

Document:-  
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**Summary record of the 891st meeting**

Topic:  
**Other topics**

Extract from the Yearbook of the International Law Commission:-  
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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*".<sup>6</sup>

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.

<sup>6</sup> Yearbook of the International Law Commission, 1963, vol. II, p. 209, para. (7).

## 891st MEETING

Friday, 15 July 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

## Draft report of the Commission on the work of its eighteenth session

(A/CN.4/L.116 and Addenda)

(continued)

### CHAPTER II: LAW OF TREATIES (continued)

COMMENTARY TO ARTICLE 45 (Establishment of a new peremptory norm of general international law) (A/CN.4/L.116/Add.3) [61]

1. The CHAIRMAN invited the Commission to continue its consideration of the draft report, beginning with the commentary to article 45.

*Paragraph (1)*

*Paragraph (1) was approved.*

*Paragraph (2)*

2. Mr. LACHS said that the reference in the last sentence should be to "the article" and not to "paragraph 1", since the article had only one paragraph.

*Paragraph (2), as thus amended, was approved.*

*Paragraphs (3) and (4)*

*Paragraphs (3) and (4) were approved.*

*The commentary to article 45, as thus amended, was approved.*

COMMENTARY TO ARTICLE 55 (*Pacta sunt servanda*) (A/CN.4/L.116/Add.4) [23]

*Paragraph (1)*

*Paragraph (1) was approved.*

*Paragraph (2)*

3. Mr. LACHS proposed the deletion from the second sentence of paragraph (2) of the reference to the International Court's advisory opinion on the *Admission of a State to the United Nations (Article 4 of the Charter)*. That case had involved the sovereign right of a State to exercise certain prerogatives of United Nations membership and he doubted its relevance to article 55.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that, although the case seemed to him relevant as an example of the exercise of treaty rights in good faith, he would have no objection to the amendment proposed by Mr. Lachs.

*Paragraph (2) as thus amended, was approved.*

*Paragraphs (3) and (4)*

*Paragraphs (3) and (4) were approved.*

*Paragraph (5)*

5. Sir Humphrey WALDOCK, Special Rapporteur, asked whether the Commission was satisfied with the reference to a possible preamble contained in the last sentence of paragraph (5).

6. Mr. LACHS said that the conditional form in which the sentence had been drafted by the Special Rapporteur was fully satisfactory.

*Paragraph (5) was approved.*

*The commentary to article 55, as amended, was approved.*

COMMENTARY TO ARTICLE 56 (Non-retroactivity of treaties) (A/CN.4/L.116/Add.4) [24]

*The commentary to article 56 was approved.*

COMMENTARY TO ARTICLE 57 (Application of treaties to territory) (A/CN.4/L.116/Add.4) [25]

*Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were approved.*

*Paragraph (3)*

7. Mr. LACHS proposed the deletion from the third sentence of the words "the nuances and controversy arising from", which preceded the words "the association of the latter term with the so-called 'colonial clause'".

*Mr. Lachs' amendment was adopted.*

*Paragraph (3), as thus amended, was approved.*

*Paragraphs (4) and (5)*

*Paragraphs (4) and (5) were approved.*

*Paragraph (6)*

8. Mr. de LUNA pointed out that paragraph (6) would have to be revised since the Commission had adopted a special article on State succession and State responsibility.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that he would redraft the paragraph accordingly.

*It was so agreed.*

*Paragraph (6), as thus amended, was approved.*

*The commentary to article 57, as amended, was approved.*

COMMENTARY TO ARTICLE 58 (General rule regarding third States) (A/CN.4/L.116/Add.4) [30]

*Paragraph (1)*

*Paragraph (1) was approved.*

*Paragraph (2)*

10. Mr. ROSENNE said he noted that paragraph (2) used the expressions "major multilateral treaty" and "general multilateral treaty of a law-making character". In the absence of a definition of "general multilateral treaty", those expressions were difficult to understand.

11. Sir Humphrey WALDOCK, Special Rapporteur said that he would be prepared to drop the words "of a law-making character" in the penultimate sentence of paragraph (2), although he considered that the use of those words was correct.

