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Summary record of the 726th meeting

Topic:
Law of Treaties

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in the event of such a conflict — even those of States not parties to the conflict.[6]

53. It was a characteristic of international law that when universal rules on a matter existed, they were mandatory even for those who had not signed the relevant instruments. That was shown, for example, by the case-law of the Nuremberg trials. Mr. Rosenne had therefore been right in mentioning the case in which no relations existed; that was a delicate question linked with the recognition of governments. For example, at the time of the Evian negotiations, Switzerland had had to decide how to treat a special mission sent by a provisional government which had not been recognized by all States and which France, in particular, regarded as merely a political party or movement.

54. As Mr. Verdross had said, the Commission was doing pioneer work. It should endeavour to draft rules which would not be imposed on States, but would be acceptable to them as universal rules. Hence it could not confine itself to mere codification, but must undertake the progressive development of international law.

55. A last question, which had been touched on by Mr. Tunkin and Sir Humphrey Waldock, was that of linking the draft articles to the Vienna Convention on Diplomatic Relations. If, on completion of its examination, the Commission found many differences between its draft and the Convention the cross-references would be few and very cautious; but if, on the contrary, it found that the two instruments had many points in common, they might be more closely linked. The Commission's task was to draft an instrument which provided, for the problems of temporary missions, solutions in keeping with the nature of those missions.

The meeting rose at 12 noon.

726th MEETING

Tuesday, 19 May 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(A/CN.4/167)

[Item 3 of the agenda]

1. The CHAIRMAN invited the Commission to take up item 3 of the agenda.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the considerations which had guided him in preparing his third report (A/CN.4/167), covering the application, effects, revision and interpretation of treaties, were set out in the introduction.

3. The articles on revision were almost ready for circulation. When drafting them he had been keenly aware of their close connexion with the articles concerning the priority of conflicting provisions and their effect on third States.

4. He was doing his best to prepare some basic articles on interpretation, but owing to other commitments they were not yet ready. The subject was a vast and difficult one and he was anxious not to penetrate too deeply into the realm of logic and what might be described as the art of interpretation.

5. He urgently needed guidance from the Commission on how far he should deal with issues involving State responsibility, given the decisions already taken by the Commission about that topic, and on whether he should include provisions concerning the obligation on States to bring domestic legislation into line with treaty obligations. His own view was that the latter point would naturally be dealt with as part of the topic of State responsibility, since it was a general principle not confined to treaty obligations.

6. He also needed guidance on whether he should include provisions concerning the effect on the application of treaties of the suspension of diplomatic relations, which was not a matter pertaining exclusively to the law of treaties and might involve the Commission in a discussion of the consequences of the outbreak of hostilities and of non-recognition, which it was perhaps desirable to avoid.

7. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had been quite right to leave aside all questions arising out of State responsibility proper, in other words, out of the breach of a treaty; for while the law of treaties comprised everything relating to the treaty itself — its formation, application and effects — the question of breach came within the sphere of State responsibility.

8. The Special Rapporteur had raised another problem: that of the obligation to bring national law into line with the rule of international law followed in the treaty. It had been said that that obligation might come within the sphere of responsibility, but surely it derived rather from the very existence of the rule of international law. Failure to bring national law into line with international law constituted a breach of the obligation. He did not think that question came within the scope of the law of treaties, or for that matter within the scope of State responsibility. He was more inclined to regard it as an aspect of the more general problem of bringing national law into line with the requirements of international law. The problem raised by the Special Rapporteur should be carefully considered, for it was of great importance.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that he had not envisaged that the report on State responsibility would be exclusively concerned with violation of rights and reparation. Presumably it would also cover such points as the justification put forward

[6] *United Nations Conferenc on Diplomatic Intercourse and Immunities, Official Records,* Vol. II, p. 87, articles 44-46.

by States that internal constitutional provisions were an impediment to compliance with international obligations.

