Document:-

A/CN.4/SR.686

Summary record of the 686th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1963, vol. I

54. The general problem dealt with in article 14 had some relevance to the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, which the General Assembly had asked the Commission to study further.

55. Mr. CASTREN said that once again the Commission was dealing with a difficult problem on which theory was divided and which the previous special rapporteur had treated with great caution. That being so, the Commission should seek guidance in practice, and in the first place in the case-law of the International Court, the body most competent in the matter. That was what the present special rapporteur had done. His draft of article 14 was simple and clear; the provisions proposed were workable, sound and prudent.

56. The Special Rapporteur had rightly emphasized that the Commission was not called upon to interpret the Charter of the United Nations, and had taken the adopted approach in saying that a treaty which conflicted with an earlier treaty should not be declared void; at most the draft should specify, without prejudice to the question of responsibility, which of the two treaties should prevail. As the Special Rapporteur said in his commentary, there were different kinds of treaties, governed by different rules. But it often happened that a single treaty contained elements of different kinds, which complicated the problem. The previous special rapporteur had distinguished a category of treaties which, in the event of a conflict, should take precedence over the others. Like the present special rapporteur, he (Mr. Castren) thought that the concept of *jus cogens*, or an equivalent concept, should be the criterion for deciding that certain treaties had absolute priority; that was the effect of paragraph 4 of article 14. The exceptions for which provision was made in paragraph 3 were also necessary.

57. The only provision of article 14 which he did not find entirely acceptable was that contained in paragraph 2 (*b*) (ii), under which the effectiveness of the second treaty could be contested not merely by a State which was a party only to the second treaty, but also by a State which was a party to both of the conflicting treaties. Such a case was doubtless rare in practice, but from the theoretical viewpoint it might be considered that that right should not be granted to such a State.

58. Mr. BRIGGS said that the Special Rapporteur's commentary on article 14 was extremely illuminating and convincingly demonstrated that conflict with a prior treaty did not raise any major issues of validity. The cases treated in paragraphs 1, 2 and 3 entailed limitations on capacity or stated the principle of priority. That being so, perhaps the Special Rapporteur's suggestion that the question of conflicting obligations be dealt with in a separate section should be adopted, in which case article 14 should perhaps be held over and re-drafted for consideration at a later stage.

59. Mr. ROSENNE said that he supported the views expressed by Mr. Briggs, but would go further than the Special Rapporteur, who seemed to favour combining parts of articles 14 and 19 in a separate section, and urge that article 14 belonged to an entirely separate part of the draft — namely, that to be devoted to the application of treaties. Perhaps the Special Rapporteur should be asked to reconsider the whole question in that context.

60. He endorsed the general conclusion reached by the Special Rapporteur in his commentary.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that if the Commission agreed with the arguments he had set out in his commentary, perhaps after consulting the Drafting Committee he might be asked to state his views as to how the subject of article 14 should be handled.

62. Mr. TUNKIN said that the Commission needed time for reflection on the complex problem dealt with in article 14; no hasty decision ought to be taken.

63. Mr. PAL did not consider that the question of conflicts between treaties belonged to section II. He agreed with Mr. Tunkin that no immediate decision could be taken on the matter.

64. Mr. AMADO said that the Special Rapporteur had certainly had sound reasons for placing article 14 in the section concerned with essential validity. Moreover, in most textbooks the conflict of treaties was considered immediately after their validity. He hoped the Commission would take the opportunity of throwing new light on a question which, as he had observed at the previous meeting, was closely linked with that of the legality of the objects of treaties.

65. Mr. ROSENNE said he wished to withdraw the comment he had made regarding the second world war (para. 10 above) as a result of having misunderstood a statement made by Mr. Tunkin at the 682nd meeting.

The meeting rose at 1 p.m.

686th MEETING

Friday, 24 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

State responsibility: Report of the Sub-Committee (A/CN.4/152)

[Item 3 of the agenda]

1. The Chairman, opening the discussion on item 3 of the agenda, invited the Chairman of the Sub-Committee on State Responsibility to introduce the Sub-Committee's report (A/CN.4/152).

2. Mr. AGO, Chairman of the Sub-Committee on State Responsibility, summarizing the Sub-Committee's work, drew attention to the conclusions given in paragraph 5 and to the proposed programme of work set out in paragraph 6 of the report. The Sub-Committee had worked in an excellent atmosphere;

it had adopted its conclusions and recommendations — which were positive — unanimously, and had reason to be very well satisfied with the experiment made in preparatory work on a most difficult question.

3. Mr. ROSENNE, commending the Chairman and members of the Sub-Committee on their work, said that they had clearly gone into the subject thoroughly and a number of points about which he had felt some difficulty at the previous session had now been elucidated.

4. The Commission's original terms of reference regarding the topic of state responsibility had been laid down in General Assembly resolution 799 (VIII), in which the Commission had been requested " to undertake the codification of the principles of international law governing State responsibility ". Later, however, they had been broadened by the recommendation in resolution 1765 (XVII) that the Commission should " continue its work on state responsibility, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations." He inferred from those resolutions that the General Assembly was looking to the Commission primarily for codification, though without excluding the possibility of progressive development.

5. The Sub-Committee's general conclusions were fully adequate and acceptable. The immediate objective should be to survey and evaluate the present state of the law and practice and to prepare precise draft articles covering the essential elements of the doctrine of state responsibility.

6. While he understood the reasons which had led the Sub-Committee to suggest, in footnote 2 to its report, that the question of the responsibility of subjects of international law other than States be left aside, he considered that the Special Rapporteur to be appointed on the subject would need to be careful in dealing with the question of the possible responsibility of States towards other subjects of international law and to avoid any lack of balance that could result from leaving aside a question which, *grosso modo*, did form part of the subject. That point should not be overlooked, even though that aspect of State responsibility perhaps more properly belonged to another subject on the Commission's agenda — namely, relations between States and intergovernmental organizations.

7. Assuming that the outline programme of work put forward by the Sub-Committee was accepted, the question remained what should be the next stage of the work. In view of the priorities already established by the Commission, he doubted whether much time could be devoted to state responsibility at its next — the sixteenth — session, and the best course might accordingly be not to require the Special Rapporteur to present a fully integrated set of draft articles in 1964, but to indicate what general line of approach he intended to adopt. Presumably time would be allotted for discussion of the subject at the seventeenth and eighteenth sessions.

8. In the meantime, some useful preparatory work could be done by the Secretariat, which might be asked to prepare a summary of the fairly lengthy discussions on state responsibility which had taken place in various organs of the United Nations, not only of those in the Sixth Committee; for example, there had been highly pertinent debates on sovereignty over natural resources. Such a summary would give an idea of the scope of the subject as seen by Members of the United Nations and of what problems were of particular interest to them.

9. It might be useful to re-examine the reasons for the failure, where state responsibility was concerned, of the 1930 Conference for the Codification of International Law [1] in the context of the broader treatment being proposed by the Sub-Committee. He made that suggestion because the Conference's failure in another domain, namely, the law of the sea, far from discouraging the Commission or the General Assembly from tackling that subject, had, in fact, provided a point of departure.

10. It might also be useful, though that could be left to the Secretariat's initiative, to prepare a digest of recent decisions of international tribunals on the lines of that relating to state succession (A/CN.4/151), classified in accordance with the programme proposed by the Sub-Committee.

11. Mr. PAL said he was in full agreement with the programme decided upon by the Sub-Committee, or rather with the recommended " main points to be considered as to the general aspects of the international responsibility of the State ".

12. The Sub-Committee had unanimously agreed to recommend that, with a view to codification of the topic, the Commission should give priority to defining the general rules governing the international responsibility of the State. He entirely agreed with that decision of the Sub-Committee, especially as he felt assured that it did not exclude any feasible progressive development from the scope of the study.

13. The Commission was told that careful attention should be paid to the possible repercussions which new developments in international law might have had on responsibility. He took it that the expression " new developments in international law " was comprehensive enough to include all relevant new developments in international life. There would certainly be included many new historical factors not yet adequately assimilated in legal thinking on the subject. He felt assured of that from the gist of the discussions given in the summary records of the Sub-Committee's proceedings. Things that had happened or were happening in the economic, social and political order were inevitably reflected in the legal order; indeed, law must be the record of life's experience if a fatal unhinging of social relations was to be avoided.

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[1] *Acts of the Conference for the Codification of International Law*, Geneva, 1930, League of Nations, Vol. I, pp. 43-44 and Vol. IV.

14. It was inexpedient to go into details of the programme at that stage; that could be left to the Special Rapporteur. The details would require careful study, however. For example, under the second point in the programme, " the forms of international responsibility ", the duty to make reparation and perhaps the basis, if any, of such reparation, would have to be considered. The suggested inclusion of the doctrine of " unjust enrichment " would also be considered in that context, and the memorandum submitted on the subject by Mr. Jiménez de Aréchaga gave ample indication of the amount of study involved.

15. In dealing with the entire question of state responsibility, it was essential to remember that the State was an institution and that the question being considered was that of the responsibility of that institution in the discharge of its appointed task. It might not be possible to make a value-judgement on any particular conduct on the basis of timeless, absolute criteria, but the Commission might have to enquire whether and to what extent the conduct was " meaningful " at the time. The conduct would have to be examined to see whether and to what extent it was inevitable for the fulfilment of a given task. He would refrain from entering into further detail, however, and would only express his full concurrence with the recommendation of the Sub-Committee, so far as it went.

16. He suggested that when a special rapporteur had been appointed, the Commission should request him to prepare a complete plan of work, including special aspects of the subject, as had been done by the Special Rapporteur on the law of treaties. Priority should be given to the fields in which tensions that threatened the peace of the world had already appeared. Those fields would no doubt give rise to controversies and difficulties, but that was no reason for evading them. Every field of tension in international life should be brought under study and norms should be drawn up which could become instruments of the international community seeking to subdue the potential anarchy of forces and interests to a tolerable harmony. Beyond that general comment he did not, at that stage, wish to suggest any specific topic and preferred to leave the question to be dealt with when the complete plan was placed before the Commission by the Special Rapporteur, whom he hoped the Commission would appoint at the present meeting.

