

Document:-
A/CN.4/SR.719

Summary record of the 719th meeting



Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1963, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

organization or were drawn up within an international organization”.

Article 2 bis, with the title proposed by the Chairman, was adopted by 15 votes to none with 1 abstention.

ARTICLE 27 (LEGAL CONSEQUENCES OF THE NULLITY OF A TREATY)

95. Sir Humphrey WALDOCK, Special Rapporteur, said that in the light of the discussion at the 714th meeting (paras. 75 - 84) and in order to safeguard the position of parties which had relied on a treaty in good faith to perform certain acts, the Drafting Committee had prepared a new text for article 27, which read:

“ 1. (a) The nullity of a treaty shall not affect the legality of acts performed in good faith by a party in reliance on the void instrument before the nullity of that instrument was invoked.

“(b) The parties to that instrument may be required to establish as far as possible the position that would have existed if the acts had not been performed.

“ 2. If the nullity results from fraud or coercion imputable to one party, that party may not invoke the provisions of paragraph 1.

“ 3. The same principles shall apply with regard to the legal consequences of the nullity of a State's consent to a multilateral treaty.”

96. Mr. CASTRÉN asked whether the question of responsibility would be dealt with in the commentary on article 27.

97. Sir Humphrey WALDOCK, Special Rapporteur, said he had drafted a passage for inclusion in the commentary explaining that the question of responsibility had not been covered in articles 27 and 28, because the Commission considered that it belonged to another branch of international law.

98. Mr. TUNKIN proposed the insertion of the words “as such” after the word “treaty” in paragraph 1 (a).

99. Sir Humphrey WALDOCK, Special Rapporteur, said that amendment was acceptable.

Article 27, thus amended, was adopted by 15 votes to none with 1 abstention.

Other business

[Item 9 of the agenda]

100. Mr. de LUNA said he wished to make a few remarks on the treatment accorded to the Spanish language. The improvement on the previous year in regard to the interval between the distribution of English texts and the Spanish translation must be acknowledged. It was, unfortunately, necessary, when there were three working languages, to choose a “key” language, which ought to be that used by the Special Rapporteur. But was there any reason why the summary records should not

be issued in the language used by each speaker, and then translated into the language of the Special Rapporteur, which, in the case of the law of treaties, was English?

101. Mr. ROSENNE proposed that the Commission include in Chapter V of its draft report a passage reading:

“*Delay in publication of the Yearbook*

“The Commission has noted with concern that publication of the volumes of the *Yearbook* is being subjected to an increasing delay. In making this observation the Commission expresses the hope that steps will be taken to ensure that in future the *Yearbook* will be published as soon as possible after the termination of each annual session.”

102. His proposal was not made in any spirit of criticism, but it was obviously essential that both volumes of the *Yearbook*, in the three languages, should be available to governments when they were asked to prepare their comments on the Commission's drafts, and, if possible, to delegations on the Sixth Committee when they had to consider the Commission's reports.

103. Mr. BRIGGS supported Mr. Rosenne's proposal.

The proposal was adopted.

The meeting rose at 1 p.m.

719th MEETING

Thursday, 11 July 1963, at 9.30 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Draft report of the Commission on the work of its fifteenth session (A/CN.4/L.102 and Addenda)¹

CHAPTER I: ORGANIZATION OF THE SESSION (A/CN.4/L.102)

Chapter I was adopted, with various drafting changes

CHAPTER IV: PROGRESS OF WORK ON OTHER QUESTIONS UNDER STUDY BY THE COMMISSION (A/CN.4/L.102/ADD.2)

Paragraph 3 (53 in final report)

1. Mr. TUNKIN proposed the deletion of the last two sentences, which read: “Some members stressed the codification of existing rules, others the progressive development of those rules. However, it was considered that the question whether, in this subject, more prominence should be given to codification or to progressive development could not be finally settled until the substance of the specific problems involved was studied”. The first of those sentences could give the misleading

¹ For final report see *Official Records of the General Assembly, eighteenth session, Supplement No. 9.*

impression that some members favoured codification rather than progressive development and that other members held the opposite view; the second sentence was quite unnecessary.

