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Summary record of the 673rd meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIFTEENTH SESSION

Held at Geneva, from 6 May to 12 July, 1963

673rd MEETING

Monday, 6 May 1963, at 3 p.m.

Chairman: Mr. Radhabinod PAL

Later: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Opening of the Session

1. The CHAIRMAN, after declaring open the Commission's fifteenth session, drew attention to the statement (A/C.6/L.497) he had made at the 734th meeting of the Sixth Committee of the General Assembly when presenting the report on the work of the fourteenth session. The Committee had paid a tribute to the Commission's work and in particular to that of its Special Rapporteur, Sir Humphrey Waldock.

2. In the course of the Committee's discussion he had indicated that international law must be largely the creation, not of professors, but of statesmen capable of judging where the focal points of tension lay and where adjustments must be made to take account of far-reaching political, economic and social developments.

3. In reply to some cursory observations made by members of the Sixth Committee, he had pointed out that a number of the questions dealt with by the Commission or included in its future programme of work were controversial, but that they must not be evaded on that score if the rule of law was to be substituted for the blind play of force in the conduct of world affairs. He had recognized, however, that in examining drafts prepared by the Commission, governments had to weigh their duty to respect a norm framed by an international body against another and perhaps higher obligation — that of assessing the practical consequences of action which might affect millions of their own nationals — and had to be vigilant lest any proposed norm diverged too far from political reality. The efficacy of any system of law must depend on its power to persuade as much as on its power to exact obedience.

4. He had reminded the Committee that in times of rapid and radical change there could be no absolute rules of international law, even among those designated as "generally accepted", nor was established custom immune from the forces of change. Adjustments were always necessary to fit new circumstances. Unfortunately, no international legislative machinery had yet been set up to effect the requisite continuous process of adaptation and if rules which had become intolerable could not be revised in time, they might provoke outright defiance. In the meantime, therefore, a grave responsibility lay

upon them all to ensure that international law reflected contemporary needs and did not lose touch with reality.

5. As would be seen from paragraph 16 of the Sixth Committee's report (A/5287), many of its members had commented on the beneficial effect on the Commission's work of the increase in membership, thanks to which existing legal systems were now better represented. The Committee had fully endorsed the hope expressed in paragraph 85 of the Commission's report concerning the facilities placed at its disposal.

6. In conclusion, he drew attention to the reference in the last paragraph of his statement to the spirit in which the Commission's deliberations were conducted.

Election of Officers

7. The CHAIRMAN called for nominations for the office of Chairman.

8. Mr. AGO proposed Mr. Jiménez de Aréchaga, who was well known to the Commission both for his talents as a lawyer and for his virtues as a colleague.

9. Mr. AMADO seconded the proposal.

10. Mr. TUNKIN, Mr. de LUNA, Mr. PADILLA NERVO and Mr. PAREDES supported the proposal.

Mr. Jiménez de Aréchaga was unanimously elected Chairman and took the chair.

11. The CHAIRMAN thanked the Commission for having elected him and expressed his deep appreciation to those members whose self-denying support of his nomination had led to that honour being conferred upon him. It was his intention to preside over the work of the Commission in the manner in which that task had been performed by the last three chairmen, under whom he had had the honour to serve since his election to the Commission.

12. He called for nominations for the office of First Vice-Chairman.

13. Mr. EL-ERIAN proposed Mr. Bartoš, who had made such an outstanding contribution to the work of the Commission since his election in 1956.

14. Mr. de LUNA, Mr. VERDROSS, Mr. TUNKIN, Mr. AMADO and Mr. ROSENNE supported the proposal.

Mr. Bartoš was unanimously elected First Vice-Chairman.

15. Mr. BARTOŠ thanked the members for the honour they had done him, and congratulated the Chairman on his election.

16. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

17. Mr. BRIGGS, after associating himself with the congratulations extended to the Chairman and First Vice-Chairman on their election, proposed Mr. Tsuruoka, the distinguished Japanese jurist who had made such a valuable contribution to the work of the Commission.