17. Mr. TABIBI said that the Sub-Committee's proposals were acceptable; he welcomed the fact that, in deference to the Commission's wishes, those of its members who had submitted memoranda had refrained from going into detail and had confined themselves to defining the general nature and elements of the doctrine.

18. The responsibility of States for the maintenance of peace was the most important topic, but responsibility for injury to persons and property had by no means lost its significance even with the acquisition of independence by many States. The feeling in the Commission on Permanent Sovereignty over Natural Resources had been that the work on state responsibility should proceed rather faster. That Commission's report, as well as the relevant General Assembly decisions and documents, should be studied by the Special Rapporteur as an indication of contemporary opinion and the present-day needs of States.

19. Mr. CASTREN said that the Sub-Committee had done excellent work, respecting its terms of reference and taking into account the opinions expressed by the members of the Commission at the fourteenth session. He approved of the proposed programme of work, and was glad the Sub-Committee had unanimously recommended that, with a view to the codification of the topic, priority should be given to the definition of the general rules governing the international responsibility of the State. The Sub-Committee had also been right to propose that the Commission should leave aside the question of the responsibility of subjects of international law other than States.

20. He took it to be agreed that, in its future study of the subject, the Commission would take account of new developments in international law in other fields closely related to State responsibility.

21. Mr. LACHS said that to his regret he had been prevented from submitting a paper on state responsibility, as he had hoped, but he fully endorsed the general approach adopted in the working paper presented by Mr. Ago, whose profound knowledge of the subject was also reflected in the Sub-Committee's report as a whole.

22. Initially, views in the Sub-Committee seemed to have been divided over the treatment of the topic, but he was able to associate himself with the conclusion finally reached that it would be wise at the outset to define the scope of the doctrine and restrict the study to the responsibility of States. To go beyond that might lead to confusion and possibly to the construction of artificial concepts.

23. The question of the protection of the property of aliens certainly formed part of the subject and deserved attention. Even in that narrow sphere a new approach was necessary to take account of significant developments and many important changes, one of the most recent of which was an interesting decision of the Bremen Court of Appeal.

24. With regard to the points listed by the Sub-Committee for study, there could be no doubt that the question of the origin of international responsibility must be discussed. On the other hand, he wondered whether it would be wise to examine possible responsibility based on " risk " in cases where a State's conduct did not constitute a breach of an international obligation. On that point he agreed with the view expounded by Mr. Yasseen in the Sub-Committee: the problem would lead them into questions of *diligentia* and should be left outside the scope of the enquiry.

25. He had similar doubts about the wisdom of considering the important questions which might have to be examined in connexion with proving the events giving rise to responsibility, which were part of the law of evidence and as such should be left aside. The

Commission must concern itself with matters of substantive law. Once the legal basis of responsibility was established, the position would be clear, and special proof would be required only, if at all, in the so-called borderline cases. He held that view although he was aware, as any student of the proceedings of conciliation commissions and arbitral tribunals must be, that in the past there had been many cases involving the question of responsibility in which issues of evidence and proof had played a very large part.

26. He fully agreed with the Sub-Committee's sound and logical conclusions concerning the objective and subjective elements to be determined.

27. As for various kinds of breaches of international obligations, where subjective and objective elements might be found combined, perhaps some arrangement in the order of the problems to be studied would be needed and certain problems of drafting would call for discussion.

28. He had some doubts about paragraph 4 of the first point, in which " state of necessity " seemed to be placed on the same footing as " self-defence ". The former had been invoked by States as a justification for violations of international law and in order to give legal sanction to acts essentially illegal, whereas self-defence was by definition qualitatively different.

29. The report as a whole deserved unanimous approval and represented a fresh and well-founded approach to an important topic of international law which was being placed in the proper perspective. The general directives proposed for the study of the subject formed a sound basis for the elaboration of draft articles reflecting the law and the consequences of its violation.

30. Mr. AMADO observed that the old theory of the international responsibility of States, which had been concerned essentially with compensation for injuries to the person or property of aliens, had given way to a more advanced conception in which the problem of sanctions occupied the foreground. For example, during the Sub-Committee's discussions Mr. de Luna, after referring to nuclear-weapons tests, which could pollute the atmosphere of the territory of States that had had no part in them, had maintained that it would only be necessary to say that an unlawful act had taken place; that a State had violated an obligation under international law.[2] The subject was expanding all the time, and that was why, despite the pessimistic forecasts that the United Nations was in danger of dissolution, he hoped that the Commission would keep on working, under United Nations auspices, to develop and codify the law relating to state responsibility.

31. It was most heartening to read a collective report which drew a single and unanimous conclusion from the opinions of a number of eminent authorities. Some of the Sub-Committee's members, such as Mr. Tsuruoka and Mr. Jiménez de Aréchaga, had taken the view that the future study should be restricted to very specific and traditional aspects of the subjects. Mr. Jiménez de Aréchaga's argument concerning unjust enrichment in his memorandum on the duty to compensate for the nationalization of foreign property was certainly highly discerning and opened up wide prospects.[3] Mr. Briggs and Mr. Gros, on the other hand, had upheld the view that the Commission should first establish the source of the international responsibility of States.[4] He agreed with them that that line of inquiry was the key to everything else, and should be given priority over all related studies.

32. Mr. TUNKIN said that he had already expressed his views during the discussion in the Sub-Committee, but he wished to make a few observations on the report and on certain suggestions by previous speakers.

33. The essential part of the report was the plan of work set out in paragraph 6 which showed the various points to be studied by the future special rapporteur. It was important to remember that the enumeration of those points could in no way be considered as an expression of opinion with respect to substance. For example, under the first point of the plan, in paragraph 4, " state of necessity " was mentioned. That was because there had been cases in which States had referred to the doctrine of the state of necessity, so that it was essential for the Commission to express its opinion on the subject. But the inclusion of " state of necessity " in paragraph 4 did not mean the Sub-Committee placed it on the same level as " self-defence ", and he fully understood Mr. Lachs' concern on that point.

34. The same applied to footnote 3 of the report, concerning the question of possible responsibility based on " risk "; the Commission would have to consider whether that question should or should not be studied as part of the topic of State responsibility.

35. With regard to future work, the Special Rapporteur on state responsibility should devote special attention to instances of state responsibility relating to the gravest breaches of international law, such as acts of aggression, violations of state sovereignty and refusal to grant independence to colonial peoples; that was the only logical approach. He fully agreed with Mr. Pal that the problems to which he had referred should be given due weight in formulating general norms for state responsibility.

36. With regard to footnote 4, he agreed with Mr. Lachs that the problem of proof was a separate one; procedural matters should not be mixed up with the substantive problems of state responsibility.

37. Mr. Rosenne had made a number of suggestions for documents to be prepared by the Secretariat. One of them entailed re-examination of the work on state responsibility done by the 1930 Hague Conference for the Codification of International Law. He did not feel that any useful purpose would be served by placing such a burden on the Secretariat; ample writings were available on the 1930 Conference, especially on its work on state responsibility. He supported Mr. Rosenne's other suggestions for documents to be prepared by the Secretariat.

[2] A/CN.4/152, annex I, p. 15.

[3] *Ibid.*, annex II, pp. 1-21.

[4] *Ibid.*, annex I, pp. 12-14.

38. He agreed with Mr. Pal that the codification of the topic of state responsibility should be accompanied by progressive development where necessary. The General Assembly had never limited the work of the International Law Commission in any particular field to codification alone. It had always been understood, both by the General Assembly and by the Commission itself, that in codifying any branch of international law the Commission should proceed with due regard to recent developments. The need to bear recent developments in mind had again been stressed in General Assembly resolution 1505 (XV) of 12 December 1960 on " Future work in the field of the codification and progressive development of international law ". Certainly, in the specific field of state responsibility, the Commission would have to consider some proposals having the character of progressive development.

39. He fully approved of the suggestion that a special rapporteur should be appointed.

40. Lastly, he agreed with Mr. Ago regarding the success of the experiment of the two sub-committees. Whenever the occasion arose, the Commission should use that method to expedite its work.

41. Sir Humphrey WALDOCK said the Sub-Committee's report was a most useful document, as were the individual papers of members of the Sub-Committee. It was his understanding that the programme of work set out in paragraph 6 constituted a general directive rather than a strait-jacket for the future special rapporteur. His own experience was that thorough consideration of a topic was apt to reveal points which had not previously been contemplated.

42. With regard to Mr. Rosenne's suggestions on what the Commission should expect from the Special Rapporteur at the sixteenth session, the opinion of the future special rapporteur would be decisive on that point. For his part, however, he had some doubts about asking him to produce heads of articles that would present broad formulations rather than detailed provisions. Such a procedure might not enable the Commission to make the best possible use of its time. Detailed articles would ultimately have to be produced, and experience suggested that the whole discussion would then take place a second time, despite the fact that heads of articles had already been considered. An additional danger involved in that method was that it was often not possible to get a matter into proper focus until it was seen expressed in detailed provisions.

43. He agreed with Mr. Tunkin regarding the proposal for a paper on the 1930 Hague Conference. It would be sufficient if copies of the records of the conference were made available in the library.

44. He also agreed with Mr. Lachs and Mr. Tunkin regarding the need for both the Special Rapporteur and the Commission to take a very clear position on the problem of " state of necessity ". Whatever view members of the Commission might hold on the inadmissibility of that plea in most circumstances, it had so often been resorted to by States in one form or another that it was essential to give prominence to a study of it. The Commission should express very firm conclusions concerning that plea in order to remove the misconceptions which still seemed to exist in respect to it.

45. With regard to the question of proof, he also agreed with Mr. Lachs that questions of evidence should be kept separate from questions of substance. There were, of course, some points on which questions of responsibility and of evidence came quite close together. A good illustration was the argument submitted on behalf of the United Kingdom to the International Court of Justice in the *Corfu Channel* case, urging it to apply the doctrine of *res ipsa loquitur* for the purpose of establishing Albania's responsibility in respect of the explosions in her territorial waters. The Court had not been willing to accept the argument that Albania's responsibility should be made to depend on a presumption of law arising from the fact of the mines' being found in her waters. It had dealt with the question on a different basis from that requested by the United Kingdom, treating the matter as one of evidence and not of responsibility; on that basis it had held that the plaintiff State was entitled to a more liberal use of circumstantial evidence in such cases.[5]

46. With regard to the contents of the report, the Commission should deal with the broad lines and the general principles of state responsibility rather than with particular topics. He saw no reason to give special attention to one field of responsibility rather than to another. The Special Rapporteur on the topic would have to draw his examples from the experience available in the various fields in which questions of state responsibility had arisen in the past.

