

9. In cases under Article 26 successive treaties necessarily involved different verbal formulations while in a case under Article 37—a modification in the application of the treaty was not necessarily directed to verbal changes (though modification could have the effect of textual alterations as well) but extended to an agreement (consensus) which while not altering the text yet effected a change in its operation or interpretation as between the parties so agreeing. Having regard to its multilateral character and the fact that it was the self-same multilateral treaty that was undergoing the transformation by reason of modification the Sub-Committee feels that the stringent conditions imposed by Article 37 were necessary. In regard to clause 2 of Article 37 the Sub-Committee considered it necessary to preserve the obligation to notify other parties to the treaty. The Sub-Committee considered that clause 5 of Article 26 which was in the nature of a saving provision was necessary as otherwise the rigorous conditions imposed by Article 37 could be set at naught by some of the parties to a multilateral treaty concluding a later multilateral treaty containing provisions that resulted in a modification of obligations.

10. As regards the general problem of amendment it was felt that in the Articles amendment meant a textual change while modification of a treaty did not necessarily involve amendment, the change or transformation being evident in the treaty's operational effects while the text remained unchanged. The Sub-Committee also wishes to record the fact that the delegate for Japan reiterated the view expressed in the plenary session that Article 38 should be deleted.

REPORT OF THE SUB-COMMITTEE ON ARTICLES 39 TO 75 OF THE I.L.C.'S DRAFT ARTICLES ON THE LAW OF TREATIES

Introduction

The Sub-Committee took into consideration the various articles seriatim with particular reference to matters of substance. The Sub-Committee did not consider it necessary to go into minute details as regards drafting changes.

Article 39

A suggestion had been made in the main Committee for the deletion of the word "only" in this Article, paragraphs 1 and 2. The Sub-Committee considered this proposal in some detail. However, if this proposal is accepted, then corresponding changes might be required in Article 57 so as to make it clear that the operation of other rules or grounds for terminating or suspending a treaty are not excluded on account of the present wording of Article 57. On balance, the Sub-Committee felt that it might be better to retain both Articles 39 and 57 as presently worded.

Article 40

Acceptable.

Article 41

Acceptable.

Article 42

Acceptable.

Article 43

The Sub-Committee considered Article 43 in some detail. In particular, it considered the advisability of substituting the term "internal law" by the term "constitutional law". Ultimately, the Sub-Committee felt that it might be better to leave Article 43 as worded in the draft articles.

Article 44

Acceptable.

Article 45

Acceptable.

Article 46

This article is acceptable to the majority. The Japanese member of the Sub-Committee was in favour of deletion of this article for reasons stated in the main Committee.

Article 47

As above.

Article 48

Acceptable.

Article 49

The majority favoured the addition of the words "or by economic or political pressure" at the end of the Article. The Japanese member of the Sub-Committee favoured the retention of Article 49 as drafted by the I.L.C.

Article 50

The Sub-Committee considered the advisability of deleting the final clause of this Article which provides for the manner

in which a peremptory norm of international law can be modified. Article 50 would then read only as follows :

"A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted."

The Sub-Committee felt, however, that it would be desirable to expressly recognise in Article 50 the possibility as well as the manner of modification of a peremptory norm, as otherwise Article 50 might be interpreted in a rigid and inflexible manner. The Sub-Committee therefore is in favour of retaining Article 50 as presently worded.

Article 51

Acceptable.

Article 52

Acceptable.

Article 53

Acceptable.

Article 54

Acceptable.

Article 55

Acceptable.

Article 56

Acceptable.

Article 57

Acceptable.

Article 58

Acceptable.

Article 59

Acceptable.

Article 60

The Sub-Committee agreed on adding the words "or suspension" after the word "severance". The proposal had originally been made in the meeting of the main Committee on December, 1967.

Article 61

Acceptable.

Article 62

Acceptable.

Article 63

Acceptable.

Article 64

Acceptable.

Article 65

The Sub-Committee puts it for consideration by the main Committee whether the term "with respect to" contained in Article 65 (3) should be replaced by the term "in favour of" so as to make it absolutely clear that a party whose fraud, coercive or corrupt act has been the cause of the nullity of the treaty, cannot invoke article 65(3). This point is made clear in the commentary, but it is for consideration whether article 65(3) itself adequately reflects this understanding.

