

Document:-
A/CN.4/SR.721

Summary record of the 721st meeting

Topic:
<multiple topics>

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

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ARTICLE 54 (FORMERLY ARTICLE 29): LEGAL CONSEQUENCES OF THE SUSPENSION OF THE OPERATION OF A TREATY

Article 54 was adopted without discussion.

Part II of the draft articles as a whole, as amended, were adopted unanimously.

72. Mr. BARTOŠ explained that although he had voted in favour of the draft articles as a whole, he maintained his reservations regarding certain specific paragraphs, which were recorded in the summary records. On the whole, he thought the draft articles adopted by the Commission were suitable for submission to governments.

73. Mr. YASSEEN said his position was similar to that of Mr. Bartoš.

74. Mr. AGO moved a vote of thanks to the Special Rapporteur on the law of treaties.

The motion was carried by acclamation.

75. Sir Humphrey WALDOCK, Special Rapporteur, thanked all the members, and in particular the members of the Drafting Committee, for their contributions to improving the draft articles.

The meeting rose at 5.30 p.m.

721st MEETING

Friday, 12 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 II: Law of Treaties (continued)

1. The CHAIRMAN invited the Commission to consider the commentaries on articles 20-24 (A/CN.4/102/Add.8).

Commentary on article 20 (42 in final report)

Paragraph 1

2. Mr. TUNKIN proposed the deletion of the second sentence which read "Nor could the rule well be otherwise, since good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect". In the past, a number of rules had been in existence against which good sense and equity might have rebelled. That change would also require the deletion of the word "Moreover" at the beginning of the next sentence.

3. He suggested that, in general, when commenting on a general rule of law it would be more appropriate first

to refer to State practice in the matter and then to the views of writers.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that the second sentence reflected a view of Judge Anzilotti, which certain members had endorsed, but he had no objection to its deletion.

Paragraph 4

5. Mr. ROSENNE proposed that the word "assume" should be substituted for the words "lay down" in the last sentence, which seemed to imply that a precedent might have binding force.

It was so agreed.

Paragraph 5

6. Mr. TUNKIN proposed the deletion of the first two sentences of paragraph 5, which did not entirely correspond to the sense of article 20, and in which the emphasis was not right.

7. Mr. BRIGGS favoured the retention of those two sentences; he considered that the generalization that a breach, or a mere unilateral allegation of a breach, did not *ipso facto* bring the treaty down was correct.

8. Sir Humphrey WALDOCK, Special Rapporteur, believed that the two sentences reflected the Commission's decision.

It was agreed to substitute the words "ipso facto" for the words "as such" and the word "not" for the word "never" in the first sentence of paragraph 5.

Paragraph 6

9. Mr. ROSENNE proposed that in order to bring the fourth sentence into line with the final text of the article, which permitted partial termination in the case of a material breach, the words "of the whole treaty or, if it does not wish to take so drastic a step" should be deleted and replaced by the word "or".

10. He also thought it inappropriate to refer to compensation in the last sentence of the paragraph, since all questions of responsibility had been reserved.

11. Sir Humphrey WALDOCK, Special Rapporteur, accepted Mr. Rosenne's first amendment and said that he would revise the last sentence so as to make it more general. It might, for example, end with some such wording as "the injured party's right to invoke the law of State responsibility".

The commentary on article 20 was adopted as amended, subject to further drafting changes.

Commentary on article 21 (43 in final report)

The commentary on article 21 was adopted without discussion.

Commentary on article 22 (44 in final report)

Paragraph 5

12. Mr. BARTOŠ said he thought that the Egyptian case had been interpreted as based not on the *rebus*

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

sic stantibus principle, but on a new *jus cogens* rule. He and Mr. El-Erian had given that example as an illustration of a change in peremptory law. As he had been present at the discussion, he asked that the facts should be checked.

13. Mr. BRIGGS said that, although he agreed with Mr. Bartoš, he considered that the second sentence of paragraph 5 was correct.

14. The CHAIRMAN, speaking as a member of the Commission, suggested that Mr. Bartoš' objection might be overcome by substituting the words "in some quarters the Egyptian case was interpreted" for the words "some delegates interpreted the Egyptian case".

15. Mr. EL-ERIAN agreed with Mr. Bartoš; it was important to ensure that the sentence was accurate.

16. Sir Humphrey WALDOCK, Special Rapporteur, said that an amendment of the kind suggested by the Chairman should suffice: a number of writers had interpreted the case in the manner described and he had, after all, made no deduction from the interpretation mentioned in the second sentence. However, he would certainly look into the matter further.