47. Mr. de LUNA said it was most gratifying that the report before the Commission should have been adopted unanimously; the credit for that was primarily due to the Sub-Committee's Chairman.

48. The first question to be considered was that raised by Mr. Rosenne. He agreed with Mr. Tunkin that in performing its task of progressively developing the law, the Commission was not limited by the resolutions which Mr. Rosenne had cited.

49. The main problem was how to resolve the conflict between the theories of subjective and objective responsibility. According to the former, *faute* alone could originate responsibility. That theory was based on Roman law, in which *dolus* was contracted with *bona fides* and *culpa* with *diligentia*, even though Roman law had also known responsibility without *faute*, for example, in the case of the loss of goods or animals entrusted to the care of boatmen, innkeepers or ostlers. The opposite theory admitted responsibility independently of *faute*, for example, responsibility by reason of risk or of the breach of a rule of international law. That view, which was of Germanic origin, had entered international law through common law.

50. Practice was not uniform, however. It was possible to interpret in the sense of objective responsibility the Island of Palmas case,[6] article 3 of Hague Convention

[5] *I.C.J. Reports*, 1949, p. 18.

[6] *American Journal of International Law*, 1928, Vol. 22, p. 867.

No. IV of 1907,[7] article 14 of the draft declaration on the rights and duties of States prepared by the Commission itself,[8] and several decisions of the International Court of Justice, the Permanent Court of Arbitration and the General Claims Commission. But in other cases, no less numerous, it seemed that the theory of subjective responsibility had prevailed.

51. Thus the concepts involved were vague and they had been variously interpreted by writers, mainly under the growing influence of common law, which applied to about a third of the world's population. Anzilotti, Borchard, Briggs and McNair had given preference to objective responsibility, whereas Oppenheim had favoured subjective responsibility. In a resolution it had adopted in 1927, the Institute of International Law had enunciated a general rule based on subjective responsibility, but had acknowledged the existence of cases of objective responsibility. Conversely, in the preparatory documents for the 1930 Hague Conference for the Codification of International Law, emphasis had been placed on objective responsibility, while the existence of cases of subjective responsibility had been acknowledged.

52. With regard to the Hague Conference, it would be most useful if members could consult the relevant documents more easily.

53. Even though practice and theory seemed to be evolving rather towards the concept of objective responsibility, it was certain that both concepts would continue to exist. The Commission should therefore begin by stating clearly its position on the problem raised by the first point in its programme of work, " origin of international responsibility ", before continuing its study.

54. Mr. LIANG, Secretary to the Commission, said it was at Mr. Rosenne's suggestion that the Secretariat had undertaken the preparation of its memorandum on resolutions of the General Assembly concerning the law of treaties (A/CN.4/154), which had proved useful to members of the Commission. He believed it would be equally useful to prepare a memorandum summarizing the discussions and the resolutions of the various United Nations organs on the subject of state responsibility. There had been occasional discussions bearing on the question in various United Nations organs other than the International Law Commission, and there was a formidable mass of documentation on the work of the Commission on Permanent Sovereignty over Natural Resources. A voluminous study by that Commission had been printed. There could, of course, be no question of summarizing the discussions of the Commission on Permanent Sovereignty over Natural Resources, because that Commission had its own summary records. The study itself, a scholarly document, should not be summarized, but would be available in printed form to members of the International Law Commission. The Secretariat could furnish a summary of the discussions and decisions of other organs of the United Nations on state responsibility and an index to the work of the Commission on Permanent Sovereignty over Natural Resources.

55. With regard to the work of the Hague Conference of 1930, he recalled that in 1946 the Secretariat had prepared a very full memorandum[9] for the United Nations Committee of Seventeen appointed by the General Assembly under its resolution 94 (I) of 11 December 1946 on the " Progressive Development of International Law and its Codification " — the Committee on whose recommendation the International Law Commission itself had been established by General Assembly resolution 174 (II) of 21 November 1947. That memorandum dealt at length with the work of international conferences on the codification of international law, and from an informal conversation he gathered that it corresponded in part to what Mr. Rosenne had had in mind. It was therefore unnecessary to undertake any further work. Personally, he believed that the failure of the Hague Conference of 1930 had been due to several causes; a great deal had been written on the subject and much space was devoted to the Conference in the memorandum he had referred to.

56. He thought that the digest of international decisions requested by Mr. Rosenne would be a very useful document, and the Secretariat would be glad to prepare it in suitable form.

57. Mr. BARTOŠ, after congratulating the Sub-Committee on its excellent work, said its report was so lucid that he could endorse it almost without reservation, but he did not agree with all the ideas expressed by members of the Sub-Committee, either in their memoranda or during the discussions. He expressed his satisfaction that certain questions had not been mentioned in the text of the report itself.

58. He agreed with Sir Humphrey Waldock that the Special Rapporteur's task would not be easy, even if a list of the questions to be examined had been drawn up. In one week, the Sub-Committee had not been able to solve all the problems involved or to lay down all the main lines to be followed in the work. Nor would the Commission be doing so merely by approving the report; that would be unscientific, for it should examine the questions of substance before deciding on the broader trends, especially as the topic was so controversial with regard to both practice and theory.

59. With regard to the question raised by Mr. de Luna whether the theory of *faute* should be considered as well as that of responsibility based on risk, he would not revert to the objective element in responsibility, since several speakers, Mr. de Luna in particular, had dealt with it very fully, but would merely draw attention to the connexion between risk and the state of necessity. In modern times, necessity could not be pleaded in defence of a wrongful act, without taking account of certain forms of responsibility, not only where a state of necessity had its origins in a *faute*, but also where acts performed in a state of necessity produced certain consequences. An act regarded as entirely excusable

[7] Scott, J. B., *Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, Oxford University Press, p. 103.

[8] *Yearbook of the International Law Commission, 1949*, p. 286.

[9] A/AC.10/5.

would not be an international wrongful act; but some risks should nevertheless be accepted by those in a state of necessity.

60. International case-law and practice recognized such risks. In maritime law, for example, there were cases in which no one was at fault, but in which certain liabilities were shared between States as between parties. In a civil war the case-law recognized responsibility incurred by the State in whose territory the war was fought, even though that State could not be said to be at fault by reason of any positive act or omission. The act might be entirely excusable, and, if so, it was not wrongful; but the fact remained that damage had been caused, so that very often the question of responsibility subsisted. In such a case there might be interstate responsibility, and it was based on risk, which also existed in international law.

61. The Sub-Committee had been right not to include specific individual cases of *faute* in its list and to confine itself to the general principle of state responsibility. He would nor for the moment express any opinion on the positions taken or the situations considered by some members of the Sub-Committee in regard to that point in their remarks or memoranda.

62. He must make reservations, however, concerning the consent of the injured State as a circumstance nullifying the wrongfulness of an act. For that raised not only the question of presumed consent, which was relevant to the main problem of the law of treaties before the Commission at that session, but also the question of the limits of consent. His approval of the proposed programme as a whole did not imply that he agreed that the Sub-Committee should be free to adopt the notion that the consent of the injured party could be accepted as a circumstance which always nullified the wrongfulness of the act entirely. He made reservations on that point, although he would not object to its being mentioned in the text of the report itself.

63. The expression " collective sanctions " was used on page 4 in paragraph 3 of the second point. That expression could be interpreted in two different ways in international law; what the Sub-Committee had no doubt had in mind was collective sanctions as provided for in the League of Nations Covenant and defined in the United Nations Charter, namely, sanctions imposed by the international community, not sanctions directed against a group of persons or a people, which had sometimes been called " collective " and which belligerents and occupying Powers were forbidden to apply.

64. The Sub-Committee had rightly refrained from including individual responsibility in paragraph 3 of the first point. The Genocide Convention [10] and the principles of the Nuremberg Charter [11] had postulated it in its most explicit form, but it was not the concern of the Sub-Committee or of the Commission. Acts by individuals had to bear some relation to state responsibility, but the Commission should concern itself for the time being, whether by prohibition or by sanctions, only with state responsibility arising out of acts committed by individuals. In maritime law omissions by individuals might also involve the State's responsibility, as they did under the rules concerning the laws and customs of war on land laid down in the Hague Convention,[12] which made a State responsible for all breaches of those rules by members of its armed forces.

65. In dealing with the question of raparations, the Sub-Committee had been right in using the word " compensation ", but what did compensation really include ? An American theory of compensation was set out in one of the memoranda (A/CN.4/152, annex II, p. 1), but it was by no means certain that all the necessary conditions for compensation had always been so clear in international law. It might be considered that compensation would not always be paid in full, but would be proportional to the responsible State's ability to pay; in other words, for purposes of determining the amount of compensation to be claimed, that State would be treated, by a kind of quasi-analogy, in accordance with the modern rules applicable to bankrupts. In dealing with Germany the injured States had made a global claim to which liability was limited, and had declared beforehand that they were being compensated for the wrongful acts of the Third Reich. In the case of Italy and the other States with which peace had been concluded in Paris in 1947, a lump sum had been claimed, taking acount of the ability to pay. That system was very often applied in practice, in cases of compensation to foreigners for expropriation of property.

66. The notion of compensation need not be defined yet, since the general principle was under consideration; the Commission could take that question up later, after considering any proposals submitted to it.

67. The CHAIRMAN, noting that practically all the members of the Commission who were not members of the Sub-Committee on State Responsibility had expressed a favourable view on the Sub-Committee's report, invited Mr. Ago, as Chairman of the Sub-Committee, to sum up the discussion.

68. Mr. AGO thanked the Commission for its appreciation of the Sub-Committee's work.

69. First of all, he wished to reassure all the speakers who had expressed concern at the fact that certain points had been mentioned in the Sub-Committee's report. Neither the Sub-Committee as a whole nor its members individually had expressed a final opinion on how the problems discussed should be solved. For example, the references to consent of the injured party and to the state of necessity did not mean that the Sub-Committee regarded them as circumstances which in every case nullified the wrongful nature of certain acts or omissions. All that the Sub-Committee had wished to do had been to remind the future Special Rapporteur that, however they might be settled, he would have to take those questions into account in his treatment of the subject as a whole.

