished to associate himself with Mr. Ago's tribute to the Chairman, to whom the Commission could be grateful for the skill and impartiality with which he had conducted its debates, and to pay his own tribute to the officers of the Commission and to the Secretariat. Lastly, he wished to thank the Commission for the spirit of collaboration and the goodwill which he had found there during the ten years of his membership.

200. Mr. JIMÉNEZ de ARÉCHAGA said he too wished to associate himself with all that had been said about the Chairman, the officers of the Commission and the Special Rapporteur on the law of treaties. Sir Humphrey Waldock had set an example of how a Special Rapporteur should do his work; he had sought not to convince but to illustrate, and had produced well-balanced reports in which careful attention was paid to the opinions expressed in the Commission; he had acted as the mouthpiece of the Commission with complete good faith, while forcefully maintaining his own views.

201. Mr. Briggs had placed his wide learning at the disposal of the Commission and had served it well as Chairman of the Drafting Committee. Mr. Tunkin had earned the deep respect of his colleagues for his outstanding capacity as a jurist, the precision of his mind and his strength of character. Through him his country had contributed much to the progressive development of international law.

202. Mr. de LUNA said that the Commission, the world of scholarship and practising lawyers all owed much to Sir Humphrey Waldock, whose selfless dedication to his task had enabled the Commission to complete its draft on the law of treaties, a task in which he had been ably seconded by their admirable Chairman.

203. As he himself would not be a candidate for the new Commission, he wished to take that opportunity to express his feelings of friendship and esteem for his colleagues. The members of the Commission had shown that men from different continents and with different

ideologies could, if they combined scholarship and objectivity with good faith, work together on a task of outstanding importance, so much so that it was already a part of the history of international law.

204. Mr. BRIGGS said he associated himself with everything that had been said by other members in their tributes to Sir Humphrey Waldock, for whom he had great admiration and respect. He also wished to thank the Secretariat for the particularly arduous work it had so ably performed throughout the session, during which he was proud to have served on the Drafting Committee.

205. Mr. AMADO, Mr. BARTOŠ, Mr. CASTRÉN, Mr. PESSOU, Mr. ROSENNE, Mr. RUDA and Mr. TSURUOKA also paid tributes to the Chairman, the Special Rapporteur for the law of treaties, and the Secretariat.

206. Sir Humphrey WALDOCK thanked the Chairman for the support he had given him as Special Rapporteur during the session; Mr. Yasseen had discharged his functions with learning and skill.

207. During the past five years he had come to appreciate the different intellectual qualities of members, and the confidence that had grown up between them in the course of the work had been a heartening experience. It was invidious to single out the contribution made by individual members but he nevertheless wished to thank Mr. Briggs for the tact and firmness with which he had presided over the long and difficult meetings of the Drafting Committee throughout the session, and to express his admiration for the clarity of mind and lucidity of expression shown by Mr. Tunkin throughout the work on the law of treaties. He regretted that Mr. Pal had been prevented by ill-health from attending the session. It was a privilege to have served as Special Rapporteur for the law of treaties because, whatever the future might bring, it had been a piece of work eminently worth doing.

208. The CHAIRMAN thanked the Special Rapporteur, who had done everything in his power to make possible the formulation of a draft convention on the law of treaties. He also thanked the members of the Commission for their friendly words; their co-operativeness and esprit de corps had greatly facilitated his task as Chairman.

209. The Commission was to be congratulated on having completed its work on the law of treaties, a task which would be a milestone in the history of the Commission and of international law. It was sad to reflect that, for its next session, the Commission would be losing some of the most eminent jurists in the world.

210. Finally, he expressed his gratitude to the other officers, the Chairmen of the Drafting Committee and the Secretariat. He was proud to have belonged to a Commission which, quietly but in no uncertain manner, served the cause of peace.

211. He declared the eighteenth session of the International Law Commission closed.

The meeting rose at 2.10 p.m.

APPENDIX

Table of references indicating the correspondence between the numbers allocated to the articles, sections and parts of the draft articles on the law of treaties in the reports of the Commission since 1962

1962 Draft (A/5209)			1963 Draft (A/5509)			1964 Draft (A/5809)			1965 Draft (A/6009)			1966 Final Draft (A/6309)		
Article	Section	Part	Article	Section	Part	Article	Section	Part	Article	Section	Part	Article	Section	Part
1	I	I	—	—	—	—	—	—	1	I	I	2	Introduction	I
2	I	I	—	—	—	—	—	—	2	I	I	3	Introduction	I
3	I	I	—	—	—	—	—	—	3	I	I	5	I	II
4	II	I	—	—	—	—	—	—	4	II	I	6	I	II
5	II	I	—	—	—	—	—	—		Deleted			Deleted	
6	II	I	—	—	—	—	—	—	6	II	I	8	I	II
7	II	I	—	—	—	—	—	—	7	II	I	9	I	II
8	II	I	—	—	—	—	—	—		Decision postponed			Deleted	
9	II	I	—	—	—	—	—	—		Decision postponed			Deleted	
10	II	I	—	—	—	—	—	—		Substance incorporated in article 11			Substance incorporated in article 10	
11	II	I	—	—	—	—	—	—	11	II	I	10	I	II
12	II	I	—	—	—	—	—	—	12	II	I	11	I	II
13	II	I	—	—	—	—	—	—		Decision postponed		12	I	II
14	II	I	—	—	—	—	—	—		Substance incorporated in article 12			Substance incorporated in article 11	
15	II	I	—	—	—	—	—	—	15	II	I	13	I	II
15, 1 (b) and (c)	II	I	—	—	—	—	—	—	16	II	I	14	I	II
16	II	I	—	—	—	—	—	—	15	II	I	13	I	II
17	II	I	—	—	—	—	—	—	17	II	I	15	I	II
18, 19 and 20	III	I	—	—	—	—	—	—	18, 19 and 20	III	I	16, 17 and 18	II	II
21	III	I	—	—	—	—	—	—	21	III	I	19	II	II
22	III	I	—	—	—	—	—	—	22	III	I	20	II	II
23	IV	I	—	—	—	—	—	—	23	IV	I	21	III	II
24	IV	I	—	—	—	—	—	—	24	IV	I	22	III	II
25	IV	I	—	—	—	—	—	—	25	IV	I	75	—	VII
26	V	I	—	—	—	—	—	—	26	IV	I	74	—	VII
27	V	I	—	—	—	—	—	—		Substance incorporated in article 26			Substance incorporated in article 74	
28 and 29 (1)	V	I	—	—	—	—	—	—	28	IV	I	71	—	VII
29 (2) to (8)	V	I	—	—	—	—	—	—	29	IV	I	72	—	VII
—	—	—	30	I	II	—	—	—	—	—	—	39	I	V
—	—	—	31	II	II	—	—	—	—	—	—	43	II	V
—	—	—	32 (1)	II	II	—	—	—	—	—	—	7	I	II
—	—	—	32 (2)	II	II	—	—	—	—	—	—	44	II	V
—	—	—	33	II	II	—	—	—	—	—	—	46	II	V
—	—	—	34	II	II	—	—	—	—	—	—	45	II	V
—	—	—	35	II	II	—	—	—	—	—	—	48	II	V