Article 66

Acceptable.

Article 67

Acceptable.

Article 68

Acceptable.

Article 69

Acceptable.

Article 70

Acceptable.

Article 71

Acceptable.

Article 72

Acceptable.

Article 73

Acceptable.

Article 74

Acceptable.

Article 75

Acceptable.

The Japanese member of the Sub-Committee stated that not a few provisions of the draft articles contain as is admitted by the commentary by the I.L.C., certain concepts which may cause disputes in their application. In his view, it is desirable therefore to designate or establish a body which is invested with standing competence to pass objective and purely legal judgments upon such disputes when they have not been solved through diplomatic negotiations or some other peaceful means.

Sd/- Dr. Hassan Al Rawi
Chairman

Sd/- Mr. B. K. Nketiah
Member

Sd/- Dr. J. M. Mukhi
Member

Sd/- Mr. K. Suchiro
Member

(VIII) INTERIM REPORT OF THE COMMITTEE ON THE LAW OF TREATIES
ADOPTED AT THE NINTH SESSION,
NEW DELHI

The Draft Articles on the Law of Treaties as provisionally drawn up by the International Law Commission at its Fifteenth Session were placed before this Committee at its Sixth Session held in Cairo in 1964 under the provisions of Article 3 (a) of the Committee's Statutes read with clause (5) (a) of Rule 6 of the Statutory Rules. After a general discussion on the Draft Articles, the Committee at that Session had decided that the Secretariat should prepare a Study on the Law of Treaties including the question of accession to general multilateral conventions taking into account the specific questions that were raised by the Delegates in the course of deliberations at that Session. The Committee further decided to request the Governments of the participating countries to communicate their views on the Draft Articles on the Law of Treaties drawn up by the International Law Commission to the Secretariat of the Committee. The Committee also decided that priority should be given to this subject and that the same should be placed on the agenda of its next Session.

2. In accordance with the aforesaid directive, the subject was placed on the agenda of the Seventh Session of the Committee held in Baghdad in 1965. At that Session the Committee appointed a Special Rapporteur to prepare a report for consideration of the Committee. It was decided that the subject be taken up at its next Session with a view to formulating proposals and suggestions from the Asian-African viewpoint for consideration of the International Law Commission.

The Special Rapporteur of the Committee (Dr. Hasan Zakaria) was requested to prepare a report on the specific points arising out of the International Law Commission's Draft on the subject which required consideration from the Asian-African viewpoint. The Special Rapporteur of the Committee attended the Seventeenth Session of the International Law Commission where the Draft Articles on the Law of Treaties were finally drawn up.

3. The Report prepared by Dr. Hasan Zakaria, Special Rapporteur of the Committee, was placed before the Committee at its Eighth Session. The Committee was informed at that Session that the Commission had concluded its work on the Law of Treaties and that the United Nations was considering the question of convoking a Conference of Plenipotentiaries to meet in the year 1968 with a view to drawing up a multilateral convention on the subject of the Law of Treaties. The President of the International Law Commission (H.E. Dr. M.K. Yasseen) who attended the Eighth Session stressed the need for the Committee to consider the subject urgently and formulate its views before the Conference of the Plenipotentiaries met to consider the question. Taking note that the provisions of Article 3 (a) of the Statutes of the Committee contemplated that the Committee should consider the reports of the Commission and make recommendations thereon to the Governments of the participating countries, it was decided that the Committee would take up this question as a priority item during its Ninth Session. It also appointed Dr. Sompong Sucharitkul (Thailand) as Special Rapporteur to prepare a report for consideration of the Committee.

4. The Report of the Special Rapporteur together with a Brief prepared by the Secretariat has been placed before the Committee for consideration at this Session. In the Brief prepared by the Secretariat, the relevant background material, including the evolution of the Draft Articles from its earliest

to the final stages in the International Law Commission has been set out. The views expressed by Asian-African Members of the Commission, during consideration of the law of treaties by the International Law Commission itself and the opinions of the Delegates of Asian-African countries to the Sixth Committee of the General Assembly of the United Nations have also been made available to this Committee. The Secretariat in its brief has indicated as many as 35 points which require consideration of the Committee with regard to the Draft Articles drawn up by the International Law Commission. The Delegates present at this Session have also brought up certain other points for consideration of the Committee.