[10] United Nations, *Treaty Series*, Vol. 78, pp. 278 ff.

[11] *Charter and Judgment of the Nürnberg Tribunal*, United Nations publication, Sales No.: 1949.V.7, pp. 91 ff.

[12] Scott, J. B., *op. cit.*, pp. 100 ff.

70. Sir Humphrey Waldock, with the very wide experience he had gained during two years as Special Rapporteur, had said that the instructions given to the special rapporteur on State responsibility should not impose induly strict limitations on his work. A plan of work, which was what the Sub-Committee had drawn up, could include fairly detailed suggestions; but the Special Rapporteur would inevitably find some gaps when he came to the heart of the matter, and would have to make some adjustments. Even though the Commission and the Sub-Commission were in full agreement on the main lines of the programme, it must be possible to depart from it when going into the subject more thoroughly.

71. It had also been asked whether the main emphasis should be on codification or on progressive development. There again, just as he did not believe it possible to draw a clear dividing line between those two activities, he did not think it possible, either, to foresee whether one of them should take precedence over the other. A final conclusion on the matter could not be reached until the substance of the problems had been examined. Neither the Commission, nor the General Assembly or the Sixth Committee, could decide beforehand which points should be codified and which were suitable for progressive development. The Special Rapporteur would first have to submit rules on each point in the light of experience, of reality and of the case-law, which was fairly abundant on certain aspects.

72. Another question was what work the Commission might ask the Secretariat to carry out. A kind of index of everything done or said by the various organs of the United Nations about State responsibility would be very useful to the Special Rapporteur. The work of the 1930 Codification Conference was certainly quite well known and the memorandum which the Secretary had mentioned might be very useful. The documentation on the subject was sufficient, but what would be especially useful would be a collection of the leading cases. It would suffice if the Secretariat prepared a full and accurate index, showing the sources.

73. Provisional work and discussion would probably be of little use, and would duplicate the Sub-Committee's work. The connexion between a principal provision and secondary provisions would only become apparent when the subject was studied as a whole. Thus there was some danger of doing work which would have to be entirely revised the following year. For that reason, and because the Commission would first need to have all the documentary material the Secretariat could provide, and because a great deal of research would be needed before a report could be written, he thought the item should not be placed on the agenda for the 1964 session; a preliminary report should not be scheduled until 1965. Besides, it would be a pity to take up valuable time which might be spent completing the work on the most important subject of the law of treaties.

74. The first report need not necessarily cover the whole subject; it could be confined to the first point, leaving the second till later. That division would be practical, and consistent with the method adopted for the law of treaties. But those were merely suggestions; the Commission could take the necessary decisions as its work proceeded.

75. The CHAIRMAN, after thanking Mr. Ago for his able summary of the discussion, said that, if there were no objections, he would consider that the Commission agreed to approve the report of the Sub-Committee on the understanding that the outline programme of work it contained was without prejudice to the position of any member regarding the substance of any of the questions mentioned in the programme. It was also understood that the outline would serve as a guide to the Special Rapporteur without, however, obliging him to follow it in detail.

It was so agreed.

76. The CHAIRMAN said that other points, such as the time for submission of the report, would be taken up at the end of the present session. There remained, however, the important question of the appointment of a special rapporteur for the topic of state responsibility. Mr. Ago, Chairman of the Sub-Committee on State Responsibility, had already been mentioned several times as the member best qualified to undertake the task. He therefore invited the Commission to indicate its approval of Mr. Ago's nomination.

Mr. Ago was appointed Special Rapporteur for state responsibility by acclamation.

The meeting rose at 1 p.m.

687th MEETING

Monday, 27 May 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda]

(resumed from the 685th meeting)

1. The CHAIRMAN invited the Commission to resume consideration of article 14 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 14 (CONFLICT WITH A PRIOR TREATY) *(continued)*

2. Mr. LACHS, stressing the importance of article 14, commended the Special Rapporteur for his approach and particularly for his commentary. The article raised certain issues of principle and his doubts had not been dispelled by the discussion. In view of the increasing number of treaties and of the danger of incompatibility of their provisions, the Commission must lay down rules for the guidance of States. Its primary concern should be the security of international transactions and the protection of the interests of parties to a treaty who

wished to rely on its provisions. The parties could not be left helpless when certain signatories entered into a new treaty that conflicted with obligations under the former treaty.

3. Paragraph 4 was the most important provision and should be placed first. Treaties which confirmed general principles of law or gave greater precision to binding rules of law could not be altered, since they confirmed what had been termed *jus cogens*. The source of the obligation lay outside the treaty itself and article 13 applied. Any conflict that might arise in such a case concerned not the treaty, but the very existence of *jus cogens*, of which the treaty only constituted evidence.

4. The second provision in order of importance was that embodied in paragraph 3 (*b*), which reproduced the terms of article 103 of the United Nations Charter. The Charter occupied a special place among instruments of contemporary international law and it was therefore appropriate that paragraph 3 (*b*) should be placed immediately after paragraph 4, which should be placed first. Article 103 of the Charter had wider implications, in particular in point of time, than, for example, article 20 of the Covenant of the League of Nations. Provisions similar to article 103 were to be found in the Paris Peace Treaties of 1947: in article 44 of the Treaty with Italy, article 10 of the Treaty with Rumania, article 8 of the Treaty with Bulgaria, article 10 of the Treaty with Hungary and article 12 of the Treaty with Finland.[1]

5. An interesting illustration of the practice under Article 103 of the Charter was furnished by the Agreement of 1 July 1948 between the Universal Postal Union and the United Nations, article VI of which specified that " no provision in the Universal Postal Convention or related arrangements shall be construed as preventing or limiting any State in complying with its obligations to the United Nations." [2]

6. The Special Rapporteur's paragraphs 1 and 2 dealt with cases in which the freedom of action of States was not limited by a higher law. It would of course be desirable in those cases for States concluding a new agreement to define its relationship to agreements already in existence — as was done in the case of the relationship between the Geneva Protocol of 1924 and the Covenant of the League by article 19 of that Protocol[3] — or to provide for the termination of the old treaty as soon as the new one came into force. An instance of that kind was to be found in International Labour Convention No. 28 of 1929, article 23 of which provided that: " Should the Conference adopt a new Convention revising this Convention in whole or in part, the ratification by a Member of the new revising Convention shall *ipso jure* involve denunciation of this Convention without any requirement of delay. . . ." [4]

7. A somewhat different approach had been adopted in the Universal Copyright Convention,[5] concluded under the auspices of UNESCO in 1952, to which a declaration[6] had been attached containing a set of principles to prevent any conflict which might result from the coexistence of that convention and the earlier Berne Convention.

8. Unfortunately, States often failed to include specific clauses on the subject in their treaties and it was necessary to deal with that contingency. It might be advisable also to include principles covering cases in which such stipulations did exist, bearing in mind that article 15 dealt with such situations in relation to the termination of treaties.

9. With regard to the serious problem raised by the case contemplated in paragraph 1 (*a*), he thought it would be desirable to place at the very outset of that provision a confirmation of the principle of unanimity — a principle to which the Special Rapporteur subscribed. The provisions on the various cases to which the rule applied, and the various exceptions to the rule, should follow.

10. However, the main problem was that of the cases contemplated in paragraph 2. The Special Rapporteur had perhaps attached too much importance to the two cases cited in paragraph 15 of the commentary, which had been decided by the Permanent Court of International Justice; he seemed to rely not so much on what the Court had said, but on what it had not said.

11. The principle of unanimity could not be questioned. In another case, that of the Act of Algeciras of 1906,[7] concerning Tangiers, which had not reached the Court, some of the parties to an older instrument had proceeded to revise it without the consent of the others; the parties which had revised the Act had tried to remedy the situation by communicating their decision to the absent parties with a view to obtaining their consent. Similar action had been taken for the revision of the Treaty of 1839 establishing the neutrality of Belgium.[8]

12. Article 14 did not deal with those treaties which specifically prohibited the conclusion by the parties of special agreements on the same subject, either between themselves or with third States, as was the case with the Berne Convention of 1886,[9] the General Act of Berlin of 1885[10] and the Declaration of Brussels of 1890.[11] The conclusion might be drawn that such stipulations had no legal effect. It was true that treaties containing provisions of that type were few in number, but it was essential to uphold the principle of unanimity and to take the existence of those provisions into account. As Judge Anzilotti had said in his separate opinion in the *Lighthouses Case*, "... it is a fundamental rule in

[1] United Nations, *Treaty Series*, vols. 41, 42, 48 and 49.

[2] *Agreements between the United Nations and the specialized agencies* (United Nations publication, Sales No.: 1951.X.I), p. 99.

[3] *League of Nations Official Journal*, Geneva, 1924, *Special Supplement No. 23*, p. 502.

[4] *Conventions and Recommendations*, 1919-1949, Geneva, 1949, International Labour Office, p. 165.

[5] United Nations, *Treaty Series*, Vol. 216, pp. 134 ff.

[6] *Ibid.*, pp. 150 ff.

[7] *British and Foreign State Papers*, Vol. 99, pp. 141 ff.

[8] *Op. cit.*, Vol. 27, pp. 990 ff.

[9] *Op. cit.*, Vol. 77, pp. 22 ff.

[10] *Op. cit.*, Vol. 76, pp. 4 ff.

[11] *Op. cit.*, Vol. 82, pp. 55 ff.

interpreting legal texts that one should not lightly admit that they contain superfluous words. . . ." [12]

13. Another question he wished to raise was that of treaties which had an effect on States that were not parties to them. Some treaties had played a decisive part in the formation of new States or had guaranteed the vital rights of States that were not parties. Such third-party beneficiaries should not be left helpless in the face of attempts to revise the treaties or to conclude new instruments which conflicted with the earlier ones.

14. He proposed that the provisions of article 14 should be rearranged, paragraph 4 being placed first and paragraph 3 second. On the points of substance he had raised, he would make no concrete proposals at that stage, but would await the explanations of the Special Rapporteur.