10. Mr. ROSENNE said he was not altogether certain that examination of the effects of the suspension of diplomatic relations between States on the application of a treaty properly belonged to the topic of State responsibility.

11. As far as the law of treaties was concerned, it would not be necessary to consider the separate subject of the effect of the outbreak of hostilities on the application of treaties; in 1949 the Commission had declared itself opposed to the study of the general topic of the laws of war,[1] and in 1963 it had decided not to consider the effect of the outbreak of hostilities on treaties.[2]

12. He thought that the effect of supension of diplomatic relations ought to be covered, as had been done by the previous special rapporteur in article 4 of his fourth report.[3] It would be remembered that McNair in his "The Law of Treaties" had devoted a special section to the subject[4] and had drawn particular attention to the effects of rupture of diplomatic relations on treaties the application of which required contact between the two parties at the diplomatic level; extradition treaties and treaties of judicial assistance were possible instances.

13. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne's point was well taken. The Harvard Research Draft[5] contained specific provisions on the matter, but he was not altogether convinced that such provisions need be included in his present report. Even in the case of treaties the application of which was dependent on the existence of diplomatic relations between the parties, the situation was perhaps one of temporary impossibility of performance. He would be glad to have further time for reflection before final decision was taken.

14. Mr. YASSEEN said that treaties of judicial co-operation were an example of treaties which had to be applied through the diplomatic channel; but it seemed to be merely a question of the application of the treaty, especially in the examples which had been given.

15. Mr. VERDROSS congratulated the Special Rapporteur on his treatment of a particularly difficult aspect of international law. With regard to the question whether rules concerning the interpretation of treaties should be included in the report, he thought the Commission ought first to decide whether it recognized the existence of such rules; for it was highly controversial whether the rules established by the case-law of arbitral tribunals and international courts were general rules of international law or merely technical rules. As the Special Rapporteur referred to those rules in article 55, paragraph 1, it seemed necessary to include an article on the interpretation of treaties. If the reference were omitted, the situation would be different. He would revert to that point when the Commission came to consider article 55.

16. Mr. BARTOŠ, after praising the Special Rapporteur's report, turned to the question of the connexion between the application of treaties and the existence of diplomatic relations. He noted that in practice the severance of diplomatic relations between two States did not necessarily entail suspension of the treaties in force between them. In the cases mentioned by Mr. Rosenne, he did not think that the rupture of diplomatic relations necessarily involved impossibility of performance of the treaties. In such cases treaties were regularly applied through the States responsible for protecting the interests of the countries which did not maintain diplomatic relations; that situation raised no special difficulties, as was shown, for example, by the case of Yugoslavia and the Federal Republic of Germany, whose interests were represented by Sweden and France respectively.

17. A distinction should be made, however, between the case in which diplomatic relations had been broken off or did not exist and that in which one government was not recognized by the other, even if the States concerned recognized each other as States. That was the situation between Yugoslavia and Spain, for example; Yugoslavia had voted for the admission of Spain to the United Nations as a State, but there were political and legal differences between the two countries, and their governments did not recognize each other. He therefore agreed with the Special Rapporteur that that very complex question should be carefully examined and that the members of the Commission could help the Special Rapporteur, by their suggestions, to produce a suitable solution.

18. Mr. LIANG, Secretary to the Commission, said that an analogy had been drawn between the effect of the suspension of diplomatic relations on the application of treaties, and the effect of war on treaties. In the well-known case of *Techt v. Hughes*, in 1920, Judge Cardozo had thrown new light on the problem by stating that "International law to-day does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact."[6] Thus some treaties were abrogated, while others continued in existence. *A fortiori* the suspension of diplomatic relations between States did not necessarily put an end to all treaty relations between them, but in some cases the application of treaties was suspended for lack of the requisite machinery of implementation, namely, the continuance of diplomatic missions in each other's territory.

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[1] *Yearbook of the International Law Commission, 1949*, p. 281, para. 18.