5. The Committee at this Session has given consideration to this subject and has decided to focus attention on certain questions with the object of assisting the Governments of the participating countries to formulate their views on the subject.

6. Due to lack of time at its disposal it has not been possible for the Committee to examine all the aspects of the various Draft Articles. Having regard to the urgency of the matter and its importance to the countries of the Asian-African region, however, the Committee has decided to draw up this Interim Report and to submit the same for consideration of the Governments confining itself to some of the more important issues.

7. It has generally been agreed that the Committee in drawing up its Report should indicate in a general manner the points which require consideration of the Conference of Plenipotentiaries and that it would refrain from suggesting any text by way of amendment to the Articles as that would be really a matter for the Drafting Committee appointed by the Conference of Plenipotentiaries.

8. The Committee's comments on the Draft Articles prepared by the International Law Commission are given in the Annexure to this Report.

9. The Committee had the advantage of the presence of H.E. Dr. M.K. Yasseen, Member of the International Law Commission, who rendered great assistance to the Committee in its discussion on the subject not only by explaining the object behind the particular articles which were under discussion in the Committee but also by expressing his personal views as an expert on the points which required clarification. The Committee wishes to place on record its deep appreciation and thanks to H.E. Dr. M.K. Yasseen for his assistance in the deliberations of the Committee on this subject.

10. The Committee wishes to take this opportunity to express its deep appreciation of the monumental work done by the International Law Commission on this complex subject and to state that the few comments which the Committee has made are to express the views of the members of the Committee on some of the aspects.

C.K. Daphtary
President

ANNEXURE

COMMENTS ON THE DRAFT ARTICLES PREPARED BY THE INTERNATIONAL LAW COMMISSION

Participation in General Multilateral Treaties

The majority in the Committee considers that the right of every State to participate in general multilateral treaties is of vital importance to the progressive development of International Law. General multilateral treaties concern the international community as a whole. If international law is to be in keeping with the real interest of the international community and if universal acceptance of the progressive development of this legal order is desirable, then the participation of every member of the community is essential. The majority in the Committee, therefore, considers that the Articles on the Law of Treaties should contain a provision regarding participation in general multilateral treaties.

One Delegate, however, holds that in view of the principle of freedom of contract and the existing practice of the international conferences held under the auspices of the United Nations and the possible complications that it may imply, it would be better that the draft articles be silent on this point.

Article 5

The Committee is of the opinion that paragraph 2 of this Article requires reformulation to include within its scope not only the units of a federation but all kinds of unions of States. It, therefore, suggests that paragraph 2 should incorporate the following principle :

In case of union between States, the capacity of Member States as well as the capacity of the units of a Federal

State to conclude treaties will be subject to the respective constitutional provisions of that union or the federation.

Article 7

The majority in the Committee is of the opinion that this article should be amended so as to include a provision to the effect that confirmation of the act performed without authority should be made within a reasonable time. This is suggested with a view to reducing any possibility of abuse. The minority has, however, no objection to retention of the present text of Article 7 of the International Law Commission's Draft.

Articles 10 and 11

The majority in the Committee considers that there is a lacuna in these provisions as no provision has been made to cover cases which do not fall either within Article 10 or within Article 11. It is felt that such cases are considerable and that a provision should be made, if possible, by linking up the two articles to cover cases which are not covered by the present text of these articles.

The majority is also in favour of the deletion of the words "or was expressed during the negotiation" in Article 10 1(c).

The minority in the Committee is in favour of retention of the present text of the Draft Articles.

Article 15

The Committee considers this article to contain a new norm of international law which could be supported as progressive development of international law.

The majority in the Committee is, however, in favour of deletion of clause (a) of this article as in its view the object of a proposed treaty might not be clear during the progress of negotiations. Some of the delegations are of the view that a provision like clause (a) of this article may hamper negotiations for a treaty.