2. Mr. CADIEUX suggested that only the penultimate sentence and the word "However" in the last sentence should be deleted.

3. Sir Humphrey WALDOCK, General Rapporteur, said that the point could perhaps be met by replacing the two sentences by some such wording as: "How far the work done would represent codification and how far progressive development could not be ascertained until the substance of the specific subjects was studied."

4. Mr. BRIGGS said it would be better to omit the two sentences altogether. It had been the unvarying experience of the Commission that almost every subject involved both codification and progressive development.

Mr. Tunkin's proposal was adopted unanimously.

5. Mr. ROSENNE proposed that a paragraph be added to record that the Commission had held a short discussion on the topic of relations between States and inter-governmental organizations.

It was so agreed.

Chapter IV was adopted as amended, with various drafting changes.

CHAPTER V (OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION) (A/CN.4/L.102/ADD.3)

Paragraph 4 (70 in final report)

6. Mr. BARTOŠ, referring to the first sentence of paragraph 4, said that several members had suggested, at earlier sessions, that the Commission should widen its co-operation with the other bodies concerned with international law. But the Commission's report had never mentioned the matter. A sentence on that point should be added, for it should not be neglected any longer. Large bodies like the International Law Association, of which he was Vice-Chairman, and the Institute of International Law might well be surprised that the Commission made no attempt to get in touch with them and did not keep them informed of the topics it was studying. Even associations not having consultative status with the United Nations could be enabled to follow the Commission's work; for example, the Commission could inform them of its plans for future studies. The prestige of the Commission was at stake too; it was not in its interests to isolate itself from the other bodies concerned with international law.

7. Mr. ROSENNE said that the Austrian representative had raised that matter during the discussion of the Commission's report in the Sixth Committee of the General Assembly.² He suggested that the question of expanded co-operation with other bodies, official and otherwise, should be placed on the Commission's agenda for its sixteenth session.

² *Official Records of the General Assembly, seventeenth session, Sixth Committee, p. 43.*

8. Mr. LIANG, Secretary to the Commission, said he welcomed Mr. Rosenne's proposal.

9. Paragraph 4 dealt with the co-operation of the Commission with those inter-governmental organizations with which it had so far had relations. The exchange of observers with those bodies involved considerable expense and, of course, required certain budgetary appropriations.

10. The position regarding co-operation with non-governmental organizations was different. The present practice was to forward sets of the Commission's documents to the secretariats of those bodies. If the Commission considered it important that a sufficient number of sets should be sent to them for all their members it would be a different matter, and new regulations on the distribution of documents would be required. The best course would be for the Commission to discuss the whole subject, as suggested by Mr. Rosenne, and take some concrete measures.

11. The CHAIRMAN, speaking as a member of the Commission, said that the point raised by Mr. Bartoš should be met by a full discussion at the sixteenth session.

12. Mr. CADIEUX supported Mr. Rosenne's suggestion. The text under consideration reflected the conclusions which the Commission had reached after discussing the question of co-operation. It had considered widening its co-operation with certain intergovernmental bodies, but as to making contact with non-governmental bodies — a question which deserved consideration, but which had political implications — it would be better merely to indicate the agreement reached by the Commission and reserve its position on the wider issue raised by Mr. Bartoš.

13. Mr. PAL observed that the Commission was discussing its report on what it had already done, not what it would do in the future.

14. Mr. de LUNA said that a reference to the widening of co-operation by the Commission with other bodies would not in any way prejudice a decision concerning which bodies it was to co-operate with. It was customary in all countries to publicize work on codification to some extent, in order to ascertain the views of as many jurists as possible. That had been done when the Italian codes had been revised. It would be for the Sixth Committee and the General Assembly to consider the question of wider co-operation between the Commission and other bodies, and to take a decision on the subject.

15. The CHAIRMAN said that the Commission could not, at that late stage, consider the whole question of expanded co-operation with other bodies.

16. Mr. BARTOŠ asked that, since Mr. Rosenne and he had brought up the point during the discussion, paragraph 4 should merely state "Some members of the Commission proposed . . .", instead of "The Commission further recommended . . .".

17. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed

to the inclusion in paragraph 4 of a passage to the effect that the question of expanded co-operation had been raised by some members and that the Commission had decided to place the subject on its agenda for the sixteenth session.

It was so agreed.

Paragraph 5 (71 in final report)

18. Mr. LACHS said that since the time-limit for government comments on the subject of State succession had been extended to 1 January 1964, it was unlikely that he would be able to have a report ready in time for the Commission's sixteenth session. He therefore suggested that the words "if possible" should be inserted after the words "(preliminary report on the aspect of treaties)". The text, as drafted, did not cover the possibility of the Special Rapporteur not being able to submit a report.

19. Mr. AGO said that Mr. Lachs' point also applied to the topic of State responsibility. It would be advisable to change the order of the items and to place "relations between States and intergovernmental organizations", which was certain to be considered in 1964, before "State responsibility" and "State succession", neither of which was likely to be dealt with before 1965.

20. The CHAIRMAN suggested that the order of the items should be: (1) Law of treaties; (2) Special missions; (3) Relations between States and intergovernmental organizations; (4) State responsibility; (5) Succession of States and governments. In the case of items (4) and (5), the words "if ready" could be added after the words "preliminary report".

It was so agreed.

Paragraph 10 (80 in final report)

21. Mr. BRIGGS pointed out that it was stated that the Commission had decided that it would be represented at the next (eighteenth) session of the General Assembly by its Chairman. To the best of his recollection the Commission had not taken such a decision. He therefore formally proposed that the Commission now decide that it be represented at the eighteenth session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Eduardo Jiménez de Aréchaga.

Mr. Briggs's proposal was adopted unanimously.

Paragraph 11 (79 in final report) (A/CN.4/L.102/Add.6)

22. Mr. BARTOŠ said he was not able to find any mention among the Commission's conclusions of Mr. Paredes' complaint, which had been supported by the Commission, regarding the delay in the distribution of documents in Spanish.

23. Mr. ROSENNE said that, in view of the Commission's criticisms in paragraphs 84 and 85 of the report on its fourteenth session,³ of the facilities provided for the production of documents, summary records and

³ *Official Records of the General Assembly, seventeenth session, Supplement No. 9.*

translations, it was only fair to preface any remarks on the subject of delay in the distribution of documents in Spanish by a statement that there had been a marked improvement in the services provided to the Commission.

24. Mr. de LUNA supported Mr. Rosenne's proposal. The Commission certainly should acknowledge the praiseworthy efforts made by the Secretariat at the present session; there had been an improvement in the translations into Spanish. It was unfortunately inevitable that there should be a time-lag between the distribution of original documents, especially documents from the Drafting Committee, and the distribution of the translations.

Mr. Rosenne's proposal was adopted.

25. Mr. PAREDES, after thanking Mr. Bartoš for his support in the matter, suggested that the production of documents in Spanish could be speeded up if the Drafting Committee would prepare the text of its articles in Spanish as well as in English and French. It could quite easily do that if it would consult the Spanish-speaking members of the Commission.

26. Mr. AGO said that great progress had been made in both the promptness of distribution and the quality of translation of documents in French.

27. The CHAIRMAN said that the Drafting Committee always included at least one Spanish-speaking member. He had himself served on the Drafting Committee and it was his experience that, if a text was discussed and formulated in English, neither the French-speaking nor the Spanish-speaking members of the Drafting Committee could be expected, in addition to participating in the discussion on substance, to accept responsibility for the translation into French and Spanish. The responsibility for translation must necessarily be accepted by the Secretariat.

Chapter V was adopted as amended, subject to drafting changes.

CHAPTER II: LAW OF TREATIES

28. The CHAIRMAN invited the Commission to consider the commentaries on articles 5-8 and 11-12 (A/CN.4/L.102/Add.1).

29. Sir Humphrey WALDOCK, Special Rapporteur, said he had not had much time to prepare the commentaries because decisions on some of the articles had been taken late in the session. Some of the footnotes might need revision or amplification.