18. Mr. AGO seconded and Mr. VERDROSS, Mr. AMADO, Mr. EL ERIAN, Mr. TABIBI and Mr. YASSEEN supported the proposal.

Mr. Tsuruoka was unanimously elected Second Vice-Chairman.

19. Mr. TSURUOKA thanked the members for the honour they had done him, and congratulated the Chairman and the First Vice-Chairman on their election.

20. The CHAIRMAN called for nominations for the office of Rapporteur.

21. Mr. GROS, after congratulating Mr. Jiménez de Aréchaga, Mr. Bartoš and Mr. Tsuruoka on their election, proposed Sir Humphrey Waldock, who had already amply demonstrated his merits as Special Rapporteur for the Law of Treaties.

Sir Humphrey Waldock was unanimously elected Rapporteur.

22. Sir Humphrey WALDOCK thanked the members for having elected him Rapporteur. The Commission was to be congratulated on its choice of a Chairman, First Vice-Chairman and Second Vice-Chairman and, as Rapporteur, he was particularly gratified at the prospect of co-operating with such able officers.

Adoption of the Agenda

23. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/153); its adoption did not necessarily mean that the Commission would follow strictly the order in which the items were set out.

The provisional agenda (A/CN.4/153) was adopted.

Resolution of the United Nations Conference on Consular Relations

24. The CHAIRMAN said that the United Nations Conference on Diplomatic Relations, held at Vienna from 4 March to 24 April 1963, had adopted a resolution paying a tribute to the Commission's work, which had been the basis of the Conference's deliberations; the text of the resolution would be found in document A/CN.4/158.

25. Mr. BARTOŠ said that as a participant in the Vienna Conference, he wished to lay special stress on the part played by Mr. Zourek, a former member of the Commission and an expert on consular relations, who had presented the Commission's draft to the Conference with authority, wisdom and expertise. His explanations

of the Commission's intentions had frequently induced participants in the Conference to accept unchanged the text proposed by the Commission when for practical reasons they had wished to amend it. A considerable share of the commendations bestowed on the commission was due to Mr. Zourek, since his contribution to the success of the draft submitted to the Conference had been so great.

26. Mr. de LUNA, endorsing Mr. Bartoš's observations, proposed that the Commission should express its gratitude to Mr. Zourek.

27. Sir Humphrey WALDOCK suggested that a message should be sent to Mr. Zourek, who, when a member of the Commission, had been its Special Rapporteur for Consular Relations, and who had so ably acted as expert to the Vienna Conference of 1963.

28. Mr. YASSEEN supported the suggestion.

29. Mr. ROSENNE, also supporting the suggestion, further proposed that the resolution adopted by the Vienna Conference should be brought to the knowledge of all former members of the Commission. The International Law Commission was, of course, a collective body, but the tribute which had been paid to its work was really intended for all those who had been members of the Commission when it had worked on the topic of Consular Relations.

30. The CHAIRMAN said that, if there were no further speakers on the subject, he would consider that the Commission agreed that a suitable note should be sent to Mr. Zourek, and that the Secretariat should send copies of the Vienna Conference resolution to all former members of the International Law Commission who had attended the various sessions at which the topic of Consular Relations had been discussed.

It was so agreed.

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

[Item 1 of the agenda]

31. Sir Humphrey WALDOCK, Special Rapporteur, drawing attention to his second report on the Law of Treaties (A/CN.4/156 and addenda), said it dealt with the essential validity, duration and termination of treaties. The documents so far distributed comprised three sections: section I (General provisions), section II (Principles governing the essential validity of treaties) and section III (The duration, termination and obsolescence of treaties).

32. He suggested that the Commission should leave aside for the time being section I (General provisions) consisting of article 1 (Definitions), article 2 (The presumption in favour of the validity of a treaty), article 3 (Procedural restrictions upon the exercise of a right to avoid or denounce a treaty) and article 4 (Loss of a right to avoid or denounce a treaty through waiver or preclusion), because those general provisions could be more easily dealt with, and more readily understood, after the Commission had considered the questions of substance dealt with in sections II and III.

