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A/CN.4/SR.890

Summary record of the 890th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1966, vol. I(2)

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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 "annulment". 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.