30. It would be explained in the introduction to chapter II of the report that article 1 of his original draft, containing definitions, had been omitted and that the definitions in Part I would apply to the present articles.

Commentary on article 5 (31 in final report)

Paragraph 12

31. Mr. BRIGGS proposed that, in the last sentence, the words "prevailed in the Commission and" should

be deleted because, in fact, the reference was to a minority view that had been reflected in article 5 as the result of a compromise.

The commentary on article 5 was adopted with that amendment and various drafting changes.

Commentary on article 6 (32 in final report)

Paragraph 3

32. Mr. CASTRÉN proposed that the words "though the circumstance that Denmark was then under enemy occupation renders the case a somewhat special one" at the end of the sixth sentence should be deleted, because that circumstance was no excuse for a minister concluding an agreement without full powers to do so. Otherwise, the whole sentence should be deleted.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that he had mentioned that case, which owing to its special features was no safe guide, only because it had been brought up during the discussion.

34. Mr. de LUNA said that although he had been responsible for mentioning the case during the discussion the reference could well be dropped from the commentary.

It was so agreed.

The commentary on article 6 was adopted as amended.

Commentary on article 7 (33 in final report)

35. Mr. CASTRÉN pointed out that the commentary did not say anything about paragraph 2 of the article; perhaps it was not necessary if the commentary on the article concerning severance was full enough.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that he would expand the commentary to cover that point.

Paragraph 5

37. Mr. BRIGGS said that the formulation of the first sentence was hardly satisfactory. It ought to be stated in terms of fraud giving the injured party the right to invoke the voidability of the treaty.

38. Sir Humphrey WALDOCK, Special Rapporteur, said he would amend the sentence accordingly.

The commentary on article 7 was adopted with the amendments proposed.

Commentary on article 8 (34 in final report)

Paragraph 7

39. Mr. CASTRÉN said he questioned whether the second sentence faithfully reflected the decision reached by the Commission. Perhaps only the first sentence should be retained.

40. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that in his original draft (A/CN.4/156) he had emphatically stipulated that the error must have

related to a fact or state of facts, but the Commission had not wished to be so absolute in the matter and some members had pointed out that the possibility of error relating to regional rules of customary law, for example, must be taken into account. He had sought to reflect that general view in the text of the article and the commentary.

41. Mr. VERDROSS thought that the second sentence of paragraph (7) was useful, because it would show governments that the matter had been raised and that the Commission had taken a decision on it.

42. Mr. BARTOŠ said that the question had been discussed at length in the Drafting Committee, and that the Commission had considered the Committee's report when Mr. Castrén had been absent. The Commission had voted on the article after explanations given by the Special Rapporteur (705th meeting, paras. 1-18).

The commentary on article 8 was adopted with various drafting changes.

Commentary on article 11 (35 in final report)

Paragraph 1

43. Mr. ROSENNE proposed the deletion of the third, fourth and fifth sentences, as he thought it unnecessary to include such historical illustrations. He particularly disliked the reference to Hitler by name.

44. Mr. TUNKIN said that the illustrations were important and should be retained.

45. Mr. LACHS agreed with Mr. Tunkin.

46. Sir Humphrey WALDOCK, Special Rapporteur, said he would redraft the fifth sentence, omitting the reference to Hitler.

Paragraph 3

47. Mr. BRIGGS considered that the first sentence should be re-drafted to read: "The article permits the State to invoke the nullity of consent given, etc."; that would remove the suggestion that coercion automatically nullified a treaty. He pointed to an apparent contradiction between paragraphs 1 and 2 of article 11; while paragraph 1 seemed to suggest automatic nullification, paragraph 2 permitted a State to "invoke" nullity.

48. The CHAIRMAN, speaking as a member of the Commission, questioned whether the first sentence of paragraph 3 was necessary at all.

49. Mr. BARTOŠ drew Mr. Briggs' attention to a difference in drafting between article 12 (36 in final report) and article 11. In the commentary on article 11, the word "nullifies" was used, whereas under article 12 a treaty was void *ipso jure*.