15. Mr. YASSEEN said that a conflict with an earlier treaty having the same substantive force would raise no difficulties if there were a single international community with a single legislative body. As in municipal law, if the judicature and the legislature were part of the same system it would be merely a matter of interpretation, since in the last resort the solution would depend on the will of the legislature.

16. But the situation was quite different in the sphere governed by international law, and especially by conventional law, since there were a large number of communities and legislative bodies. No problem arose where completely different international communities existed side by side, for every rule would then remain in force within its own sphere; but where conventional rules came into force successively in international communities which differed from each other only in part, that overlapping complicated matters.

17. Two principles had then to be borne in mind. First, respect for acquired rights: a later treaty should not impair the interests of the States parties to an earlier treaty. As a general rule, however, it would be wrong to go so far as to invalidate the later treaty. Secondly, the interests of States, which were parties to the later, but not to the earlier, treaty should be safeguarded. The contractual principle should be ignored, since the Commission was drafting rules *de lege ferenda*, and the development of international law should not be impeded merely for the sake of some States which might not be willing to bow to modern requirements.

18. The line taken by the Special Rapporteur was therefore both moderate and justifiable; it did not impair the rights of the States parties to an earlier treaty, since that treaty was held to prevail. At the same time there was no bar to the treaty's amendment. The later treaty was not invalidated, but could be carried into effect provided that the States signatories to the later treaty fulfilled their obligations to the States parties to the earlier treaty.

19. The Special Rapporteur had not laid down any absolute rule, but had provided for justified exceptions. The proviso regarding the constituent instruments of international organizations seemed perfectly reasonable in view of the importance of such instruments and the need to provide international organizations with certain guarantees. The other exception, relating to *jus cogens* rules, was also essential. Moreover, the solutions adopted in article 14 could be more easily accepted in view of the approval of article 13.

20. Further exceptions might be conceivable, especially for conventions of great political importance based on a balanced compromise achieved with great difficulty, particularly those prohibiting derogation from their provisions by means of later conventions. They might be regarded as somewhat analogous to *jus cogens* rules.

21. The principles on which article 14 was based and the solutions put forward in it were acceptable as a whole, subject to the reservations he had mentioned.

22. Mr. TUNKIN said it was important to avoid the temptation to adopt an approach borrowed from municipal law; in article 14, it would be inappropriate to take a position based on the concept of civil liability. The situation in international relations was very different from that obtaining under municipal law; international treaties were of greater importance than contracts concluded under municipal law, for world peace could depend on the fulfilment of treaty obligations. Consequently, the provisions of article 14 were of vital importance.

23. The problems of principle involved had some bearing on the *pacta sunt servanda* rule. A State which was a party to a treaty would violate that rule if it entered into a later treaty which conflicted with its obligations under the earlier treaty. The question then arose what the legal consequences would be with regard to the validity of the later treaty; he would leave aside, for the time being, the problem of responsibility, which would be dealt with by Mr. Ago as Special Rapporteur for that topic.

24. The principle stated in paragraph 2 was correct, but the problem arose of whether that principle could be applied to every situation. Some speakers had quoted instances in which exceptions might have to be made. Personally, he thought there could be international treaties of which it was not sufficient to say that " the later treaty is not invalidated by the fact that some or all of its provisions are in conflict with those of the earlier treaty." One example was the recent agreement on the neutrality of Laos,[13] which prohibited the establishment of foreign military bases on Laotian territory. It a treaty were concluded in violation of that provision, it would clearly not be sufficient merely to say that the provisions of the earlier treaty would prevail; such a statement might cover most of the practical points involved, but it would also be necessary to state that the second treaty was void.

25. Paragraph 1 dealt with the case where all the parties to the later treaty were also parties to the earlier treaty. In that case, the principle to be applied was that the parties could always change the provisions of the earlier

[12] *P.C.I.J.*, Series A/B, No. 62, p. 31.

[13] Command Papers, H.M. Stationery Office, London. Cmd. 9239, pp. 18 ff.

treaty by subsequent agreement. The problem of validity did not arise and paragraph 1 did not properly belong to the subject matter of article 14; he suggested that it should be removed from the article.

26. Mr. de LUNA said he was glad to see that the Special Rapporteur had departed from the approach adopted by his two predecessors, Sir Hersch Lauterpacht, who had held that a treaty should be void " if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties ",[14] and Sir Gerald Fitzmaurice, who had drawn a distinction between cases in which a previous treaty imposed reciprocal obligations and those in which the obligations imposed were of the " interdependent " or " integral " type.[15]

27. The Special Rapporteur had adopted a more correct approach, which had, moreover, the support both of judgements of the Permanent Court of International Justice and of the principle that conflicts between treaties should be resolved on the basis of the relative priority of conflicting legal norms, not on the basis of the nullity of the later treaty.

28. The most useful idea in the arguments of the two previous Special Rapporteurs, the idea that a treaty conflicting with a *jus cogens* rule was invalid, had been retained; any other solution would needlessly impair the stability of conventional law. Wherever *jus cogens* rules did not apply, the principles to be respected were the autonomy of the will of the parties, the principle that so far as third States were concerned treaties were *res inter alios acta* and the principle *pacta tertiis nec nocent nec prosunt*. Where a party to an earlier treaty assumed a subsequent obligation, it would be sufficient to follow the general principles governing the interpretation and application of treaties, their amendment and termination. Where a State was unable to fulfil one or other of its successive obligations, the principle of responsibility would apply, with its consequence: compensation.

29. In many instances States in a particular region which were parties to multilateral treaties had concluded among themselves regional agreements containing provisions that differed from those of the earlier treaties. For such States it was the regional agreements which had effect, by virtue of the principle *tractatus specialis derogat generali*. Many cases similar to those quoted by the Special Rapporteur and by Mr. Lachs existed in general international law; for example, not all the States parties to the Hague Convention of 1899 had become parties to the Hague Convention of 1907, but both conventions had operated simultaneoulsy by virtue of a special clause in the latter.[16]

30. Mr. ROSENNE said the discussion had strengthened his opinion that article 14 dealt with the interpretation and application of treaties rather than with their validity.

31. In most cases, subject to the overriding rules of *jus cogens*, the real problem was that of determining which set of obligations was to prevail in the event of conflict between an earlier treaty and a later one. As pointed out by the eminent French internationalist Rousseau, that could give rise to delicate situations in which legal considerations were not always predominant.

32. He believed that the guiding principles should be expressed in terms of a residual rule. Indeed, the Special Rapporteur had begun his formulation on that basis, but his approach should be more emphatic. The residual rule would apply where both treaties were completely silent on the question of other treaties and where there had been no real negotiations to try to bridge the gap between them. It was quite common for a clause to be included in a treaty dealing with its relationship with past treaties, with future treaties, or with both. It was essential that that practice should be encouraged and that the efficacy of that type of clause should not be impaired by the adoption of too general a rule. All United Nations conventions codifying international law concluded since 1958 contained a clause on the subject. On the other hand experience showed that provisions for resolving that type of conflict did not always appear on the face of the treaty, but could be agreed in the antecedent negotiations. Accordingly, the residual rule would have to be carefully formulated.

33. Paragraph 9 of the commentary referred to the effect of knowledge of the conflict between the earlier and the later treaty; he wondered whether compliance with the provisions on the registration of treaties might affect that question of knowledge.

34. With regard to paragraph 3 (*a*) of the article, he found it difficult to accept the proposition that the Charter of the United Nations or the constitution of a specialized agency limited the treaty-making powers of member States or raised questions of capacity. What article 108 of the United Nations Charter and similar provisions did was to lay down modalities for the conduct of negotiations, a matter which was covered by article 5 of Part I of the draft.

35. Finally, paragraph 3 (*b*) seemed unnecessary, because the matters it dealt with were already covered by other provisions of the draft.

36. Mr. ELIAS said he found the provisions of article 14 acceptable, except that they omitted to deal with one situation which merited attention. They dealt with the case in which the parties to the later treaty were the same as those to the earlier treaty, the case in which the later treaty had a larger number of parties and the case in which the later treaty had fewer parties; there was, however, a fourth case, admittedly a somewhat rare one: the case in which the later treaty was concluded by parties entirely different from the parties to the earlier one.

37. The provisions proposed by the Special Rapporteur were based on the attitude adopted by the Permanent Court of International Justice in the *Oscar Chinn* [17] and

[14] *Yearbook of the International Law Commission, 1954*, Vol. II (United Nations publication, Sales No. 59.V.7, Vol. II), p. 133, article 16.

[15] *Op. cit.*, 1958, Vol. II (Sales No.: 58.V.1, Vol. II), pp. 27-28, articles 18 and 19.

[16] Scott, J. B., *Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, Oxford University Press.

[17] *P.C.I.J.*, Series A/B, No. 63.

European Commission of the Danube [18] cases. The situation which he had in mind, and which had been the subject of attention at a conference held at Niamey, in the Republic of the Niger in February 1963, on the subject of the River Niger, went beyond those cases.

38. The Act of Berlin of 1885 had established an international regime for the Congo and the Niger. That regime had been confirmed and slightly modified by the Convention of St. Germain of 1919.[19] As far as the Niger was concerned, France and the United Kingdom had been the riparian signatories of those treaties at the time. The territories which had then been colonies of France and the United Kingdom had, of course, since become independent. Nine independent riparian States had thus met at the Niamey Conference to consider arrangements for the development of the Niger and its utilization, in particular for the generation of hydroelectric power and the exploitation of the river's resources. The question which had arisen was whether, and if so to what extent, those nine States could seek to provide, in a treaty establishing a River Niger Commission, for the abrogation of the General Act of Berlin of 1885 and the Convention of St. Germain of 1919, in so far as those States were concerned.

39. That question could be considered from several different angles, one of which was that of State succession. Since the nine independent States had taken over the rights and duties of the former colonial Powers under the two treaties in question, they had also taken over the right to abrogate the treaties and substitute for them arrangements more acceptable from the point of view of their development schemes. The doctrine of *rebus sic stantibus* had also been invoked and, more broadly, the problem of the obsolescence of treaties. The conclusion reached by almost all the members of the prospective River Niger Commission was that the Act of Berlin, the Convention of St. Germain and the intervening Declaration of Brussels of 1890 must be deemed inapplicable to the new situation in which the riparian States found themselves.