Paragraph 6

17. Mr. AGO, referring to the fifth sentence, questioned whether it was appropriate to speak of a gap in the law.

18. Sir Humphrey WALDOCK, Special Rapporteur, said that he had had in mind not so much a gap in the law as the absence of rules regulating peaceful change. He was not very well satisfied with the drafting of the sentence, particularly the expression "imperfect legal institution", and intended to revise it.

Paragraph 7

19. Mr. AGO, referring to the fourth sentence, said it would be going too far to say that making the application of the doctrine of change of circumstances depend on the intentions of the parties was only a fiction.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that the point could be met by deleting the words "by making the doctrine dependent upon the intentions of the parties it invited", and substituting the words "it increased the risk of".

21. Mr. TUNKIN proposed the deletion of the words "the Commission recognized that" at the beginning of the paragraph, because the point referred to in the first sentence had not in fact been discussed.

22. He also proposed the insertion of the words "and to divorce it from some doctrinal connotations" after the word "rule" in the penultimate sentence, and the deletion of the last sentence.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Tunkin's amendments were acceptable, but he would prefer to retain some reference to the *clausula rebus sic stantibus*, because of the particular objections to which it gave rise. He therefore suggested

that Mr. Tunkin's amendment to the sixth sentence be amplified by the addition of the words "connected with the *clausula rebus sic stantibus*".

The commentary on article 22 was adopted as amended, subject to further drafting changes.

The commentaries on articles 22 bis, 23 and 24 (45, 49 and 50 in final report) were adopted without discussion.

Chapter III: Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (A/CN.4/L.102/Add.5)

24. Mr. YASSEEN said that on the whole the Commission was in favour of the solution proposed in the final paragraph of the Special Rapporteur's report (A/CN.4/162), but that view did not seem to be fully reflected in the draft of Chapter III. The Commission had plainly expressed a preference with regard to the problem of the succession of the United Nations to the functions and powers of the League of Nations. It had been said that the United Nations could find a method of designating an organ to replace the League of Nations Council and assume its powers.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that he had sought to reflect the Commission's view in the last two sentences of paragraph 33 (c) (50 (c) in final report).

26. The CHAIRMAN, speaking as a member of the Commission, said he thought the last two sentences of paragraph 33 (c) were quite categorical enough. It was, after all, possible that the General Assembly might not follow the course advocated by the Commission.

27. Mr. YASSEEN said that the method proposed by the Special Rapporteur was the best, so far as the substance was concerned, because it did not entail what might be termed a bilateral system. His own interpretation of the Commission's view evidently differed from the Chairman's. He (Mr. Yasseen) had maintained that if the Commission could find a better method, it should say so.

28. Mr. CASTRÉN said he had not been present when the matter had been discussed, but he had read the summary records and the draft before the Commission. He agreed with Mr. Yasseen that the third method was the best and that the drafting might be improved.

29. Sir Humphrey WALDOCK, Special Rapporteur, suggested, in deference to Mr. Yasseen, that the last sentence of paragraph 33 (c) be amended to read: "It would avoid some of the difficulties attendant upon the use of other methods and would be administrative action...".

30. Mr. TUNKIN proposed that the word "However" should be added at the beginning of paragraph 33 (c) in order to give special emphasis to its content.

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

31. Mr. LACHS said that paragraph 33 (e) (50 (e) in final report) should be expressed in stronger terms,

since the examination of general multilateral treaties to determine whether they needed to be brought up-to-date was no less important than the question of extended participation in them, and the General Assembly's attention should be drawn to that fact.

32. The CHAIRMAN, speaking as a member of the Commission, suggested that it might suffice to delete the word "any" before the words "further action."

33. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that sub-paragraphs (d) and (e) of paragraph 33 should be read together; he thought that sufficient prominence had been given to the point made by Mr. Lachs.

34. Mr. TUNKIN agreed with Mr. Lachs; before extending participation it would have to be decided whether the treaties in question needed to be adapted to contemporary conditions. Mr. Lachs' point could be met by deleting the opening words of paragraph 33 (e) "Independently of the question of extending participation in the treaties" and substituting the words "what action" for the words "whether any further action".

The amendments proposed by Mr. Tunkin were adopted.

Chapter III, as amended, was adopted.