50. Mr. AGO referring to the second sentence in paragraph 3 said that a distinction should be made between automatic nullity and nullity established on the initiative of the injured party.

51. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had left open the question of the relationship between the article and the procedural provisions. It had come near to equating the personal coercion of a representative with coercion of a State — a point of view which he did not share.

52. The CHAIRMAN, speaking as a member of the Commission, pointed out that when discussing article 25 (714th meeting, paras. 17-56) the Commission had clearly endorsed Mr. Pal's view that coercion could provide a ground for the assertion of nullity, but that nullity did not follow automatically. The Commission was by no means contemplating a unilateral right of repudiation in such cases.

53. Mr. BARTOŠ said that at all stages in its work the Commission should take account of contradictions which might be noted and try to remedy them. There was a serious contradiction in article 11. With regard to general effects, the concept of automatic application was adopted, but with regard to severance (paragraph 2), it was said that a State might "invoke" the coercion. He asked the Special Rapporteur to give his opinion.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that if there were any contradiction between paragraphs 1 and 2 of article 11, it could be removed by substituting the word "treat" for the word "invoke" in paragraph 2.

That amendment was adopted.

55. The CHAIRMAN speaking as a member of the Commission, proposed that the first sentence of paragraph 3 should be deleted and that the word "absolute" should be substituted for the word "complete" at the end of the second sentence.

It was so agreed.

56. Mr. ROSENNE proposed that the last part of the second sentence, following the semi-colon, should read: "it concluded that the use of coercion against the representative of a State for the purpose of procuring the conclusion of a treaty would be a matter of such gravity that the article should provide for the absolute nullity of consent to a treaty so obtained or for the severance of the tainted provisions at the option of the injured State".

57. Mr. AGO said that a distinction should be made. Article 25 dealt with procedure but the Commission had wished to establish a very clear distinction where grounds for nullity were concerned. In the cases of fraud and error, the Commission had said that consent was vitiated, but that the vitiation would produce effects only if invoked by the party concerned. In the case of coercion, on the other hand, whether it was directed against a person or against the State, or whether it involved conflict with a *jus cogens* rule, the Commission had not wished the nullity to depend on the will of one party; it took effect *ex lege and erga omnes*. Of course some form or procedure for recognition of the fact would also have to be followed in the latter case; but the distinction was fundamental and it should not be

lost sight of merely because there was a procedure to be followed.

The commentary on article 11 was adopted as amended with various other drafting changes.

Commentary on article 12 (36 in final report)

Paragraph 1

58. Mr. TSURUOKA, noting that the Tokyo Charter was mentioned in the fourth sentence, asked whether there was any such charter.

59. Sir Humphrey WALDOCK, Special Rapporteur, said that in order to satisfy Mr. Tsuruoka, he would refer to the Charters of the Nuremburg and Tokyo tribunals.

Paragraph 3

60. Mr. YASSEEN said he had raised the question of the scope of article 12 (705th meeting, paras. 31-52) and he thought that the commentary took too little account of the comments he had made. In the second sentence it was stated that "Some members of the Commission expressed the view that certain extreme forms of economic pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion". But economic pressure was not the only form of pressure that need be taken into account: for example, there could also be political pressure. He therefore asked the Special Rapporteur to mention that some members had suggested that the article should cover all forms of coercion.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that perhaps Mr. Yasseen's point could be met by substituting the words "certain other forms of pressure" for the words "certain extreme forms of economic pressure".

62. Mr. BARTOŠ said that, at the same time as Mr. Paredes and Mr. Yasseen, he, too, had advocated mentioning all forms of pressure.

63. Mr. EL-ERIAN said he fully supported Mr. Bartoš on the principle, but he thought the Special Rapporteur's suggested amendment would cover the point.

64. Mr. de LUNA suggested the words "any other forms of pressure". Modern technical facilities, such as broadcasting, made it possible to exert pressure of many kinds.

65. Mr. PAREDES thought that the words "certain extreme" should be replaced by the words "the other".

66. Mr. CASTRÉN said he was surprised that some members of the Commission wished to go so far as to include all forms of pressure. The word "certain" could, of course, be deleted if they wished, but he did not share their opinion.