40. The States attending the Niamey Conference had reached agreement on a Convention and on a Statute for the River Niger Commission. Those instruments had been communicated to the United Nations and circulated to France and the United Kingdom, the Powers formerly responsible for the Niger Basin, and there appeared to be general agreement that the course adopted had been unexceptionable. In any event, the nine riparian States had reaffirmed the main principles which the Act of Berlin had sought to protect: equality of treatment for the nationals of all States, and freedom of navigation for vessels of all flags.

41. He accordingly suggested that the Special Rapporteur should deal with the case of a treaty concluded between parties entirely different from the parties to an earlier treaty and with the subrogation of new States to the rights and duties of the former colonial Powers.

42. Mr. TSURUOKA said it seemed to him that the essential point in article 14 was not the substantial validity of a later treaty, since under the Special Rapporteur's draft such a treaty was not invalidated by the fact that some or all of its provisions were in conflict with those of an earlier treaty, but rather the position under conventional law of a State which had concluded two treaties and thereby assumed two mutually conflicting treaty obligations. It would be better to consider that point in connexion with the question of the application and effects of treaties. Any other problems that might arise in connexion with article 14 were relevant either to the revision of treaties or to *jus cogens* rules.

43. Accordingly, the questions dealt with in article 14 might be gone into in the commentary on article 2 or article 13, or even in connexion with the succession of States and governments.

44. Mr. TABIBI said that the length of the commentary on article 14 testified to the complexity of the subject. It was one which ought not to be approached exclusively with a view to codification, as had been done by the two previous special rapporteurs on the law of treaties, but also with a view to progressive development.

45. He agreed with the views expressed by the present Special Rapporteur, in paragraphs 3 and 4 of his commentary, as to the kind of cases in which a question of essential validity might arise, and with his statement in paragraph 18 that international jurisprudence was not perhaps entirely conclusive on the question whether and, if so, in what circumstances, a treaty might be rendered void by reason of its conflict with an earlier treaty. That was probably the main reason why Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice had been chary of admitting that such conflicts ever led to nullity.

46. Although he was in general agreement with the fundamental purpose of the article, he feared that it might lead to difficulties in application, especially if the points raised by Mr. Lachs were not elucidated, and might detract from the force of the other articles on essential validity. It also appeared from the general trend of the discussion that the article in its present form would not prove acceptable. It might be preferable for the Special Rapporteur to reconsider the subject and submit a new text to the Commission.

47. Mr. AGO said that his doubts regarding the need for article 14 — which had been strengthened by the critical examination made by the Special Rapporteur himself — had not been dispelled by the discussion.

48. Paragraph 1 of the article, concerning the case in which the parties to two treaties were the same, stated an obvious truth which no one would think of disputing and which it was therefore unnecessary to reaffirm in the draft.

49. Paragraph 2 dealt with the problem of conflict between two successive treaties to which only some of the parties were the same and the effects of the conflict on the validity of the second treaty. The Commission was not concerned at that point with the problem of revision, which it would consider later. Nor could it,

[18] *P.C.I.J.*, Series B, No. 14.

[19] League of Nations, *Treaty Series*, Vol. 8, pp. 27 ff.

of course, hold that the earlier treaty ceased to be valid with respect to States not parties to the later one; for manifestly, if some of the parties to a treaty concluded another treaty *inter se* which conflicted with the earlier one, the second instrument was valid as between those parties; but equally obviously, as between those parties and the other parties to the earlier treaty, the validity of the earlier treaty remained intact. If the second instrument made it impossible to carry out some of the obligations deriving from the first, the question which would arise would not be one of validity, but one of international responsibility. Of the two solutions proposed in paragraph 2 (*b*), the first was obvious and the second seemed to deal with a purely theoretical situation, for a State which had participated in the conclusion of the second treaty could hardly contest its effectiveness.

50. Paragraph 3 dealt first, in sub-paragraph (*a*), with the case of a special treaty concluded between States members of an international organization, some provisions of which conflicted with provisions of the constitution of that organization. There could be no doubt that problems of that kind could only be solved by interpretation and application of the constitution concerned. Sub-paragraph (*b*) was not necessary, as it merely reproduced article 103 of the Charter.

51. Paragraph 4 merely repeated what had already been said in article 13.

52. There remained the case mentioned by Mr. Tunkin and Mr. Lachs: that of a State which, having first concluded with other States a treaty placing certain obligations on all of them, subsequently concluded with some of its partners or with other States, a treaty some of whose provisions conflicted with the first treaty. There would appear to be two possibilities: either the first treaty expressly limited the capacity of the parties to conclude other treaties conflicting with its provisions, in which case the second treaty was void; or else the first treaty prescribed no such limitation, in which case the second treaty was valid as between the States which had concluded it, but the State or States which were parties to both treaties had failed to fulfil their obligations under the first treaty and thereby incurred international responsibility, one of the consequences of which was that they were under a duty to eliminate the conflict between the two instruments by terminating or amending the second.

53. To sum up, article 14 contained only provisions which, if not unnecessary, merely reproduced clauses already embodied elsewhere in the draft articles or dealt with problems which the Commission would take up later. He therefore suggested that the Commission should suspend consideration of the article and pass on to the following articles, reverting to article 14 later, if necessary, to see whether any part of it need be retained or not.

54. Mr. VERDROSS said he shared the view of Mr. Tunkin and Mr. Ago that paragraph 1 of article 14 did not apply to the case of a conflict between two treaties, and should therefore be deleted.

55. According to the prevailing doctrine, if a State party to a treaty concluded with another partner a second treaty conflicting with the first, then that State was undoubtedly bound to do everything it could to annul the second. Admittedly, it was reasonable to ask whether the Commission, one of whose tasks was to develop international law, should not go further than that doctrine; he would prefer not to give a categorical answer to that question.

56. If the Commission wished to take a decision concerning a possible conflict between the Charter of the United Nations and the provisions of another international agreement, then it should be a clear decision. It was unnecessary to reproduce Article 103 of the Charter, which had been intentionally drafted in rather vague terms so that it could also apply to a treaty concluded by a Member State with a State which was not a Member; according to Article 103, the Charter obligations prevailed in such a case, but the treaty conflicting with the Charter was not declared void.

57. Mr. PAL said that, after listening to the observations of other members and examining some of the literature on the subject, he had come to the conclusion that there was authority for the view that conflict with a prior treaty at some points touched upon the issue of validity. For instance, according to Oppenheim, a treaty conflicting with a prior treaty was illegal, a view clearly stated in the following passage:

> "Treaties, whether general or particular, lay down rules of conduct binding upon States. As such they form part of international law. They are, in the first instance, binding upon the contracting parties, who must refrain from acts inconsistent with their treaty obligations. This implies the duty not to conclude treaties inconsistent with the obligations of former treaties. The conclusion of such treaties is an illegal act which cannot produce legal results beneficial to the law-breaker." [20]

58. Article 14 should remain in section II among the articles dealing with essential validity, but should be amplified to cover both the important case raised by Mr. Elias and the case in which the earlier treaty contained clauses restricting or purporting to restrict the capacity of the parties to enter into the later treaty. The latter point needed general treatment, whereas the provision in paragraph 3 (*a*) was limited to the constituent instruments of international organizations.

59. Mr. GROS said it had been his understanding at the previous meeting that most members approved of the Special Rapporteur's approach in proceeding from the assumption that article 14 was concerned less with the validity of treaties than with the conflict between two treaties. However, the conflict between successive rules of law raised problems concerning the revision and the termination of treaties and the interpretation of the constitutions of international organizations; he therefore supported Mr. Ago's suggestion that consideration of article 14 should be deferred.

60. With regard to the substance, he particularly endorsed paragraph 20 of the commentary, for he did not think

[20] *International Law*, 8th edition, 1955, Vol. I, p. 894.

it was by applying a theory of the nullity of treaties that certain breaches of international law could be effectively penalized. The rule of estoppel was much more practical, as the Permanent Court of International Justice had indicated in its advisory opinion on the European Commission of the Danube, when it had stated the governments " cannot, as between themselves, contend that some of its [the Statute's] provisions are void as being outside the mandate given to the Danube Conference ..." [21]

61. Mr. AMADO said that from the length of the commentary it was evident that the Special Rapporteur had had serious doubts about article 14. Indeed, the article did not stand up to searching scrutiny. It was inconceivable that States would behave in a manner that would make such rules necessary. The Commission's task was to give form, not to the doubts of scholars, but to scientific certainties and to the rules accepted by States. He did not think that any of the provisions of the article should be retained, since the whole of its substance was already embodied in articles 2 and 19 and whatever few points were not settled by those two articles would be covered by the provisions governing the interpretation, revision and deposit of treaties.

62. Sir Humphrey WALDOCK, Special Rapporteur, summarizing the discussion, said that although a few members of the Commission were hesitant about removing article 14 from section II, the majority seemed to agree with him that the article did not really raise any issues of essential validity. He had explained, when introducing the article, that it had been inserted in that section because the two preceding Special Rapporteurs had treated its subject-matter in that context, having found that some of the problems arising from conflict with a prior treaty touched upon validity. Until the Commission had expressed its view on the question whether any matters of validity were raised by article 14, he had thought it better to present the article in the context of validity in section II of the report.

63. As he had already suggested, the substance of the article might need to be discussed in connexion with article 19 which raised questions of implied termination of a treaty brought about by concluding a subsequent treaty. But generally speaking, if the Commission did not think the article raised any question of essential validity, it ought to be taken up at the sixteenth session when he would be presenting his draft articles on the application of treaties. It would be easier to deal with the matter of conflict after the Commission had discussed the question of the effects of treaties on third parties.

64. Some members had touched upon the question of revision. That certainly had links with the question of conflict between treaties, but had no relevance to article 14 if it were dealt with in its present context as an article on essential validity.

65. Commenting on some of the detailed observations put forward during the discussion, he said that Mr. Lachs' suggestions about rearranging the order of the clauses had some justification, though perhaps he would differ as to emphasis. But those suggestions called for consideration only if the article were left in section II.