Chapter II: Law of Treaties (resumed)

The CHAIRMAN invited the Commission to consider the remaining commentaries (A/CN.4/L.102/Add.9).

Commentary on article 2 (30 in final report)

The commentary on article 2 was adopted with a drafting change in the French text.

Commentary on article 2 bis (48 in final report)

35. Mr. TUNKIN said that the title of the article should be amended to refer to treaties which were the constituent instruments of international organizations or had been drawn up within such organizations.

It was so agreed.

36. Mr. ROSENNE proposed that in paragraph 2 a passage should be added to explain that the expression "established rules of the organization" was intended to have the same meaning as it had in article 18, paragraph 1 (a), of Part I.

It was so agreed.

The commentary on article 2 bis was adopted as amended, subject to drafting changes.

Commentary on article 4 (47 in final report)

Paragraph 1

37. Mr. BRIGGS proposed that in the first sentence the words "that a party is not permitted to take up a legal position" should be replaced by the words "that a party is not permitted to benefit from a legal position...". He also proposed the deletion of the final words of the first sentence: "when another party has

been led to assume obligations towards, or attribute rights to, the former party in reliance upon such representations or conduct".

38. Mr. TUNKIN proposed the deletion of the first sentence and of the first part of the second sentence: "If in some legal systems, such as the common law systems, the application of the principle may to some extent be dependent upon technical rules...". Comparisons with systems of internal law would introduce controversial ideas into the commentary.

39. Sir Humphrey WALDOCK, Special Rapporteur, accepted Mr. Briggs' proposals. In reply to Mr. Tunkin, he said he would be prepared to drop the reference to the common law systems, but thought that the commentary would have to retain some description of the general principle referred to in paragraph 1.

40. Mr. ROSENNE proposed that the first two sentences should be replaced by a single sentence reading:

"The foundation of the principle that a party is not permitted to benefit from a legal position that is in contradiction with its own previous representations or conduct is essentially good faith and fair dealing, which demand that a party shall not be able to take advantage of its own inconsistencies." (*Allegans contraria non audiendus est*).

Mr. Rosenne's proposal was adopted subject to drafting changes.

Paragraph 5

41. Mr. TUNKIN said that the Commission could in no case formulate "a full statement of the conditions" for the operation of an article; he therefore proposed that the first sentence should be deleted.

It was so agreed.

The commentary on article 4 was adopted as amended subject to drafting changes.

Commentary on article 25 (51 in final report)

Paragraph 3

42. The CHAIRMAN suggested that, in the first sentence, the word "invoked" should be replaced by the word "alleged".

Paragraph 4

43. Mr. TUNKIN suggested the deletion of the last two sentences, which could give rise to controversy regarding the interpretation of Article 33 of the Charter and of article 25 of the Commission's draft.

44. Mr. CASTRÉN thought that those two sentences should be retained, as they gave a useful explanation.

45. Sir Humphrey WALDOCK, Special Rapporteur, said he believed that the last two sentences were correct and stated the logical consequence of the Commission's proposals.

46. Mr. TUNKIN said that if the other members wished to retain those two sentences, he would propose that in the last sentence the word "still" should be replaced by "also".

47. Mr. ROSENNE proposed that the word "will" should be replaced by the word "would" in both sentences.

48. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to the amendments just proposed by Mr. Tunkin and Mr. Rosenne.

It was so agreed.

The commentary on article 25 was adopted as amended, with various other drafting changes.

Commentary on article 26 (46 in final report)

49. Mr. BARTOŠ suggested that a note should be added stating which were the pronouncements of the Permanent Court of International Justice referred to in the last sentence of paragraph 2.

It was so agreed.

The commentary on article 26 was adopted as amended, subject to drafting changes.

Commentary on article 27 (52 in final report)

The commentary on article 27 was adopted without discussion.

Commentary on article 28 (53 in final report)

50. Sir Humphrey WALDOCK, Special Rapporteur, said that in view of a previous comment by Mr. Tunkin (719th meeting, para. 73), the words "international public order" in the penultimate sentence of paragraph 3 would be replaced by the words "international law".

The commentary on article 28 was adopted with that amendment, subject to drafting changes.

Commentary on article 29 (54 in final report)

The commentary on article 29 was adopted without discussion.

Introduction

51. The CHAIRMAN invited the Special Rapporteur to present the introduction to Chapter II (A/CN.4/L.102/Add.10).

52. Sir Humphrey WALDOCK, Special Rapporteur, said that the introduction to the chapter of the Commission's report dealing with the law of treaties was similar to the corresponding passage in the report on the previous session.