33. Mr. TUNKIN said that the Special Rapporteur's proposal was very sound. It would indeed be difficult to discuss the general provisions of section I before the provisions contained in sections II and III.

34. The CHAIRMAN said that, if there were no further comments on that point, he would consider that the Commission agreed to begin at its next meeting the discussion of section II (articles 5 to 14).

It was so agreed.

The meeting rose at 4.15 p.m.

674th MEETING

Tuesday, 7 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*)

SECTION II

(Principles governing the essential validity of treaties)

ARTICLE 5 (CONSTITUTIONAL LIMITATIONS ON THE TREATY-MAKING POWER)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 5 in section II of his second report (A/CN.4/156).

2. Sir Humphrey WALDOCK, Special Rapporteur, recalled that at its previous meeting the Commission had agreed to begin consideration of the draft articles in his second report with section II (Principles governing the essential validity of treaties (A/CN.4/156), because it could not deal adequately with the general principles stated in section I until it knew what was going to be the substance of section II and of section III (The duration, termination and obsolescence of treaties).

3. He had also prepared a section IV, dealing with the procedural aspects of essential validity, which would be circulated shortly and consideration of which, like that of section I, would have to await the Commission's decisions on the main problems of substance dealt with in sections II and III. The Commission had therefore acted wisely in deciding to concentrate at that stage on the solution of those difficult problems of substance. Naturally, in any decision that might be taken, a member would be able to reserve his attitude regarding sections I and IV.

4. Article 5, the first article in section II, dealt with the important problem of constitutional limitations on the treaty-making power. He had set out at length in the commentary to article 5 his reasons for drafting that article in the form in which it appeared in the report.

5. He must point out that, owing to a typographical error, the three last lines of paragraph 1 of article 5 had been made to appear as the concluding portion of sub-paragraph (b); in fact, the words "the effect of such provisions . . . this article" constituted the concluding portion of the main clause of paragraph 1, and should therefore not have been indented.

6. Mr. VERDROSS, after congratulating the Special Rapporteur on his report, said that he himself did not accept the view which had previously prevailed and had been accepted by the first Special Rapporteur and the Commission in 1951, that in deciding a treaty's validity, all constitutional provisions which limited treaty-making capacity must be taken into consideration. On the face of it, the United Nations Charter seemed to support that view, since the phrase "in accordance with their respective constitutional processes" was used for ratification by signatory States in Article 43, paragraph 3, and Article 110, paragraph 1. It was, however, clear from international practice that even countries whose constitution made no provision for treaties in simplified form did conclude such treaties every day and that such treaties were recognized by all States as valid.

7. He accepted the Special Rapporteur's proposals in substance; the only problem was that raised by paragraph 4. Were there any cases where a treaty concluded by an organ endowed with constitutional authority to do so — head of State, government or minister — was not valid because the organ in question had acted *ultra vires*? It might happen that a head of State visiting another country might, without the approval of his government or his parliament, sign a treaty with the State in which he was staying, embodying a provision by which the instrument became valid immediately. The validity of such a treaty was doubtful. Unless, however, the competent organs — government or parliament — expressed their dissent immediately they learned of the treaty, they implicitly endorsed it. No reference was made in paragraph 4 to that hypothetical case, which, obviously, could occur only under a parliamentary system under which the head of State could never conclude a treaty on his own authority. It would not apply in a presidential system, where the head of State was also the head of the government. A State which signed a treaty with the United States, for example, could not be expected to know whether a treaty concluded by the President was in fact a treaty or an executive agreement; that was a doubtful case, and its interpretation was a matter for the United States alone.

8. Mr. de LUNA, commending the Special Rapporteur's second report, said that in a remarkable endeavour to settle the question of the international effects of constitutional limitations he had prudently avoided the shoals of doctrinal hair-splitting and crude realism. Outlining the development of the question from Locke and Montesquieu, who had originated the confusion between the "external" power and the executive power, to the French Revolution, when an attempt had been made to put an end to the power of the absolute monarchy in matters of foreign policy, he said it had then passed on to the democratic stage, when the head