—	—	—	36	II	II	—	—	—	—	—	—	49	II	V
—	—	—	37	II	II	—	—	—	—	—	—	50	II	V
—	—	—	38	III	II	—	—	—	—	—	—	51	III	V
—	—	—	38 (3) (b)	III	II	—	—	—	—	—	—	52	III	V
—	—	—	39	III	II	—	—	—	—	—	—	53	III	V
—	—	—	40	III	II	—	—	—	—	—	—	54	III	V
—	—	—	41	III	II	—	—	—	—	—	—	56	III	V
—	—	—	42	III	II	—	—	—	—	—	—	57	III	V
—	—	—	43	III	II	—	—	—	—	—	—	58	III	V
—	—	—	44	III	II	—	—	—	—	—	—	59	III	V
—	—	—	45	III	II	—	—	—	—	—	—	61	III	V
—	—	—	46	IV	II	—	—	—	—	—	—	41	I	V
—	—	—	47	IV	II	—	—	—	—	—	—	42	I	V
—	—	—	48	IV	II	—	—	—	—	—	—	4	Introduction	I
—	—	—	49 and 50 (1)	V	II	—	—	—	3 (bis)	I	I	63	IV	V
—	—	—	50 (2)	V	II	—	—	—	—	—	—	64	IV	V
—	—	—	51	V	II	—	—	—	—	—	—	62	IV	V
—	—	—	52	VI	II	—	—	—	—	—	—	65	V	V
—	—	—	53	VI	II	—	—	—	—	—	—	66	V	V
—	—	—	53 (4)	VI	II	—	—	—	—	—	—	Substance incorporated in article 40		
—	—	—	54	VI	II	—	—	—	—	—	—	68	V	V
—	—	—	—	—	—	55	I	III	—	—	—	23	I	III
—	—	—	—	—	—	56	I	III	—	—	—	24	II	III
—	—	—	—	—	—	57	I	III	—	—	—	25	II	III
—	—	—	—	—	—	58	I	III	—	—	—	30	IV	III
—	—	—	—	—	—	59	I	III	—	—	—	31	IV	III
—	—	—	—	—	—	60	I	III	—	—	—	32	IV	III
—	—	—	—	—	—	61	I	III	—	—	—	33	IV	III
—	—	—	—	—	—	62	I	III	—	—	—	34	IV	III
—	—	—	—	—	—	63	I	III	—	—	—	26	II	III
—	—	—	—	—	—	64	I	III	—	—	—	60	III	V
—	—	—	—	—	—	65	II	III	—	—	—	35	—	IV
—	—	—	—	—	—	66	II	III	—	—	—	36	—	IV
—	—	—	—	—	—	67	II	III	—	—	—	37	—	IV
—	—	—	—	—	—	68	II	III	—	—	—	38	—	IV
—	—	—	—	—	—	69	III	III	—	—	—	27	III	III
—	—	—	—	—	—	70	III	III	—	—	—	28	III	III
—	—	—	—	—	—	71	III	III	—	—	—	27 (4)	III	III
—	—	—	—	—	—	72	III	III	—	—	—	29	III	III
—	—	—	—	—	—	73	III	III	—	—	—	29	III	III
—	—	—	—	—	—	—	—	—	0	I	I	1	Introduction	I
—	—	—	—	—	—	—	—	—	29 (bis)	IV	I	73	—	VII
—	—	—	—	—	—	—	—	—	—	—	—	40 ^a	I	V
—	—	—	—	—	—	—	—	—	—	—	—	47 ^b	II	V
—	—	—	—	—	—	—	—	—	—	—	—	55 ^c	III	V
—	—	—	—	—	—	—	—	—	—	—	—	67 ^d	V	V
—	—	—	—	—	—	—	—	—	—	—	—	69 ^e	—	VI
—	—	—	—	—	—	—	—	—	—	—	—	70 ^f	—	VI

^a Second part of the seventeenth session and eighteenth session, article 30 bis.

^b Eighteenth session, article 34 bis.

^c Eighteenth session, article 40 bis.

^d Eighteenth session, article 53 bis.

^e Eighteenth session, article Y.

^f Eighteenth session, article Z.

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