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Summary record of the 876th meeting

Topic:

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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 ".

[1] See 875th meeting, para. 79.

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.

[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 distinguish 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, althought 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 meeting[12] 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.

[10] See 853rd meeting, paras. 32-36; 869th meeting, paras. 20-22.

[11] Para. 19.

[12] Paras. 64-67.

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

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 Convention[17] 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 prejudge 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.

[18] *Yearbook of the International Law Commission, 1963*, vol. II, p. 228.

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

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.