[2] *Official Records of the General Assembly, Eighteenth session, Supplement No. 9*, p. 2, para. 14.

[3] *Yearbook of the International Law Commission, 1959*, Vol. II, p. 42.

[4] *Op. cit.*, Part VII, chapter 41.

[5] *American Journal of International Law, 1935, Supplement*, Vol. 29, No. 4, Part III.

[6] Hudson, M. O., *Cases on International Law*, second edition. p. 906.

19. He agreed with Mr. Yasseen that it was a matter of the application of treaties, but he thought it should perhaps be dealt with towards the end of the draft, in the same way as provisions relating to abnormal situations had been inserted at the end of the Vienna Conventions on Diplomatic and on Consular Relations.

20. As reference had been made to the Harvard Law Research drafts, he would point out that it was the Draft on State Responsibility, not the Draft on Treaties which contained the provision to the effect that the internal law of a State could not absolve or excuse it from fulfilling an international obligation.[7] Also of interest in that connexion was a statute enacted by the United States Congress towards the end of the nineteenth century prohibiting the immigration of Chinese into the United States, which conflicted with the provisions of a treaty on the matter concluded earlier by the United States and China. The Supreme Court of the United States had subsequently decided that the statute, though incompatible with the treaty, must override its provisions because the statute had been enacted after the treaty.[8] In the view of the Supreme Court, that was the only correct conclusion from the point of view of American constitutional law. From the point of view of international law, however, the United States was not relieved of its responsibility for acting contrary to its treaty obligations.

21. There was no imperative need to include a provision on that matter in the draft articles on the law of treaties; it belonged more properly to the topic of State responsibility. International law had primacy over internal law not only in regard to treaty obligations, but also in regard to obligations resulting from customary international law. The preamble to the United Nations Charter stated the determination of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". It seemed to him, therefore, that the primacy of international law over internal law was not confined to the obligations resulting from treaties; it was a problem of wider scope which might have to be dealt with separately.

22. Mr. ELIAS said that breach of treaty obligations might prove too broad a subject to fit into provisions on application and might involve issues of State responsibility which should be left aside.

23. Perhaps after further thought the Special Rapporteur might make some suggestions as to whether provisions concerning the effect of the suspension of diplomatic relations on treaty obligations should be included in the draft.

24. He was anxious that the Commission should not go too deeply into the extensive and controversial subject of interpretation, though some detailed rules on specific matters might need to be included. It would be preferable, therefore, to delete the latter part of article 55, paragraph 1, following the words "in accordance with its terms".

25. Mr. de LUNA, after congratulating the Special Rapporteur on his very interesting work, said he entirely agreed with Mr. Bartoš about the distinction to be drawn between severance of diplomatic relations and absence of diplomatic relations as a result of some event entailing non-recognition of the government of the State concerned.

26. There had been much argument about whether recognition was declaratory or constitutive. According to one very clear thesis, supported in particular by Mr. Verdross, the act of recognition of a State comprised two simultaneous juridical acts, one of them purely declaratory, by which the existence of a State was recognized as a fact, the other constitutive, by which a State signified that it wished to have diplomatic relations with the State recognized. It was the constitutive act which was lacking in the case of Yugoslavia and Spain quoted by Mr. Bartoš. The two countries complied with all the rules resulting from the existence of a State or the existence of a regular government on the territory of that State, but not with certain rules which would result from the constitutive act, in other words from the will to establish normal diplomatic relations with that State.

27. The point raised by Mr. Ago concerning the co-ordination of national with international law, should not be studied separately in connexion with the law of treaties. For there were two kinds of responsibility: responsibility by omission, where rules of national law did not coincide with rules of international law; and active responsibility, where national law laid down rules which conflicted with international obligations, whether they derived from a treaty or from custom. The question raised was therefore a special case of a more general problem covering both active responsibility and responsibility by omission, in respect of both treaty law and customary law.