*Paragraph (2), as thus amended, was approved.*

*Paragraph (3)*

12. Mr. TUNKIN said that the cases cited in the commentary were not relevant to the text of the article. Article 58 stated that the consent of the third State was required for the treaty to create rights or obligations for that State. The cases cited referred to the rule that a State which was not a party to a treaty was not entitled to invoke it.

13. Sir Humphrey WALDOCK, Special Rapporteur, said that the various paragraphs of the commentary

had been taken from the 1964 commentary and were therefore no longer a direct illustration of article 58, since the text of the article was now different. However, the material in those paragraphs illustrated the *pacta tertiis* rule, which was the rule underlying the series of articles commencing with article 58. He therefore suggested that the material in those paragraphs should be retained in shortened form and that he should make the necessary adjustments to orient it to the new formulation of the article.

*It was so agreed.*

*Paragraph (3), as thus amended, was approved.*

*Paragraphs (4) and (5)*

*Paragraphs (4) and (5) were approved.*

*The commentary to article 58, as amended, was approved.*

COMMENTARY TO ARTICLE 59 (Treaties providing for obligations for third States) (A/CN.4/L.116/Add.4) [31]

*Paragraph (1)*

*Paragraph (1) was approved.*

*Paragraph (2)*

14. Mr. AGO said that the statement in the first sentence, that "the application of this article is illustrated by the Permanent Court's approach to article 435 of the Treaty of Versailles in the *Free Zones* case", was open to criticism. The Permanent Court's decision in 1929 could not be an illustration of the application of the Commission's article 59, which was only now being adopted.

15. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the sentence be amended to read: "The operation of the rule in this article is illustrated...".

*It was so agreed.*

*Paragraph (2), as thus amended, was approved.*

*Paragraph (3)*

16. Mr. TUNKIN proposed the deletion from the fourth sentence of the words "in its opinion"; that sentence stated a well-established rule of international law and not a mere opinion.

17. He also proposed the deletion of the fifth sentence which read: "The Commission did not consider, however, that it should introduce a specific provision on the question into the present article; for such a provision might involve the interpretation of the Charter for which specific organs of the United Nations are the competent bodies". The reason given in that sentence was not valid; the Commission had not been deterred from making reference to the Charter in other articles of the draft by the consideration that such reference might involve interpretation of the Charter.

18. Mr. AGO said he supported Mr. Tunkin's amendments. The reason given in the fifth sentence was not the correct reason; the second sentence, which read "The Commission recognized that such cases would fall outside the principles laid down in this article, provided that the action taken was in conformity with the Charter", gave a better explanation of the Commission's decision

to submit a separate article containing a general reservation relating to the aggressor State.

19. The CHAIRMAN, speaking as a member of the Commission, said he also supported Mr. Tunkin's amendments. He saw no validity in the argument relating to the interpretation of the Charter. The fact that there was an official method of interpretation did not exclude the possibility of any interested party interpreting a Charter provision.

*Mr. Tunkin's amendments were adopted.*

20. Mr. TUNKIN proposed that the opening words of the sixth sentence, which read: "Instead, it decided to submit for the consideration of governments the text of a separate article", be replaced by the words "It decided to include in the draft a separate article".

21. Sir Humphrey WALDOCK, Special Rapporteur said that he had drafted the sentence in that form in order to indicate that there had been some division of opinion in the Commission on the question.

22. Mr. BRIGGS said that, as he considered the special article in question rather irrelevant, he preferred the formula drafted by the Special Rapporteur.

23. Mr. ROSENNE said that, strictly speaking, the Commission's draft was submitted to the General Assembly and not to governments. He saw no reason for differentiating between the Commission's decision in that particular matter and its other decisions.

24. Mr. LACHS said he supported Mr. Rosenne's remarks.

25. Sir Humphrey WALDOCK, Special Rapporteur, suggested that an indication be given in the paragraph that some members of the Commission had expressed a different view.

26. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's suggestion was in conformity with the Commission's usual practice.

27. Mr. CASTRÉN proposed that the sixth sentence be amended as proposed by Mr. Tunkin, but that the matter be clarified in the commentary to article Z.

28. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept that proposal.