Some members, however, are in favour of the retention of the present text.

Articles 27 and 28

The Committee discussed the provisions of these two articles in great detail. There was some difference of opinion in the Committee in regard to how the question of interpretation of treaties should be approached. There was on the one hand those who considered the task of interpretation to be the elucidation of the text of a treaty and on the other those who held the view that the discovery of the true intention of the parties to be the paramount function of interpretation. One view expressed was that the provisions of these articles do not sufficiently take into account that the main aim of interpretation is to look for the real intention of the parties and that these articles should be suitably modified to bring out that position. Another view that "preparatory work" as a source of determination of real intention of the parties should be included in Article 27 so as to make it a primary means of interpretation and that this source should not be assigned a secondary place in Article 28. A suggestion was, therefore, made for assimilation of Article 28 to Article 27 as a new sub clause (d) to clause 3 of Article 27.

The majority whilst appreciating that it is basic to the whole process of interpretation that the goal should be the ascertainment of the true intention of the parties concludes that the primary emphasis should be placed on the intention as evidenced by the text, that is to say, the actual terms, of the

treaty and that it would not be either necessary or desirable to state specifically in Article 27 that the object of interpretation is the discovery of the intention of the parties. According to the majority view, this is manifest from the formulation of the general rule in clause (1) which is a succinct statement of the essential rule. They feel that by the further elaboration of what is meant by the expression "the text" in clause (2) and by the indication of additional sources of interpretation in clauses (3) and (4), the International Law Commission's draft has taken full account of the paramountcy of the element of intention. The majority, therefore, is of the opinion that the draft rules of interpretation as formulated by the International Law Commission are quite adequate to the ascertainment of intention and are an inherent body of rules emphasising the unitary character of the interpretative process. The majority is also of the view that the distinction contemplated in Articles 27 and 28 should be maintained. They feel that a formulation of the rule which does not stress sufficiently the primacy of the text in relation to the extrinsic sources of interpretation would tend to considerable uncertainty and that there should be no room for recourse to preparatory material if the textual reading establishes a clear meaning in accordance with the rules specified in Article 27. The majority is further of the view that though no rigid distinction is possible and that a nexus exists between the several sources, it is unable to accord preparatory material a parity of status with the primary criteria mentioned in Article 27 and is of the opinion that the two articles should be separate and distinct.

Articles 30, 31, 32 and 33

The Committee considered the provisions of this group of articles which deal with the rights and obligations of third States. The majority in the Committee is of the view that Article 32 be amended by deletion of the words "and the State assents thereto. Its assent shall be presumed so long

as the contrary is not indicated" and substitution therefor of the words "and the State has expressly consented thereto". The majority is also of the opinion that Article 30 be amended by interpolation of the word "express" before the word "consent". The majority is of the opinion that as in the case of obligations the express consent of such third State should be a condition precedent to the creation of a right also. Whatever may be the true position in regard to stipulations for the benefit of a third party in systems of municipal law, in international relations, the express consent of such third State should be required even in the case of the conferment of rights consistently with the principle of sovereign equality of States. The majority feels that such a requirement would also reduce any uncertainty in regard to the question whether a third State has assented to the conferment of the right and insistence of such consent by the third State would in the case of multilateral treaties tend to the effective participation of all States in treaties of a law-making character. The majority is also of the view that if express consent of the third State is stipulated as a requirement it would help to reduce the danger of the creation of rights which carry with them contingent obligations to which such third State may well be deemed to have assented by its silence.

The minority, however, is of the view that the draft articles as drawn up by the International Law Commission are adequate.

Article 37

A view was expressed in the Committee that the modifications contemplated in Article 37 should be in writing so as to obviate any uncertainty. The majority, however, was in favour of the provision as in the draft articles.

Article 38

A view was expressed in the Committee that this article should be deleted as subsequent practice was too vague and

uncertain a criterion for modification of a treaty. Another view is that there could be no objection to accepting this article as in the present draft with the clarification that the "parties" in this Article meant all the parties to a treaty. A third view was that there was no objection to the present text as in the International Law Commission's draft.

Article 39

The principle contained in this article was generally found to be acceptable to the majority. A delegation was, however, of the view that the word "only" in paragraphs 1 and 2 of this article should be deleted.