28. Mr. PAREDES said it would leave a serious gap in the draft if the Commission did not include certain general rules on the interpretation of treaties, which were lacking at present.

29. It was also essential to safeguard the binding character of treaties by inserting a rule which clearly stated the primacy of treaty obligations over municipal or regional law.

30. Mr. AMADO said that the discussion seemed to be giving undue prominence to secondary questions. The Commission should not lose sight of the essential point, merely, that in considering the draft articles proposed by its Special Rapporteur, its main concern should be to prepare texts worthy of the task with which it had been entrusted by the United Nations. Accordingly, it should first endeavour to formulate in satisfactory terms the ordinary rules — the rules of law — relating to the application of treaties. If it decided to study every question that arose it might be carried too far from the subject, for it would have to reconsider

[7] *American Journal of International Law, 1929, Supplement*, Vol. 23, special number, p. 142, article 2.

[8] 130 U.S. 581, 9 S. Ct. Rep. 623.

the whole of international law. However interesting the question of the general rules governing the interpretation of treaties might be, it could well be left till later.

31. As to the definition of good faith in article 55, paragraph 2, volumes could be written about it, and it could be debated for hours. The Commission should first go straight to the heart of the matter, to what was of immediate importance, to the general structure.

32. Mr. TUNKIN said that he largely shared Mr. Amado's view, but he thought the discussion had served some purpose by helping to clarify the points raised by the Special Rapporteur. Perhaps the Commission might take up the detailed consideration of the articles themselves and after members had had a chance for further thought, revert to those points so as to give him the clear guidance he sought.

33. The CHAIRMAN, speaking as a member of the Commission, said that in order to continue his work, the Special Rapporteur needed the Commission's guidance on the three questions he had put to it. It seemed that he had received a satisfactory reply to one of them. The Commission could defer consideration of the question of adapting national law to treaty obligations and the question of the effect of the rupture of diplomatic relations on the application of treaties, which might be settled by consultation between the Special Rapporteur and various members of the Commission.

34. The interpretation of treaties, however, was of capital importance for the Commission's work and for the law of treaties in general. It had been said rather too glibly that interpretation was an art; the question was whether there were any rules for practising that art. Technical rules had also been mentioned; but what precisely was a technical rule? Was it or was it not mandatory? Was there or was there not a rule under which the terms of a treaty must be construed in the etymological sense or having regard to the context of the treaty? Was there or was there not a rule that in deciding between two possible interpretations of a treaty the preparatory work, the object of the treaty and the practice of the parties concerned must be taken into account? Those were problems which the Commission could not leave aside. The reason why the United Nations had entrusted it with the codification of international law, and in particular the law of treaties, was that the main objective was certainty of the law; and certainty of the law of treaties depended mainly on certainty of the rules of interpretation. The Commission was not expected to take any decision immediately, but it should give the Special Rapporteur an answer on that point as soon as possible, without going into theoretical discussions or excessive detail.

35. Speaking as Chairman, he suggested that further discussion on those questions be postponed and that the Commission should begin to examine the draft articles.

36. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the Chairman that the question of interpretation was an exceedingly important one, but it could lead the Commission into great difficulties because the approach of jurists to it was so varied. There were two different kinds of rules; general ones, such as the rule that the treaty must be read as a whole, and strictly technical ones. Some rules of a practical nature could be usefully summarized but he would view with apprehension any attempt to delve too deeply into the theoretical issues.

37. Mr. YASSEEN said that the Commission was bound to take a position on theoretical questions and, in particular, on the static and the dynamic theories of interpretation.

38. Mr. TSURUOKA congratulated the Special Rapporteur on his report. The most practical and the quickest way of deciding the question of the interpretation of treaties was to ask the Special Rapporteur to draft some articles on the subject; the Commission could then examine them and decide whether or not to include them in its draft.