66. Mr. Lachs had drawn attention to treaties containing provisions dealing with the problem of incompatible obligations, or expressly prohibiting the parties from assuming incompatible obligations under some other instrument or giving the treaty priority over other treaties; but the question of validity was usually not touched upon by those provisions. A number of treaties, including the Charter, contained such provisions, and he also knew instances of two treaties containing inconsistent provisions and both claiming priority for their own provisions. But the mere introduction of such clauses did not, in his opinion, transform a conflict into an issue over validity. It was noteworthy that in the *European Commission of the Danube* case the Permanent Court had attached no special significance to the existence of an express prohibition in the Treaty of Versailles against inconsistent agreements, although the point had been stressed in the opinions of the dissenting judges. If the Commission as a whole accepted the general conclusion set out in article 14, that would certainly not mean that it sanctioned entry into inconsistent obligations; such action would be a violation of a previous treaty and would raise a question of responsibility. The injured State could always bring the matter before the United Nations and rely upon such procedural remedies as existed.

67. He would be encroaching on the territory of the Special Rapporteur to be appointed on State succession, if he were to comment on the special case brought up by Mr. Elias of an agreement to which none of the parties were the same as those to the previous treaty. He had not dealt with the matter in the article or in the commentary, because such a situation did not raise a question of validity. The question might have to be taken up in another context. The particular example of the régime of the river Congo mentioned by Mr. Elias was of the greatest legal interest. But it seemed to raise other issues than those of validity — issues of State succession and of *rebus sic stantibus*.

68. Mr. Tunkin had raised the very difficult problem of the possible existence of special cases in which conflict between two treaties might involve validity even if the general thesis propounded in article 14 were accepted, but he would have thought that the example of Laos raised a problem of capacity, and in particular the difficult problem of when diminution of capacity took place as a result of a treaty. The matter had been touched upon during the previous session, but the Commission had shown itself reluctant to press it to any conclusion. In any event, he did not regard such a case as constituting an exception to the general rule he had sought to lay down in article 14 and which appeared to have gained general support. The case seemed, as he had indicated, rather to raise a possible question of capacity and certainly a question of responsibility. In such an instance, the State regarding itself as the injured party could raise the matter in the United Nations and also seek application of the various remedies open to it under general international law.

[21] *P.C.I.J.*, Series B, No. 14, p. 23.

69. Mr. TUNKIN said that the question at issue was not what was the proper place for article 14 but what should be its substance, and the discussion had not sufficiently clarified that. Few members had put forward really definite opinions and, with all respect to the Special Rapporteur, he himself was not convinced that treaties in violation of a previous agreement only raised problems of responsibility and not of validity.

70. As for the action to be taken by the Commission, he supported Mr. Ago's suggestion that the discussion on article 14 should be suspended, so that it could be decided later where the article should be placed and in what form.

71. Sir Humphrey WALDOCK, Special Rapporteur, said he would like to make it plain that he too favoured the course suggested by Mr. Ago.

72. The CHAIRMAN said that article 14 might be left aside until the Commission was in a position to determine whether it should be included in some part of the draft, or whether the question of conflict with a prior treaty ought to be dealt with under the topic of state responsibility or of state succession.

73. Mr. TUNKIN said it should be understood that the Commission would resume the discussion of article 14 at the present session.

74. Mr. ELIAS agreed with Mr. Tunkin: the argument that some of the issues raised by conflict with a prior treaty did not involve essential validity had not convinced him. The matter should not be held over until the following session.

75. The CHAIRMAN proposed that the decision on article 14 be deferred and that the article be taken up again at a later stage in the session.

It was so agreed.

The meeting rose at 5.55 p.m.

688th MEETING

Tuesday, 28 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider section III of the Special Rapporteur's second report (A/CN.4/156/Add.1), which began with article 15.

SECTION III (THE DURATION, TERMINATION AND OBSOLESCENCE OF TREATIES)

ARTICLE 15 (TREATIES CONTAINING PROVISIONS REGARDING THEIR DURATION OR TERMINATION)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 15, 16 and 17 were clearly linked together and could be regarded as a unity. Article 15 dealt with the case in which the treaty contained provisions intended to regulate either its duration or its termination. Article 16 was, strictly speaking, of the same kind; it dealt with the case in which the treaty, on its face, appeared to contemplate an indefinite duration, making no provision of any kind for denunciation or for termination by other means; its chief relevance was its link with article 17. Article 17 dealt with the case in which the treaty contained no provisions regarding either its duration or its termination.

3. In article 15 he had stated possible rules, in case the Commission wished or thought it right to state in terms the methods by which the duration or termination of a treaty could be determined, in accordance with the various types of clause which a treaty could contain for that purpose. He fully realized that, as already appeared from one or two of the proposals for amendment, the article could be dealt with quite differently; indeed, it could be said simply that " a treaty shall endure, or terminate, in accordance with its terms, where the treaty itself makes provision for that purpose "; if that method of approach were adopted, it would be possible to shorten article 15 very considerably.

4. There were very few points in article 15 on which the matter did not really follow directly from the treaty. Perhaps the main point was in paragraph 4 (*c*), where there was a little problem to which he had suggested an answer, but which he did not think could be said to be settled by the treaty itself. There were quite a number of treaties which contained a clause preventing the treaty from coming into force until a certain number of ratifications had been obtained; the problem was what was to happen if denunciations should reduce the number of parties below the number originally specified. He had dealt with that point in the commentary, and proposed a rule.

5. Apart from that problem, the provisions set out in the article really followed from the particular provisions of the treaty itself, so that if the Commission wished to adopt a different method it would be quite possible to dispense with some of the paragraphs. It was simply a question of whether, in a codification of that kind, it was useful or not useful to try to state explicitly the rules which would, in fact, be applied under the various forms of treaty clauses.

6. A point which might possibly be raised in connexion with paragraph 5 was that two possible methods of termination were sometimes provided for in the same treaty. Even then, it followed from the treaty itself how the two clauses would operate in conjunction, but it might be argued that it was worth noting that particular point, as he had done in paragraph 5 (*a*).

7. Article 17 dealt with quite a complicated question on which there might be different views. If the Commission were to take a widely different view from the Special Rapporteur as to the extent to which implied rights of denunciation were to be understood in treaties, then the provisions of article 17 could be greatly shortened.

8. When the Commission had discussed articles 15, 16 and 17, it could consider whether some contraction or amalgamation of the text was desirable.

9. The CHAIRMAN drew attention to the amendments to article 15 submitted by Mr. Castrén and Mr. Briggs.

Mr. Castrén's proposal read:

" 1. The provisions of a treaty which relate to the duration or to the termination thereof for one or all the parties shall be applicable subject to articles 18 to 22.

" [or, alternatively, a separate article or a reference in the commentary]. A treaty shall not come to an end by reason only of the fact that the number of parties has fallen below the minimum number originally specified in the treaty for its entry into force, unless the States still parties to the treaty so decide."

Mr. Briggs' proposal read:

" 1. Except as otherwise provided in these articles, a party may denounce a treaty only in accordance with the provisions of the treaty or with the consent of all other parties.

" 2. In the case of a bilateral treaty, denunciation by a party in accordance with paragraph 1 terminates the treaty.

" 3. In the case of a multilateral treaty, the party denouncing it in accordance with paragraph 1 ceases to be a party to the treaty."

10. Mr. CASTRÉN said that according to article 15 the general rule was that the provisions of a treaty regarding its duration or termination, if any existed, were applicable; the other possibilities were dealt with in articles 16 to 22. Consequently, article 15 could be confined to stating the general rule, and it was unnecessary to list all the provisions covering the different cases which were contained in bilateral or multilateral treaties.

11. It might, however, be advisable to retain paragraph 4 (*c*), which provided that a treaty's validity was not impaired by reason only of the fact that the number of parties had fallen below the number originally specified for its entry into force; for the contrary view could also be held. The Special Rapporteur's arguments in favour of that provision were, however, wholly convincing. It was for the Commission to decide whether it preferred to deal with the matter in a separate article or in the commentary.

12. On the other hand, although sub-paragraph 5 (*b*) contained a new element, the case contemplated in it was hardly likely to arise in practice. Indeed, if a treaty whose duration was expressed to be limited by reference to a specified period, date or event provided that it should automatically be prolonged for a further period or periods unless denounced before the expiry of the first period, it was hardly likely that the duration of the further periods would not also be specified. That case might, if absolutely necessary, be mentioned in the commentary, with a statement of the rule proposed by the Special Rapporteur, which seemed on the whole to reflect the intention of the parties to such a treaty.

13. Mr. Briggs' amendment was very similar to his own, particularly so far as paragraph 1 was concerned. The idea stated in paragraph 2 was correct, but self-evident. As to paragraph 3, it should be noted that a treaty might sometimes be terminated by denonciation when it required a minimum number of parties for validity.

14. Finally, he drew attention to footnote 2 to paragraph 2 of the commentary, in which the Special Rapporteur observed that it was the passing rather than the arrival of the date which was relevant when the duration of a treaty was expressed to be limited by reference to a specified date, since the treaty would expire at midnight on the date fixed by the treaty. In his opinion, that raised a question of interpretation. If a treaty was said to terminate on 31 December 1964, for instance, that meant that it expired after the date had passed; but if it was specified that the final date was 1 January 1965, the parties would probably have had the beginning of that day in mind. It was therefore better to say that the treaty remained in force until the specified date, rather than that it came to an end on a certain date.

15. Mr. VERDROSS said that articles 16 to 22 formed a complete whole and that it was essential to indicate their main lines first.

16. The reasons for terminating a treaty fell into three main groups. First, and simplest, came the common will of the parties. Secondly, if it was the will of the contracting parties when concluding a treaty that it should eventually be terminated, the treaty itself generally contained a denunciation clause. But the will of the parties might also be deduced from the records of proceedings or from the purpose of a treaty. There was no denunciation clause in the United Nations Charter, but the records showed that the parties had been in agreement that States could withdraw in certain circumstances. The third and largest group of treaties comprised those in which the parties had made no provision for termination. In that case, the problem was settled directly by general international law.

17. An article stating the general cases in which a treaty could be terminated should precede section III, before the particular cases were dealt with.