*Mr. Tunkin's amendment was adopted.*

*Paragraph (3), as amended, was approved.*

*The commentary to article 59, as amended, was approved.*

COMMENTARY TO ARTICLE 60 (Treaties providing for rights for third States) (A/CN.4/L.116/Add.4) [32]

*Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were approved.*

*Paragraph (3)*

29. Mr. TUNKIN suggested that the first sentence be amended to indicate that the jurists whose views were given in that sentence regarded the case in question as analogous to that of obligations for third States.

*It was so agreed.*

*Paragraph (3), as thus amended, was approved.*

*Paragraph (4)*

*Paragraph (4) was approved.*

*Paragraph (5)*

30. Mr. JIMÉNEZ de ARÉCHAGA suggested that, in the penultimate sentence, the passage beginning with the words "its consent should always be required" be replaced by the actual words used in article 61.

*It was so agreed.*

31. Mr. LACHS suggested that the word "neutral", before the word "form" in the last sentence, be deleted.

*It was so agreed.*

*Paragraph (5), as thus amended, was approved.*

*Paragraphs (6), (7) and (8)*

*Paragraphs (6), (7) and (8) were approved.*

*The commentary to article 60, as amended, was approved.*

COMMENTARY TO ARTICLE 61 (Revocation or modification of obligations or rights of third States) (A/CN.4/L.116/Add.4) [33]

*Paragraphs (1), (2) and (3)*

*Paragraphs (1), (2) and (3) were approved.*

*Paragraph (4)*

32. Sir Humphrey WALDOCK, Special Rapporteur, said that the word "agreement", in the sixth sentence, should be corrected to read "argument".

*The commentary to article 61 was approved.*

COMMENTARY TO ARTICLE 62 (Rules in a treaty becoming binding through international custom) (A/CN.4/L.116/Add.4) [34]

*Paragraph (1)*

33. Mr. TUNKIN proposed that, in the second sentence, the wording "comes to be generally accepted by other States as customary international law..." be expanded to read "comes to be generally accepted by other States, and becomes binding on those States by way of custom".

34. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept that amendment.

35. Mr. TUNKIN proposed the deletion of the third sentence, which read: "Or a multilateral treaty, formulating new general norms of international law and drawn up between a large number of States, may be ratified only by some of the negotiating States and yet come to be generally accepted as enunciating rules of customary law". That case was indistinguishable from the first one given in the previous sentence. There were in fact only two cases: that of treaties declaratory of rules of general international law and that of treaties which gained general acceptance and thereby became part of general international law.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that he would have no objection to the deletion of the third sentence although it did in fact represent a third case, that in which some States had refrained from ratifying the treaty but had afterwards by their acts indicated their acceptance of its principles. That case was a little different from the case of a State which

was a complete stranger to the treaty but acted in accordance with its principles.

*Paragraph (1), as thus amended, was approved.*

*Paragraphs (2) and (3)*

*Paragraphs (2) and (3) were approved.*

*Paragraph (4)*

37. Mr. BRIGGS suggested that the sixth sentence, which read "As the theory of treaties creating objective régimes was controversial, the Commission concluded that to recognize it would be premature at the present stage of the development of international relations", be reworded so as to state that the Commission had decided to leave that question aside.

38. Mr. BARTOŠ said he too felt that the sentence should be amended, since it raised theoretical problems by implying that the Commission should "recognize" the theory of treaties creating objective régimes.

39. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the sentence be reformulated on some such lines as: "Since to lay down a rule recognizing the creation of objective régimes by treaty might be unlikely to meet with acceptance, the Commission decided to leave this question aside in drafting the articles."

*It was so agreed.*

*Paragraph (4), as thus amended, was approved.*

*The commentary to article 62, as amended, was approved.*

COMMENTARY TO ARTICLE 46 (Separability of treaty provisions) (A/CN.4/L.116/Add.5) [41]

*Paragraph (1)*

40. Mr. AGO proposed that the end of the third sentence, which read "and without destroying one of the considerations which induced the parties to accept the treaty as a whole", be deleted.