67. Mr. de LUNA proposed that, if the word "extreme" was deleted, it should be replaced by the word "serious". It was necessary to use a qualifying adjective, because in international politics there were always pressures.

68. Mr. YASSEEN said it was merely a question of making the commentary reflect what had been said. He remembered having spoken of the condemnation of all forms of coercion.

69. The CHAIRMAN, speaking as a member of the Commission, proposed that the words "certain extreme forms of economic pressure" be replaced by the words "any other form of pressure".

It was so agreed.

70. Mr. de LUNA, noting that the word "serious" had not been adopted, asked that it be mentioned in the record that he was not among the members of the Commission referred to in the second sentence of paragraph 3.

Paragraph 5

71. Mr. TUNKIN drew attention to the third sentence, reading: "The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, the expression of general rules of international law which are of universal application and which find their authoritative formulation in the Charter". In order to avoid theoretical controversies, he proposed that the words "the expression of general" and the words "and which find their authoritative formulation in the Charter" should be deleted, and that the word "general" should be inserted before the words "international law".

It was so agreed.

72. Mr. AGO proposed that the word "today" should be inserted before the words "of universal application" so as to avoid giving the impression that the rules referred to were of long standing.

It was so agreed.

Paragraph 6

73. Mr. TUNKIN said that, again in order to forestall doctrinal argument, he proposed that the words "international law" be substituted for the words "international public order" in the second sentence, and that the words "of the United Nations Charter" be substituted for the words "of international public order" at the end of the paragraph.

74. The CHAIRMAN, speaking as a member of the Commission, supported Mr. Tunkin's first amendment. He thought that the last sentence, which might prove to be controversial, could be omitted, as it had no direct bearing on the Commission's discussions.

75. Sir Humphrey WALDOCK, Special Rapporteur, maintained that the last sentence dealt with a point that had been discussed at considerable length and had been given particular prominence by Mr. Ago (682nd meeting, paras. 38-42).

76. Mr. de LUNA supported the Chairman's proposal that the last sentence be deleted.

77. Mr. ROSENNE said he would regret the deletion of the reference to international public order, the existence of which was an important point brought out during the discussion.

78. Mr. YASSEEN said that the text under discussion was a commentary, not an article, and the last sentence referred to a consequence, which was perfectly appropriate in a commentary.

79. Sir Humphrey WALDOCK, Special Rapporteur, said that the last sentence could be retained with the substitution of the words "in effect by the conclusion of a new treaty" for the words "by a process of 'novation'".

80. Mr. TUNKIN said that although it was generally recognized that there were certain rules of *jus cogens* from which States could not derogate, the concept of an international public order was a controversial one.

81. Mr. YASSEEN agreed with Mr. Tunkin; he would not press for the retention of the expression "international public order", but he attached great importance to the substance of that idea. It covered rules from which States could not derogate by agreement.

The amendments proposed by Mr. Tunkin and the Special Rapporteur were adopted.

The commentary on article 12 was adopted as amended.

82. Mr. PAREDES said he would be obliged to abstain from voting on the commentary as a whole, as he had not had enough time to study it.

83. Mr. TUNKIN said he wished to make a general observation on commentaries on drafts prepared by the Commission; it was not intended as a criticism of the Special Rapporteur on the law of treaties.

84. The time had come for the Commission to abandon its traditional practice of relying exclusively on the works of western writers. No reference was made in the report on the law of treaties to works by socialist lawyers, even though some had been translated into English or French, or to Asian or African writers. The Commission was engaged in framing general rules of international law and must take account of the views of authorities throughout the world.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that he would have liked to engage in further research, but had been prevented from doing so by the need to submit his report in time for it to be translated into other languages. He would be glad to receive the names of authors of further publications concerning the law of treaties, so that he could enlarge the bibliography that might be attached to his report.

86. The CHAIRMAN said that any member of the Commission was at liberty to communicate the titles of further works of reference to the Special Rapporteur.

The meeting rose at 1 p.m.