39. Mr. BARTOŠ said that the Commission had a duty to the international community to draft provisions encouraging "respect for the obligations arising from treaties and other sources of international law", in accordance with the terms of the preamble to the United Nations Charter. It was regrettable that certain States agreed to sign treaties but did not apply them, on the pretext of some constitutional impediment. He understood the scruples of some members of the Commission, but he thought it better to leave States to dissociate themselves from the rules drawn up by the Commission than to offer them a means of evading their obligations on the basis of the Commission's formulation.

40. The CHAIRMAN invited the Commission to proceed to the detailed examination of the articles contained in the Special Rapporteur's third report (A/CN.4/167).

ARTICLE 55 *(Pacta sunt servanda)*

41. Sir Humphrey WALDOCK, Special Rapporteur, said that there was no need to enlarge on the explanation of the content of article 55 given in the commentary. For the time being paragraph 3, which dealt with the application of the *pacta sunt servanda* rule to other States, could be left aside.

42. He could assure Mr. Amado that the reference to "good faith" in paragraph 2 was not intended simply as a piece of ornamentation; the reasons for its inclusion were explained in the commentary. It seemed necessary to mention that obligation, however, so as to be consistent with the provision inserted in article 17 of the draft [9] which enjoined negotiating or signatory States to refrain from acts calculated to frustrate the objects of the treaty.

43. Mr. BRIGGS said that the Special Rapporteur's report constituted an admirable working instrument for

[9] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 175.

the Commission. With regard to article 55, he agreed with the purpose of each of the four paragraphs, but considered the *pacta sunt servanda* principle so important that it should be formulated in its stark simplicity, without adding too many qualifications that might weaken it.

44. In paragraph 1, he suggested that the words " in force " after the word " treaty " should be deleted ; in the light of the definition of a " treaty " contained in article 1, paragraph 1 (*a*) of the Commission's draft articles on the law of treaties adopted at the fourteenth session,[10] the words " in force " were redundant. He suggested, however, that the word " legally " should be introduced before the word " binding ". In that connexion, he was somewhat surprised at the last sentence of paragraph 1 of the commentary on the article ; the obligation to observe a treaty was a legal obligation, not merely a moral one.

45. With regard to the point raised by Mr. Verdross in connexion with the interpretation of treaties, he suggested the deletion from paragraph 1 of the concluding words " in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties ". He agreed that the Special Rapporteur should prepare draft articles on the rules of interpretation of treaties, but saw no need for any reference to those rules in paragraph 1. He accordingly suggested that paragraph 1 read simply : " A treaty is legally binding upon the parties and must be applied by them in good faith ".

46. As to paragraph 2, in his opinion the obligation to refrain from any acts calculated to prevent the due execution of a treaty constituted much more than an obligation of good faith ; it was a legal obligation, even if it was not based on the actual terms of the treaty. Indeed, he noticed from the penultimate sentence of paragraph 4 of the commentary that the Special Rapporteur was in agreement with that position. He therefore suggested the deletion of the first six words of paragraph 2 which then would begin : " A party to a treaty shall refrain... ".

47. The references to articles 59, 62 and 63 seemed to him unnecessary and he therefore suggested that paragraph 3 be deleted.

48. In paragraph 4, he suggested that the words " the preceding paragraphs " be replaced by the words " a treaty " ; it was the obligations of a State under a treaty and not its obligations under article 55 that were in question. In the same paragraph, he suggested the deletion of the concluding phrase " unless such failure is justifiable or excusable under the general rules of international law regarding State responsibility ". If the failure to comply with an obligation was legally justifiable or excusable, then there was no obligation at law.

49. Mr. CASTRÉN said he had no comment to make on the introduction to the report, in which the Special Rapporteur had very clearly drawn the boundary between the law of treaties proper and the questions of State responsibility and succession of States and governments.

50. With regard to article 55, he approved of paragraphs 1 and 4. Paragraph 3 was unnecessary, but could be retained if the Special Rapporteur so wished.