*Mr. Ago's amendment was adopted.*

*Paragraph (1), as thus amended, was approved.*

*Paragraph (2)*

41. Mr. ROSENNE said that the word "inessential", in the last sentence, was inappropriate and should be changed.

42. Sir Humphrey WALDOCK, Special Rapporteur, said he would modify the end of the sentence.

*Paragraph (2), as thus amended, was approved.*

*Paragraphs (3), (4) and (5)*

*Paragraphs (3), (4) and (5) were approved.*

*Paragraph (6)*

43. Mr. JIMÉNEZ de ARÉCHAGA said that, according to the first sentence in paragraph (6), paragraph 4 of article 46 made "the question of the separability of the clauses subject to the conditions contained in paragraph 3". But paragraph 4 of article 46 (A/CN.4/L.115) did not make that clear. He therefore proposed that it be amended by introducing a proviso to the effect that it was subject to the provisions of paragraph 3. There should be no question of the injured State taking

advantage of the situation to invoke a truncated version of the treaty to its own advantage.

44. Mr. TUNKIN said that he had his doubts about that proposal.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that, as he had understood the Commission's intention, paragraph 4 was meant to be governed by the provisions of paragraph 3.

46. Mr. de LUNA said he agreed with Mr. Jiménez de Aréchaga.

47. Mr. BRIGGS said he supported Mr. Jiménez de Aréchaga's proposal for the amendment of paragraph 4 of article 46. There was nothing either in that paragraph or in paragraph 1 to justify the statement in the first sentence of paragraph (6) of the commentary. The position should indeed be as stated in that sentence, but it was essential to amend the text of the article in order to make that position clear.

48. Mr. AGO said that paragraph 3 of article 46 stated the general rule which was valid in any situation where separability applied. Consequently, paragraph 4 was necessarily governed by the general rule stated in paragraph 3. If it were not so, the Commission would be suggesting that, in the situation envisaged in paragraph 4, separability was possible even in cases where the clauses were not separable, which would be absurd.

49. Mr. BARTOŠ said that he was in some doubt as to how to interpret the passage in paragraph (6) of the commentary in which the Commission expressed the view that a State which was the victim of fraud or corruption "should have the option either to invalidate the whole treaty or to denounce the principal clause to which the fraud or corruption related". In his opinion, it was a question of invalidating either the whole treaty or certain of those clauses that had been vitiated, not of denunciation, which was a unilateral act depending on the will of one of the parties.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that his understanding of the position was borne out by paragraph (6) of the commentary to article 33 in the 1963 report, which stated: "The Commission considered that where the fraud related to particular clauses only of the treaty, it should be at the option of the injured party to invoke the fraud as invalidating its consent to the whole treaty or to the particular clauses to which the fraud related. On the other hand, even in cases of fraud the severance of the treaty could only be admitted under the conditions specified in article 46, because it would be undesirable to set up continuing treaty relations on the basis of a truncated treaty the provisions of which might apply in a very uneven manner as between the parties".<sup>1</sup>

51. Mr. BARTOŠ said that, according to paragraph 4 of article 46, there was no difference in the nature of a State's right to claim that a treaty was invalid. It was not a question whether the treaty should or should not be denounced, but of requiring that either the whole treaty or particular clauses should be declared invalid.

<sup>1</sup> *Yearbook of the International Law Commission, 1963, vol. II, p. 195.*

52. Mr. AMADO suggested that the words "to denounce" in the second sentence of paragraph (6) be deleted; there was no reason to include those words at that point.

53. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept Mr. Amado's suggestion.

54. The CHAIRMAN, speaking as a member of the Commission, said that unfortunately he could not agree with Mr. Briggs. Paragraph 3 was general in scope and applied to all cases of separability. It would be impossible to envisage a case of separability that was not subject to that paragraph without creating injustice, which it was the Commission's purpose to prevent. His view was that the article was well drafted, that its paragraph 3 was general in scope, and that paragraph 4 manifestly hinged on paragraph 3.

55. Mr. ROSENNE said that the discussion had revealed that the sense of paragraph 4 of the article was not altogether clear, and that was made worse by the omission from the commentary of any express reference to cases of breach. He had understood that the provisions of paragraph 2 of the article were not subject to the conditions laid down in paragraph 4. Paragraph 2 had been framed in that way so as to meet the point made by Mr. Castrén at the Monaco session.<sup>2</sup> It was therefore not correct to state that all cases of separability were governed by paragraph 3.

56. The CHAIRMAN, speaking as a member of the Commission, said that the injured State was given the choice between invalidation of the whole treaty and separability. If it said that it was in favour of separability such separability was unquestionably governed by paragraph 3.