18. Mr. YASSEEN agreed with Mr. Castrén that article 15 might be summed up in a form of words to the effect that the duration and termination of a treaty were governed by the relevant provisions embodied in it. That would be better than an enumeration of all possible clauses on the duration and method of termination of a treaty, since in any case an enumeration could not be exhaustive.

19. Although he approved of Mr. Briggs' method of condensing the article, he thought his proposal omitted rather too much; for it dealt only with denunciation, whereas article 15 also referred to other means by which treaties could be terminated. Paragraph 2 of Mr. Briggs'

amendment seemed unnecessary, as the idea it expressed was too obvious.

20. Several ideas in the Special Rapporteur's draft were worth retaining, however; paragraph 4 (*b*), for example, stated a presumption in law, and introduced an innovation. Paragraph 4 (*c*) seemed even more necessary, since the number of signatories required for a multilateral treaty to come into force was not necessarily the same as the number required for it to remain in force. It would also be advisable to retain paragraph 5 (*b*) which introduced a presumption in law, and paragraph 6, the idea of which was useful, though obvious.

21. While he approved of the solutions proposed by the Special Rapporteur in article 15, he did not think the drafting was appropriate.

22. The CHAIRMAN said it would be advisable for the Commission to decide, at that point, whether to discuss article 15 separately or in conjunction with articles 16 and 17. His own view, based on the experience of the Commission, was that it was better to keep to well-defined points, taking each article separately as a basis of discussion. He suggested that the Commission should continue the discussion of article 15, on the understanding that members could refer to the provisions of articles 16 and 17 to the extent they considered necessary.

After some discussion *it was so agreed.*

23. Mr. BRIGGS said he supported Mr. Verdross' suggestion that a general article setting out the various ways in which a treaty could be terminated should be inserted at the beginning of section III; the articles containing detailed provisions would then follow.

24. As far as article 15 was concerned, he preferred the text proposed by Mr. Castrén to the rather lengthy draft put forward by the Special Rapporteur. His own proposal, which was not dissimilar from Mr. Castrén's, was limited to the question of denunciation; it would replace articles 15, 16 and 17, and be followed by other articles dealing with termination of a treaty by means other than denunciation.

25. In paragraphs 3 and 4 of article 15, the Special Rapporteur had really dealt with the consequences of denunciation before dealing with the right of denunciation. Article 17 dealt with the right of denunciation where not provided for in the treaty itself. It would be more correct to state the right of denunciation first and deal with the legal consequences of denunciation afterwards.

26. Paragraph 1 of his own proposal dealt with the subject-matter of article 17. Paragraph 2 was perhaps not necessary, strictly speaking, but he had introduced it because the Special Rapporteur had dealt in article 15 not only with the right of denunciation, but also with its legal consequences. The purpose of his paragraphs 2 and 3 was to formulate in more concise terms the provisions embodied in article 15, paragraphs 3 and 4 (*a*), of the Special Rapporteur's text.

27. In connexion with paragraph 3, he agreed with Mr. Castrén that the denunciation of a multilateral treaty could, in certain circumstances, have the effect of termination.

28. He did not like the use of the term " duration " in the sense in which the Special Rapporteur had used it in articles 15, 16 and 17; the articles did not deal with the beginning of the duration of a treaty, but with its termination. Nor did he like the use in paragraph 4 of the expression " shall continue in force ": the object of the provision was to deal with the legal consequences of denunciation.

29. There were good reasons for dealing with denunciation in a separate article; other ways of terminating a treaty could also be dealt with in separate articles.

30. Mr. LACHS said he supported Mr. Verdross's suggestion that an introductory article embodying a general formula should be inserted in section III; he also agreed with Mr. Castrén and Mr. Briggs that a shorter formulation of article 15 was desirable. The examples given by the Special Rapporteur would be very useful in the commentary, however; they would illustrate methods of terminating a treaty in accordance with the will of the parties, though it was most improbable that all the possible methods could be covered.

31. The provision in paragraph 4 (*c*) should be retained because it dealt with an exceptional case; it could be tranferred to article 17. He agreed with the reasoning in paragraph 7 of the commentary in support of that provision. The mere fact that the number of parties had fallen below the minimum specified for entry into force was not decisive for the termination of a treaty. There were, however, certain borderline cases. For example, the European Agreement on Road Traffic [1] provided for entry into force upon ratification by three States. In view of the emphasis placed on the multilateral character of that type of convention, it was worth considering the situation that would arise if the number of parties fell to two. A further element of complication would be introduced if reservations had been entered by the remaining parties. With all the complications arising from reservations, a quantitative change could alter the nature of the treaty and make it a bilateral treaty.

32. Mr. BARTOŠ observed that the question of the minimum number of parties to a treaty affected its application as well as its entry into force. It sometimes happened that States acceded to a treaty of general interest, such as The Hague Convention on Marriage [2] or the Vienna Convention on Diplomatic Relations,[3] in order to join the group of contracting parties which had dealt with the matter, and that most of them subsequently withdrew. Where it could be presumed that a convention would be universal, reciprocal concessions were made in order to induce certain States to become parties to it. But where many of the States for which

[1] European Agreement supplementing the 1949 Convention on Road Traffic and the 1949 Protocol on Road Signs and Signals, signed at Geneva on 16 September 1950.

[2] *British and Foreign State Papers*, Vol. 95, pp. 411 ff.

[3] *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, Vol. II (United Nations publication, Sales No.: 62.X.1), pp. 82 ff.

they had been made withdrew from the Convention, those concessions proved useless.

33. If, after the number of parties had fallen below the minimum specified for entry into force, the States which remained parties to a convention expressed their will to abide by it, then the convention, hitherto considered to be one of general interest, was transformed into a convention without that quality and might be considered to subsist in that form. In principle, however, the convention having the character of a general treaty had come to an end when the number of parties had fallen below the required minimum.

34. Again, if a treaty whose duration was limited by reference to a specified period contained a clause providing that might be prolonged after the expiry of that period, and if a large number of States denounced it, the question arose whether the States which remained parties were obliged to participate in so limited a community or whether they could denounce the treaty without awaiting the expiry of the further automatic renewal period of, say, three years, in view of the fact that they had remained parties to it because they expected to remain in a larger contracting group and did not wish to be members of a smaller one. He had no strong views on the question, but he wished to draw the Commission's attention to it.

35. Mr. TUNKIN said that the rule embodied in most of the provisions of the somewhat lengthy article 15 was that, where a treaty contained provisions regarding its duration or termination, those provisions must be applied. He was therefore inclined to favour a shorter formulation along the lines proposed by Mr. Castrén, though he had some doubts regarding the actual language of Mr. Castrén's proposed paragraph 1. That could be left to the Drafting Committee, however.

36. Article 15 also laid down another rule, which was stated in paragraph 4 (*c*) and reproduced in paragraph 2 of Mr. Castrén's proposal. He agreed on the need for that provision.

37. When the Commission had completed its consideration of articles 15, 16 and 17, it could consider what gaps, if any, were left to be filled; the discussion might also bring to light some new questions relating to article 15.

38. Mr. ROSENNE said he favoured Mr. Verdross's suggestion of an introductory article dealing in general terms with the matters later considered in detail in the various articles of section III. Such an introductory article would complement the provisions of article 23 of Part I on the entry into force of treaties, in particular paragraph 4, which dealt with the substantive consequences in law of the entry into force of a treaty.

39. For the same reasons as other speakers, he thought that a short article along the lines proposed by Mr. Castrén would be adequate for the purposes of article 15, though it would be useful to retain the provisions of paragraphs 5 and 6 proposed by the Special Rapporteur. The commentary, on the other hand, should be rather full, and he congratulated the Special Rapporteur on his remarkable text.

40. He understood Mr. Lachs' concern about the consequences of a fall in the number of parties to a multilateral treaty, but the question of the effect of reservations was more appropriately dealt with in the articles on reservations. The formulation proposed by Mr. Castrén for paragraph 2 was to the effect that a treaty would not come to an end by reason " only " of the fact that the number of parties had fallen below the minimum number originally specified for entry into force; that formulation, together, if necessary, with the doctrine of *rebus sic stantibus*, opened the way to the solution of the particular problem raised by Mr. Lachs. He believed that a multilateral treaty could be transformed into a different kind of treaty by a reduction in the number of parties, but that was no reason why the surviving parties should not keep it in force. The matter appeared to be one exclusively for the surviving parties themselves.

41. Mr. Gros said he thought that article 15 should be simplified; being a codifying article, it should contain nothing but what was strictly essential. He approved of the substance of Mr. Castrén's proposal; the few suggestions he had for supplementing the text could be submitted to the Drafting Committee.

42. The interesting anomalies pointed out by Mr. Lachs and Mr. Bartoš were resolved by Mr. Castrén's proposal, and incidentally, by the Special Rapporteur's draft, in so far as both texts specified that States still parties could decide to terminate the treaty. To make it quite clear that the will of those States was independent, it might perhaps be appropriate slightly to amend the expression " unless the States still parties to the treaty so decide ", which occurred in both texts. It would be sufficient to specify that in special cases the States would take the necessary decisions.

43. Articles 15, 16 and 17 should be considered together, and the problems arising should be settled without going into the details of certain exceptional situations.

44. Mr. AGO said he acknowledged that it was possible to simplify article 15, but he could not accept so radical a simplification as that proposed in Mr. Castrén's text. It was not enough to say, as was done in paragraph 1 of that text, that the provisions of a treaty which related to its duration or termination were applicable, for all the provisions of a treaty were applicable, and there was no reason to specify that those relating to its duration or termination were particularly applicable. Moreover, the paragraph in question referred to articles 18 to 22; but those articles provided for other cases of termination. The Commission was engaged in codification; it must therefore state all the reasons for termination of treaties, and could not omit to mention expiry, and the resolutory condition. Merely to refer to the relevant provisions of treaties would be an over-simplification.

45. The Special Rapporteur's excellent text could be improved in points of detail. For example, paragraph 1 would become superfluous if, instead of enumerating the circumstances in which the treaty remained in force, the Commission decided, on the contrary, to list those in which the treaty came to an end. The resolutory condition, to which paragraph 2 referred, must certainly be