51. He supported Mr. Briggs's suggestion that the first six words of paragraph 2 should be deleted, because he thought they weakened the *pacta sunt servanda* rule stated in the article. As the Special Rapporteur himself said in paragraph (4) of his commentary, " acts calculated to frustrate the objects of the treaty " were " not only contrary to good faith, but also to the undertaking to perform the treaty according to its terms which is implied in the treaty itself." Paragraph 2, thus abridged, should be placed before paragraph 1.

52. Mr. ELIAS said he supported the suggestion that the words " in force " should be deleted from paragraph 1 ; they did not seem to add anything to the meaning of the provision. He also supported the deletion of the words " and in the light of the general rules of international law governing the interpretation of treaties " ; but he could agree to the retention of the words " in accordance with its terms ", if that was the wish of the Commission.

53. In his opinion, paragraphs 2, 3 and 4 should simply be deleted ; the principle stated in paragraph 1 was so important and self-contained that it ought not to be qualified in any way by the addition of non-essential matter.

54. The difficult question of good faith, dealt with in paragraph 2, could best be treated in the commentary. Paragraph 3 attempted to define who were the parties to a treaty, a matter already covered in the draft articles adopted by the Commission at its fourteenth session. If it were considered appropriate, cross-references to article 55 could be introduced in articles 59, 62 and 63.

55. Paragraph 4 dealt with a matter which was closely connected with the binding character of treaties, but belonged to the law of State responsibility rather than the law of treaties.

56. Mr. VERDROSS said he approved, in principle, of the ideas underlying article 55. With regard to the reference in paragraph 1 to the " general rules of international law governing the interpretation of treaties ", the theoretical objection that writers were reluctant to admit the existence of such rules could be ignored. The reference to those rules should stand, for without it the whole question of the application of treaties would remain in doubt.

57. He supported Mr. Briggs's suggestion that the words " in force " after the word " treaty " should be deleted and that the word " legally " should be inserted before the word " binding ".

58. The idea express in paragraph 2 was correct, but was already embodied in paragraph 1. Paragraph 2 could stand, however, because the words " *inter alia* " clearly showed that what followed was a partial explanation.

[10] *Ibid.*, p. 161.

59. Paragraph 3 could be simplified by saying merely that the obligations applied also to any State bound in any other way by the treaty.

60. Paragraph 4 expressed an idea that was correct, but might appear in any convention; its inclusion in a set of draft articles on the application of treaties was superfluous.

61. Mr. PAREDES said that although the spirit of article 55 was entirely reasonable and just, it dealt only with the negative aspect of the rule that the parties must show good faith by refraining from acts calculated to prevent the execution of the treaty or otherwise to frustrate its objects. But there were positive attitudes and acts which were not provided for in the article: direct and complementary measures which, though not expressly mentioned in the clauses of the treaty, were implicit in the purpose of its negotiation.

62. That principle formed the counterpart of the *rebus sic stantibus* rule and reinforced its element of justice, for the Commission had recognized to some extent that that rule applied the will of the parties themselves inasmuch as it assumed that if the circumstances had been such as they were later, the treaty would not have been concluded or would have been concluded in different terms. It must also be presumed that the parties had wished to agree on the elements necessary for the exact fulfilment of their intentions, but had not expressly stipulated them. That idea could be formulated in the following terms: "Treaties must be concluded in good faith; consequently, they bind the parties not only to fulfilment of their express provisions, but, also to what follows from their nature and purpose."

63. The parties might forget or neglect to provide for some of the consequences, or consequences might be brought about by supervening causes which made new action necessary for complete performance of the treaty; it was even possible that the negotiators had thought it unnecessary to provide for some of the consequences. That might apply for instance to the repair and reconditioning of wharfs at which a State had undertaken to load or unload goods for another State.