57. Sir Humphrey WALDOCK, Special Rapporteur, said he would have thought that the article itself was clear. Under paragraph 4 there could be no derogation from the rule set out in paragraph 3, and paragraph 4 simply provided two alternative courses for the State. However, if it were the wish of the Commission, he would be prepared to explain the point in the commentary.

58. Mr. TSURUOKA said that, although the Special Rapporteur's explanation seemed to be satisfactory, some allowance should be made for Mr. Rosenne's misgivings. If a misunderstanding had arisen among the experts in the Commission, then the drafting was at fault. If a few words could be added explaining the relationship between the two paragraphs, without damage to the general structure of the draft, it would be to the advantage of the Commission to add them.

59. Mr. JIMÉNEZ de ARÉCHAGA said that unless paragraph 4 of the article were slightly modified to reflect what he believed to be the unanimous view of the Commission, it would be misconstrued.

60. Mr. AGO said that he had no objection to the idea of adding a few words to make the article more explicit; the relationship between paragraphs 3 and 4 was clear, but it could be made clearer.

61. Mr. Rosenne, however, had raised the question of article 42. In the circumstances of a breach of a treaty provided for in article 42, it was apparently possible to arrive at the conclusion that the right to suspend or to terminate the operation of the treaty, in whole or in part, was not governed by the rules stated in paragraph 3. Such a conclusion was odd; it would mean that the application of certain rules could be partially suspended in cases where the clauses to be suspended were not separable from the remainder of the treaty. It would surely be rather surprising if, in response to the violation of a treaty, it were possible to suspend part of it in cases where separation was impossible in practice.

62. Sir Humphrey WALDOCK, Special Rapporteur, said that if any change were needed at all in the text of article 46, it would suffice to insert the words "subject to paragraph 3" at the beginning of paragraph 4.

63. Mr. TUNKIN said that, in his opinion, no change was needed in the article, because in article 42 the word "material" qualified the word "breach" in paragraphs 1, 2 and 3.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that reference was made in article 42 to suspension in whole or in part, but it would probably be going too far to argue that the principle of separability would automatically apply in cases of breach, which raised problems of sanction and reprisal. He had understood the Commission in article 42 to have made an exception deliberately to the provisions concerning separability; that was particularly important for cases of a violation of a multilateral treaty by one party.

65. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the Special Rapporteur. Under the rules of law governing reprisal, a State was entitled to suspend the execution of a particular clause vis-à-vis a State committing a material breach, even if the strict conditions laid down in article 46 about separability had not been met.

*Paragraph (6), as amended, was approved.*

*The commentary to article 46, as amended, was approved.*

AMENDMENT TO ARTICLE 46 (Separability of treaty provisions) (A/CN.4/L.115) [41]

66. Mr. ROSENNE said he still considered that paragraph 4 of the article should be amplified so as to explain the situation regarding breach.

67. The CHAIRMAN formally proposed that, in order to clarify the point raised by Mr. Jiménez de Aréchaga, the words "subject to paragraph 3" be inserted in the text of paragraph 4 of article 46<sup>3</sup> as suggested by the Special Rapporteur.

*The Chairman's amendment to article 46 was adopted.*

COMMENTARY TO ARTICLE 47 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty) (A/CN.4/L.116/Add.5) [42]

*Paragraphs (1), (2) and (3)*

*Paragraphs (1), (2) and (3) were approved.*

<sup>2</sup> Yearbook of the International Law Commission, 1966, vol. I, part I, 843rd meeting, para. 5.

<sup>3</sup> As adopted at the Monaco Session. See Yearbook of the International Law Commission, 1966, vol. I, part I, 843rd meeting, para. 13.

*Paragraph (4)*

68. Mr. ROSENNE said that the word "*préclusion*" did not exist in French and should be replaced by the word "*forclusion*".

69. Mr. AGO said it was true that the only French word which had some similarity with the English '*estoppel*' was "*forclusion*", but it was a word which had a clearly defined meaning in procedure.

70. Mr. JIMÉNEZ de ARÉCHAGA said that the term "*preclusión*" existed in Spanish and was a perfectly proper one to use in that context.