Article 43

The Committee considered the provisions of this article in some detail. The majority was in favour of retaining the article as it is. A view was, however, expressed that the provision of Article 43 as drafted might lead to practical difficulties and therefore should be brought in consonance with the principle embodied in Article 110 of the United Nations Charter. Moreover, it was suggested that if the Committee retains the principle adopted in Article 43, the expression "constitutional law" be substituted in place of the words "internal law".

Articles 46 and 47

One delegation was in favour of deletion of these articles as in its view the provisions of these articles bring in an element of doubt in the legal security and order. In the view of the delegation the provisions of Article 47 in regard to the concept of corruption were too vague.

Article 49

The majority in the Committee is in favour of the addition of the words "or by economic or political pressure" at the end of the article. The minority is, however, in favour of the retention of the article as in the draft.

Article 50

Whilst the majority had no objection to the present draft being retained, one delegation expressed the view that this is one of the concepts which may cause dispute in its application. In the view of the delegation it was desirable to designate or establish a body which is invested with standing competence to pass objective and purely legal judgments upon such disputes when they have not been solved through diplomatic negotiations or some other peaceful means.

Articles 58 and 59

One delegation was of the view that these articles should be so formulated as to provide a safeguard against situations in which the destruction of the object or a change in the fundamental circumstances is brought about by the voluntary act of the party itself.

Article 60

The majority in the Committee is in favour of the addition of the word "suspension or" before the word "severance". A minority of one is of the opinion that the addition of these words is superfluous.

NOTE

A general comment on the draft articles made by one delegation is that there are quite a few provisions in the draft articles which contained as is admitted by the commentary of the International Law Commission certain concepts which may cause disputes in their application. The delegation considered it desirable to designate or establish appropriate bodies or authorities invested with standing competence to resolve such disputes in a purely objective and legal manner.

Sd/- C.K. Daphtary
29-12-1967

(IX) DISCUSSIONS HELD IN THE
COMMITTEE AT ITS TENTH SESSION,
KARACHI, ON THE LAW OF TREATIES

Meeting held on the 21st of January, 1969

at 2.30 P. M.

*Mr. Sharifuddin Pirzada,
President of the Committee,
in the Chair.*

President :

Now we take up the next item relating to the Law of Treaties, but before I take up this item I would like to call distinguished Delegates to express their views about the manner in which we should take this and the other two topics which are on the agenda.

Jordan :

Inasmuch as the number of Articles that are the subject of different points of view is limited, I am inclined to think that it would be the best if we leave it to the distinguished Delegates to mention those particular Articles in which they have a particular point of view. That would limit the discussion to mere points.

President :

It is being suggested that we will follow the following procedure :

- (1) There may be a statement by H. E. Dr. Tabibi ; and
- (2) thereafter there can be a broad analysis of what happened in Vienna and indications of points which require consideration. This can be done by the various Delegates.

Thereafter each delegate may indicate the points on which discussion should be held. Thereafter, if it is agreed to, we may appoint sub-committees as may be required. After the appointment of sub-committees, we may also have the views of Delegates and Observers on the various issues involved. This is the suggestion. If it is acceptable, it may be so indicated.

Ceylon :

If I am permitted to put forward a suggestion, to expedite matters, I would say that after a preliminary discussion on and pinpointing of the matter concerning the Convention on the Law of Treaties by the full Committee, could there not be a Sub-Committee in which every Delegation will have a representative in order to thrash out the points which have been first highlighted. I think the consequence may be that the Report of the Sub-Committee will then be easier to deal with, for the reason that each Delegation will have a voice. I do not know whether it may be possible that every Delegation might be represented on the Sub-Committee.

President :

We should like to have a clarification from the Ceylonese Delegation. Whether it would be possible to have one or more Sub-Committees in respect of the Law of Treaties.

Ceylon :

It is my suggestion that there should be only one Sub-Committee. There should be a Sub-Committee certainly to deal with what in my mind and perhaps in the opinion of the distinguished Delegates are the crucial matters. If necessary, there can be a smaller Sub-Committee in the usual way to deal with other matters.