64. An example of the silence of a treaty might serve to illustrate the positions in which negotiators could be placed *vis-à-vis* their partners. Suppose it had been agreed to open to navigation by another State a river which flowed through certain areas, but the river changed its course and began to pass through other places. What would be the consequences for the navigation agreed on? Was the right extinguished? Was the servitude, and consequently the consideration, increased? Or would the obligation remain the same as before? If the new route threatened the security of the State, for instance by making vulnerable certain regions which required special protection, the *rebus sic stantibus* rule would apply. If only the necessary services were increased, the injured party should be compensated. If there were no additional costs, the obligation should be fulfilled as stipulated. The principle he had stated had many applications, which he would point out as the discussion proceeded.

65. Mr. BARTOŠ said he had only a few comments to make on article 55, which he approved and could even accept as it stood.

66. With regard to paragraph 1, provision should be made for cases in which a treaty was not in force for all the parties. For example, a treaty entered into force as soon as the requisite number of parties had ratified it; it then bound those parties, but only them, and not all the signatories. That was self-evident, but it might be stated in the commentary.

67. He was grateful to the Special Rapporteur for having introduced the idea of good faith into the first article of his draft. That idea had gained renewed popularity at the beginning of the twentieth century and it exerted a salutary influence on the development of law. No opportunity of stating it should be neglected; it might perhaps introduce a subjective element into international law, but precisely on that account it should gradually be "objectified" through the application of treaties and through case-law.

68. The phrase "and in the light of the general rules of international law governing the interpretation of treaties" was not unnecessary, for it warned States that they were required to interpret the treaty in the manner generally accepted by international law; thus it condemned arbitrary interpretations.

69. In paragraph 2, the expression "to frustrate its objects" was perhaps not entirely satisfactory; it might happen that the objects of the treaty were diminished or distorted without being frustrated.

70. The Commission would do well to follow the advice of the Special Rapporteur and postpone consideration of paragraph 3 until it came to consider articles 59, 62 and 63.

71. With regard to paragraph 4, he agreed with the Special Rapporteur; nevertheless, he feared that States might find in the last phrase encouragement to seek excuses and justifications for evading their obligations. It might perhaps be possible to excuse a failure, but it would be dangerous to justify it. A State which signed a treaty engaged its international responsibility; how it could divest itself of that responsibility was another question, which need not be dealt with in that context. Although he had argued the existence of general rules of international law on the interpretation of treaties, he was not sure that general rules of international law on State responsibility existed as yet. The expression "failure ... to comply with its obligations" struck him as rather weak. It would be better also to mention, at least in the commentary, the case of deliberate violation of a treaty by a positive act.

72. Mr. ROSENNE, associating himself with the tributes paid by other speakers to the excellent report by the Special Rapporteur, said he was in general agreement with article 55 but thought that it would be desirable, if possible, to combine paragraphs 1 and 2, while at the same time taking into consideration the point raised by Mr. Bartoš that the obligation of good faith should be couched in more objective terms. In the Guardianship Convention Case of 1958, the International Court of Justice had considered not "the real or alleged reasons which determined or influenced

the decisions complained of", but the "compatibility of the measure with the obligations binding upon Sweden under the 1902 Convention".[11] The idea of the compatibility of an action was an objective one and was preferable to the idea expressed in paragraph 2, which was subjective in character and rather too wide in its terms. Those terms might well cause disputes, rather than reduce international tensions.

73. Paragraph 3 could well be omitted: if a link were needed between article 55 and articles 59, 62 and 63, the reference should be in the latter group rather than in article 55.

74. The idea contained in paragraph 4 should be retained, but embodied in a separate article, perhaps even in a different section of the draft, as suggested by the Secretary to the Commission. With regard to the language of the provision, he supported the suggestion that the words "obligations under the preceding paragraphs" should be replaced by the words "obligations under a treaty".