71. The CHAIRMAN, speaking as a member of the Commission, said that in his view it was a dangerous practice to make use in a legal text of expressions borrowed from a foreign language. The terms used in the commentaries should be those employed by the Special Rapporteur, which were familiar in English usage.

72. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the words "*as 'préclusion'*" be dropped.

*It was so agreed.*

*Paragraph (4), as thus amended, was approved.*

*Paragraph (5)*

*Paragraph (5) was approved.*

*The commentary to article 47, as amended, was approved.*

COMMENTARY TO ARTICLE 50 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) (A/CN.4/L.116/Add.5) [63]

*The commentary to article 50 was approved.*

COMMENTARY TO ARTICLE 50 (*bis*) (Revocation of notifications and instruments provided for in articles 51 and 50) (A/CN.4/L.116/Add.5) [64]

*The commentary to article 50 (bis) was approved.*

COMMENTARY TO ARTICLE 51 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) (A/CN.4/L.116/Add.6) [62]

*The commentary to article 51 was approved.*

COMMENTARY TO ARTICLE 52 (Consequences of the invalidity of a treaty) (A/CN.4/L.116/Add.6) [65]

73. Mr. BRIGGS said that some explanation was needed in the commentary of the sense in which the term "party" was used in the article.

74. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the necessary explanation be inserted in the commentary to article 1.

*It was so agreed.*

*Paragraph (1)*

75. Mr. CASTRÉN proposed that paragraph (1) be deleted, since there was now a special article Y in which the Commission expressly excepted State responsibility.

76. Mr. ROSENNE said he thought that paragraph (1) should be retained, with the insertion of a cross-reference in the last sentence to the new article Y.

77. Mr. AGO said that it would be better to retain the reference to responsibility because the problem would immediately occur to the reader in connexion with the consequences of the invalidity of a treaty.

78. However, as it was not absolutely certain that the question of responsibility necessarily arose in cases of fraud and coercion, it was undesirable to prejudge the matter, and he would therefore prefer to see the word "raise" in the second sentence replaced by the words "may raise".

79. Mr. BARTOŠ said he agreed with Mr. Rosenne and Mr. Ago. It should be made quite clear that the article did not deal with questions of responsibility and redress, and that the Commission had deliberately excluded that matter from the scope of the article.

80. Sir Humphrey WALDOCK said it was very important to retain paragraph (1), since otherwise it might be thought that the Commission had overlooked questions of responsibility arising from acts which were the cause of invalidity. A cross-reference to the new article Y could be inserted.

81. The word "may" could be substituted for the word "clearly" in the second sentence to meet Mr. Ago's point.

*It was so agreed.*

*Paragraph (1), as thus amended, was approved.*

*Paragraph (2)*

*Paragraph (2) was approved.*

*Paragraph (3)*

82. Mr. JIMÉNEZ de ARÉCHAGA proposed that, in the fourth sentence, the expression "*status quo*" be expanded to "*status quo ante*".

*It was so agreed.*

*Paragraph (3), as thus amended, was approved.*

*Paragraphs (4) and (5)*

*Paragraphs (4) and (5) were approved.*

*The commentary to article 52, as amended, was approved.*

COMMENTARY TO ARTICLE 53 (Consequences of the termination of a treaty) (A/CN.4/L.116/Add.6) [66]

*Paragraph (1)*

83. Mr. BARTOŠ said that he was doubtful whether the second sentence in paragraph (1), "it is limited to the consequences of a treaty's termination", should be retained. The question of responsibility or redress had very properly been excluded, but either could be a consequence of the termination of a treaty.

84. Sir Humphrey WALDOCK, Special Rapporteur, said that the simplest course was to delete the sentence.

*It was so agreed.*

*Paragraph (1), as thus amended, was approved.*

*Paragraph (2)*

*Paragraph (2) was approved.*

*Paragraph (3)*

85. Mr. AGO said that, although he agreed with the wording of the last sentence of paragraph (3) of the

commentary, he was not sure whether the Commission's intention was brought out so clearly in the wording of the article itself. It might be better to transpose the words "of the parties" and "or any legal situation", since otherwise the words "legal situation" might appear to have a wider meaning and create the misunderstanding mentioned by the Special Rapporteur at the end of the paragraph.

86. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the phrase be amended to read:

"any right, obligation or legal situation of the parties created through the execution of the treaty".

*It was so agreed.*

87. Sir Humphrey WALDOCK, Special Rapporteur, said that that amendment would entail a similar amendment to paragraph 1 (b) of the article.

*Paragraph (3), as thus amended, was approved.*

*Paragraphs (4), (5), (6) and (7)*

*Paragraphs (4), (5), (6) and (7) were approved.*

*The commentary to article 53, as amended, was approved.*

AMENDMENT TO ARTICLE 53 (Consequences of the termination of a treaty) (A/CN.4/L.116/Add.6) [66]

88. The CHAIRMAN invited the Commission formally to adopt the amendment proposed by the Special Rapporteur to paragraph 1 (b) of article 53, as adopted at the 865th meeting.

*The Special Rapporteur's amendment to article 53 was adopted.*

COMMENTARY TO ARTICLE 53 (bis) (Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law) (A/CN.4/L.116/Add.6) [67]

*Paragraph (1)*

*Paragraph (1) was approved.*

*Paragraph (2)*

89. Mr. AGO said that the word "*annulation*" in the second sentence of the French text was quite inappropriate; the word "*nullité*" should be used.

90. Sir Humphrey WALDOCK, Special Rapporteur, said that as far as the English text was concerned, the word "*invalidation*" was correct because the sentence referred to the law rendering a treaty invalid from a certain moment. However, if Mr. Ago wished, he would be prepared to substitute the word "*annulment*".

*It was so agreed.*

*Paragraph (2), as thus amended, was approved.*

*Paragraph (3)*

91. Mr. TUNKIN proposed the deletion of the first half of the second sentence, reading "since both or all the parties have *ex hypothesi* participated in the violation of a peremptory norm of general international law"; the sentence would then begin with the words "The Commission did not consider...". The assertion in that first half of the sentence was not borne out by the facts. A peremptory norm of *jus cogens* was usually

violated by one party, for example, by imposing a treaty upon another State.

92. Sir Humphrey WALDOCK, Special Rapporteur, said that article 53 (bis) did not deal with the question of unequal treaties, but with the case when the provisions of a treaty were in conflict with a rule of *jus cogens*. It must be presumed that the parties knew the law and what constituted an infringement of it.

93. If the Commission subscribed to the view taken by Mr. Tunkin, the article itself was incorrectly drafted because in the preceding article allowance had been made for a certain adjustment of interests between the parties, but under article 53 (bis) that was prohibited. If the parties put their signature to a provision that infringed a rule of *jus cogens*, they could not seek protection under the law.

94. Mr. JIMÉNEZ de ARÉCHAGA suggested that the difficulty might be overcome by substituting the words "in the agreement in conflict with" for the words "in the violation".

95. Mr. TUNKIN said that there might be cases where all the parties were equally responsible for violating a peremptory norm of international law, but the point was somewhat academic and the possibility could certainly not be treated on the same footing as the imposition of a treaty by a powerful State on another State.

96. The CHAIRMAN, speaking as a member of the Commission, said that, so far as the party which had imposed it was concerned, the treaty would be void on two counts: it would be in conflict with a rule of *jus cogens* and it would have been concluded as a result of coercion. From that point of view there was a marked distinction between the State responsible for the coercion and the State that was a victim of it.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that the Chairman had raised an entirely different point, namely, when the actual conclusion of a treaty violated *jus cogens*.

98. Mr. Tunkin's point could be met by the insertion of the words "in these cases" after the words "The Commission did not consider that", in the second part of the sentence. The first part of the sentence could be dropped, leaving it to be implied that paragraph 1 was an application of the principle *in pari delicto*.

*It was so agreed.*

*Paragraph (3), as thus amended, was approved.*

*Paragraph (4)*

*Paragraph (4) was approved.*

*The commentary to article 53 (bis), as amended, was approved.*

COMMENTARY TO ARTICLE 54 (Consequences of the suspension of the operation of a treaty) (A/CN.4/L.116/Add.6) [68]

*Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were approved.*

*Paragraph (3)*

99. Mr. AGO said that it should be made clear, both in paragraph 1 (b) of the article and in paragraph (3)



of the commentary, that it was the legal relations between the parties that were referred to.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that the words "between the parties" could be inserted after the words "legal relations" in paragraph 1 (b) of the article itself<sup>4</sup> and in paragraph (3) of the commentary.