53. Paragraph 3 (11 in final report) explained that the Commission had come to the conclusion that it was more appropriate to formulate the articles on what had previously been called the "essential validity" of treaties in terms of the various grounds upon which

treaties might be affected with invalidity, and the articles on "duration and termination" in terms of the various grounds upon which the termination of a treaty might be brought about.

54. Paragraph 4 referred to the Commission's plan (mentioned in paragraph 18 of its report on the previous session) to prepare three sets of articles on the law of treaties. It was explained that, in accordance with its decision at the previous session, the Commission had prepared a second self-contained group of articles.

55. With regard to the scope of the draft articles, it was explained in paragraph 6 (14 in final report) that they did not deal with the effect of the extinction of the international personality of a State upon the termination of treaties and that the Commission had decided to review that question at a later session when its work on the succession of States was further advanced.

56. Paragraph 7 set out the different trends of opinion which had emerged, during the Commission's discussion on the invalidity of treaties, regarding the case of a treaty whose provisions conflicted with those of an earlier treaty.

57. The change of the title of Part II to "Invalidity and termination of treaties" was explained in paragraph 3.

The introduction to Chapter II was adopted without discussion.

Production and distribution of documents²

58. Mr. PAREDES said he had abstained from voting on some parts of the draft report because he had not yet received the Spanish text.

59. The CHAIRMAN explained that some parts of the draft had been distributed only that morning in the original English.

60. Mr. BRIGGS expressed the desire that the final report should reach members as early as possible, to enable them to prepare for the forthcoming session.

61. Mr. ROSENNE proposed that it be recommended in the report that documents should be sent to members by air mail.

62. Mr. BARTOŠ supported Mr. Rosenne's proposal. The documents sent to him for the Vienna Conference on Consular Relations and for the current session of the Commission had been received at Belgrade on 2 July.

Mr. Rosenne's proposal was adopted.

63. Mr. TUNKIN expressed concern regarding the arrangements for the distribution of documents for the winter session to be held in January 1964. It was essential that members should receive the draft articles before they came to Geneva; otherwise the first few days of a short three-week session would be wasted.

64. The CHAIRMAN suggested that the Secretariat should take that point into consideration when preparing the documents for the winter session.

² See Chapter V, section C of the Commission's report.

65. Mr. BARTOŠ said it would be hard to ensure that members of the Commission received documents by early December. He had proposed a solution, but the Secretary to the Commission had doubted whether it was feasible. In the case of some commissions (for example those of the Economic and Social Council), if the Rapporteur was a Yugoslav, the documents were published at the United Nations office at Belgrade and sent direct to the persons concerned. If that was feasible for other departments of the Secretariat, it ought also to be so for the Legal Office.

66. Mr. LIANG, Secretary to the Commission, said that when he had discussed the matter with the officers of the Commission, he had promised to refer the whole subject to the Department of Conference Services. One of the problems involved was that of translation, in particular the availability of legal translators in New York and Geneva.

67. Mr. AGO recalled that in 1962, in order to save time, he had sent the introduction to the study on State responsibility to the Secretariat for circulation and had simultaneously sent copies to members of the Commission. As there was little time remaining before the winter session, Mr. Bartoš might perhaps follow the same procedure with his report on special missions.

68. Mr. BARTOŠ pointed out that the Sub-Committee on State responsibility had consisted of only five members, and his own report would be longer than Mr. Ago's. He could, however, assure members that they would receive the text of the draft articles by 15 December.

69. The CHAIRMAN noted that the Special Rapporteur on special missions would try to send his colleagues direct, by air mail, at least the text of his draft articles.

70. If there were no further remarks or proposed additions to the report, he would put the draft report as a whole to the vote.

The report of the Commission on the work of its fifteenth session, as amended, was adopted unanimously, subject to drafting changes.

Closure of the session

71. The CHAIRMAN thanked the members and officers of the Commission for their co-operation and understanding during the session, and the Drafting Committee for performing its task so effectively.

72. He paid a tribute to the Special Rapporteur on the law of treaties for the work he had done before and during the session. His pragmatic, bold and imaginative approach, his flexibility on drafting points and his firmness on matters of substance would place him among the most eminent of the Commission's special rapporteurs.

73. After the customary exchange of courtesies the Chairman declared the fifteenth session of the Commission closed.

The meeting rose at 1.15 p.m.