75. It seemed to him that there was some value in the words "in force" in paragraph 1, which he understood as fixing in point of time the application to treaties of the *pacta sunt servanda* rule. The Commission had adopted draft articles dealing with the rights and obligations of the parties prior to the entry into force of a treaty; it had adopted draft articles dealing with the entry into force of a treaty and its termination; provision had also been made for the obligations which endured after the termination of a treaty. It was therefore perhaps appropriate to speak in paragraph 1 of a "treaty in force".

76. He feared that some mistake, perhaps due to a misprint, might have crept into the last sentence of paragraph 1 of the commentary, which was not acceptable as it stood.

77. Mr. REUTER said that he had joined the Commission too recently to venture to congratulate the Special Rapporteur. He thought that in paragraph 2 of the article, the English word "objects" might be better rendered in French by the expression "*l'objet et la fin*"; that was the wording used by the International Court of Justice in connexion with the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide;[12] in other cases it had used the French word "*but*" alone as the equivalent of the English word "object". If it adopted that suggestion, the Commission would be introducing a teleogical nuance into article 55 which might perhaps satisfy both Mr. Paredes and Mr. Bartoš. But that question of form also affected the substance, for the object of an obligation was one thing and its purpose was another.

78. Mr. YASSEEN paid a tribute to the Special Rapporteur, who had once again provided the Commission with an excellent working tool. Article 55 reflected the reality of positive law. He approved of it in general, and, as suggested by the Special Rapporteur, he would confine his comments to paragraphs 1, 2 and 4.

79. In paragraph 1, there would be no objection to deleting the words "in force", as Mr. Briggs had suggested; the paragraph referred to an obligation, and it was clear that the treaty must be in force. Mr. Briggs had also suggested deleting the whole of the latter part of paragraph 1, after the words "in good faith". It was true that that part might perhaps be superfluous, for it stated a self-evident truth; but if it was thought essential to retain the reference to the rules governing interpretation, it would be better to delete the word "general", because there might be particular rules governing the interpretation of treaties.

80. The obligation laid down in paragraph 2 derived from the idea that the treaty was mandatory; he was therefore reluctant to regard that obligation as a consequence of the idea of good faith. Moreover, the reference in the text to good faith gave the impression that the Commission was trying to justify the rule it had stated, and it seemed neither necessary nor useful for the wording of the rule itself to contain a justification.

81. Paragraph 4 was essential; a draft on the law of treaties should state the principle of conventional responsibility, but should go no further. To mention justifying causes and excuses was to enter into the theory of the binding force of treaties. He would therefore prefer to see the words "regarding State responsibility" deleted, and also the word "general" before the word "rules", because there were cases, such as self-defence, in which a failure was justifiable or excusable under certain rules of international law which, owing to their importance and scope, could not be regarded as applying only to State responsibility.

82. Mr. AMADO said that the text submitted by the Special Rapporteur was so clear and explicit as to substance that only the form was open to discussion.

83. He did not agree with Mr. Briggs's proposal that the word "legally" should be inserted before the word "binding" in paragraph 1. As to the words "in accordance with its terms", they merely served to lead on to the following phrase. He had at first been opposed to the idea of introducing the obscure subject of interpretation into the article, but had been impressed by the arguments put forward in favour of doing so, in particular by Mr. Bartoš.

84. With regard to paragraph 2, he yielded to Mr. Yasseen's reasoning: good faith was the honour of international law. The need for good faith was already stated in paragraph 1, but it was dangerous to seek to define the concept.

85. With regard to paragraph 3, Mr. Rosenne had been right to point out that it was better to refer back to an earlier article than to refer in advance to later articles.

86. He hesitated to accept paragraph 4, for it was always disagreeable to formulate the obvious. A treaty could not be broken without there being responsibility. If that paragraph were retained, it would be well to take account of Mr. Bartoš's comment and mention not only the negative act of non-performance of the treaty, but also the positive act of violation.

The meeting rose at 5.55 p.m.

[11] *I.C.J. Reports*, 1958, p. 67.

[12] *I.C.J. Reports*, 1951, pp. 15 *et seq.*