*It was so agreed.*

*Paragraph (3), as thus amended, was approved.*

*Paragraph (4)*

*Paragraph (4) was approved.*

*The commentary to article 54 was approved.*

AMENDMENT TO ARTICLE 54 (Consequences of the suspension of the operation of a treaty) [68]

101. The CHAIRMAN formally proposed that paragraph 1 (b) of article 54 be amended by the insertion of the words "between the parties" after the words "legal relations".

*The Chairman's amendment to article 54 was adopted.*

The meeting rose at 1 p.m.

<sup>4</sup> See 865th meeting, para. 87.

## 892nd MEETING

*Monday, 18 July 1966, at 10 a.m.*

*Chairman:* Mr. Mustafa Kamil YASSEEN

*Present:* Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

### Representation of the Commission at the twenty-first session of the General Assembly

1. The CHAIRMAN invited the Commission to appoint a member to represent it at the twenty-first session of the General Assembly.

2. Mr. de LUNA, supported by Mr. BRIGGS, Mr. BARTOŠ, Mr. JIMÉNEZ de ARÉCHAGA, Mr. TUNKIN, Mr. PESSOU, Mr. LACHS, Mr. TSURUOKA, Sir Humphrey WALDOCK and Mr. CASTRÉN, proposed that the Commission appoint the Chairman to represent it at the General Assembly.

*It was so decided.*

### Draft report of the Commission on the work of its eighteenth session

(A/CN.4/L.116 and Addenda)

*(resumed from the previous meeting)*

#### CHAPTER II: LAW OF TREATIES (continued)

##### INTRODUCTION (A/CN.4/L.116/Add.7)

3. The CHAIRMAN invited the Commission to continue its consideration of the draft report.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that it would be helpful if the Commission could start with the introduction to chapter II (A/CN.4/L.116/Add.7), as that would give him time to draft any necessary additions before members left Geneva. For example, he had been uncertain whether to mention in the introduction such matters as most-favoured-nation clauses, which the Commission had decided not to deal with in the draft articles.

5. Mr. BRIGGS said that the Commission must also decide what recommendation it wished to put forward to the General Assembly under article 23 of its Statute, about the convening of a diplomatic conference on the law of treaties.

6. Mr. ROSENNE said that mention should be made in the introduction to chapter II, as had been done in its reports on its fifteenth<sup>1</sup> and sixteenth<sup>2</sup> sessions, of the main issues which the Commission had decided to leave aside.

7. Some mention should also be made of the fact that the Commission had continued its work on the law of treaties on the lines laid down by the General Assembly in its resolutions 1765(XVII), 1902(XVIII) and 2045(XX) and had complied with the General Assembly's request to take into account the discussions on the law of treaties in the Sixth Committee.

8. Finally, in paragraph 22 a reference should be inserted to paragraph 58 of the Commission's report on its fifteenth session, with an indication that the Commission had taken note of the recommendation by the Sub-Committee on the Succession of States and Governments, that the problems of State succession in the matter of treaties should be dealt with under that topic and not covered in the draft articles on the law of treaties.

9. Mr. TUNKIN said he agreed with Mr. Rosenne's second and third suggestions.

10. Mr. LACHS said that, in his opinion, it was only necessary to mention the main points not covered in the draft articles, such as most-favoured-nation clauses, since otherwise the length of the introduction was going to make the report top-heavy.

11. He doubted whether paragraph 3 need be retained. The account of what had taken place at the Commission's third session was not strictly relevant to the work of the past five years.

12. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that mention should be made of points not covered in the draft and of the relevant decisions by the General Assembly. But he also needed guidance from the Commission on whether, as appeared to have been contemplated earlier in the session, some statement was desirable which would anticipate the kind of arguments that could be expected from many governments and lawyers against any attempt to draw up a convention on the law of treaties as such, and would reinforce the Commission's own recommendation on the subject.

<sup>1</sup> *Yearbook of the International Law Commission*, 1963, vol. II, p. 189.

<sup>2</sup> *Yearbook of the International Law Commission*, 1964, vol. II, p. 176.