President :

The distinguished delegate from India.

India :

In regard to the suggestion made by the distinguished Delegate of Ceylon, may I say that it is an excellent proposition. We may have to adopt, and perhaps we will have to adopt it. It would perhaps be better to have at first a discussion along the lines indicated by you, and after you have ascertained the views, we may go on to the constitution of the Sub-Committees.

President :

As to the suggestion made by the distinguished Delegate of Ceylon and seconded by the distinguished Delegate of India, it seems that the consensus is in favour of adopting that suggestion. I, therefore, take it that we proceed with the procedure indicated and then come to the constitution of the Sub-Committees.

International Law Commission

H. E. Dr. A. H. Tabibi

Mr. President, let me take this opportunity, first of all, to express my deep felicitation for the unanimous election of yourself as the President of this Session of the Asian-African Legal Consultative Committee. Knowing your ability as a distinguished jurist and also as a distinguished diplomat of your country, I am sure that the affairs of this Session are in good hands, and I wish you all success in your work and success of the Committee as a whole.

I want also to express my gratitude for inviting me to explain my views on the most important topic which is now before the Committee this year, namely, the Law of Treaties. But it is a little difficult for me to speak as a representative of the International Law Commission. As you know, the practice of the International Law Commission is that we in our personal capacity decide the various aspects of a given text and we request the Secretary-General to submit to Governments our

views for their comments and observations. We receive comments and observations and go over them and when we are satisfied ourselves, we unanimously adopt the text and send it for adoption by the countries concerned. I said that it is difficult to express on behalf of the Commission because what the Commission wishes is that the text unanimously adopted is the one that they have submitted to the Vienna Conference and I do not want to speak in such a manner as to explain views contrary to the unanimous decision which we arrived at during the five years of deliberations on the text of the draft convention, which is now before the Vienna Conference.

I also do not want to express my views as a representative of my country since I am not speaking here as a member of the Committee, because on that issue also it is very difficult for me to come here as an observer of the International Law Commission and influence the Committee and members as a representative of a country of which I may be an observer. But since you have been kind enough to invite me to speak, I will speak as a completely neutral person on behalf of the Asian-Africans and on the basis of my personal observation of what I have seen in Vienna during the last session, and also make some observations on those important and crucial points, which we shall take into account between now and the next Vienna Conference. So, with this comment, Mr. President, I want to say that we should first endorse a resolution like the other resolutions that you have adopted unanimously. It is a resolution to thank the Secretariat of the Asian-African Legal Consultative Committee for preparation of the excellent documentation in regard to this topic.

As was stated this morning by the distinguished Vice-President of the Conference, the Ambassador of Jordan, this brief on the Law of Treaties and its supplements will be very helpful not only to the members of the Afro-Asians but also to other members who will participate in the next Vienna Conference, and I suggest that these should be circulated to

all the members of the Afro-Asian family so that they could have this excellent piece of work in order to use it at the forthcoming Vienna Conference. I, on my own part, as a representative of the International Law Commission, will communicate to the Secretary-General of the Conference my own personal idea if it is possible to circulate this as a document of the Conference for the benefit of all the participants in that Conference.

I am very happy to see here amongst us many participants of the Afro-Asian group, whether they are members of the Committee or just they are sitting here as observers, who took part in the Vienna Conference. I am glad that the Governments took interest to send all those who have taken part in the Vienna deliberations, and I think, it is a good decision by your Committee that we should discuss in detail and thrash out our views in regard to our position to be taken in the next session.

As we know from the brief prepared by the Secretariat of the Committee, there are three groups of Articles before the next session of the Conference. The first category of articles are those which have been adopted unanimously or by two-thirds vote, and I thank those who have taken part in the unanimous adoption of these articles or with 2/3rds vote. Now no decision will be taken in any international organisation without the participation and general support of the Afro-Asian participants, and since it was with the wide support of the Afro-Asian group in the Vienna Conference that the articles have been adopted, we should try to maintain our position and not to frustrate those articles which have been adopted already.

Then the second group of articles are those which have not achieved two-thirds vote. They are controversial and might be discussed again both in the plenary and, if it is possible, in the Committee.