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Summary record of the 716th meeting

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citizens, and universities had been founded for them within twenty years of the conquests of ancient Mexico and Peru. That had been the origin of the Spanish legal tradition represented by the Chairman and the other members from Spanish-speaking countries in the Commission, which was called upon to harmonize the ideas deriving from the different legal systems of the world.

48. Mr. CADIEUX associated himself with the previous speakers and said that the whole Commission would be grateful to its Chairman if he accepted the mission offered him. He was, indeed, particularly well fitted by his personal qualities to speak for the Commission, and coming from the Americas he represented a region which it was important to bring into contact with the members of the Asian-African Committee.

49. He also wished to endorse Mr. Ago's comments. Canada was a country that was neither European nor old, and certainly not imperialist, but it had been able to accept the rules of international law which had existed before it appeared on the world scene; and Canada had never felt that it had lost by doing so. On the contrary, it had welcomed with deference the rules evolved through the centuries, which everyone was in duty bound to treat with the greatest respect. He believed that Canada's point of view was shared by a number of American countries and that to present the existing rules as capable of bringing together the different elements of the international community would serve the interests of the new countries no less than those of the old. Far from making for division, those rules were a force for unity and coherence which might be of the greatest value.

50. As to Mr. Rosenne's suggestion regarding comments from governments, he agreed that they should be invited to send whatever comments they could. But in the past fifteen years international activities had increased considerably and perhaps the machinery of State had not evolved at the same rate. If States had enough officials to prepare comments at every stage, the idea was feasible; but under present conditions it would be unreasonable to ask them for comments too often. It was an internal administrative problem. The Commission could ask governments to do their best, but it should avoid any suggestion that they were guilty of negligence if they failed to supply all the documentation asked of them.

51. Mr. GROS said that he personally would be very glad if the Chairman would agree to represent the Commission at the Cairo meeting.

52. As to the substance of the discussion, he fully agreed with Mr. Ago's remarks; they reflected his own views exactly.

53. Sir Humphrey WALDOCK said he supported Mr. Pal's proposal and agreed with Mr. Ago's comments on certain general issues involved.

54. The CHAIRMAN, thanking the Commission for proposing that he should represent it as an observer at the forthcoming session of the Asian-African Legal Consultative Committee, said he looked forward to attending the Committee's deliberations, particularly in

view of the interesting agenda that was proposed. In the unlikely event of his being unable to go to Cairo in February, he would ask another member or the Secretary to replace him.

55. Mr. LIANG, Secretary to the Commission, said that the Secretariat had distributed to members all the documents and proceedings of earlier sessions of the Asian-African Legal Consultative Committee which had been received.

56. The United Nations had regulations concerning the distribution of documents and perhaps similar regulations were applied by other bodies. The Commission might therefore wish to mention in its report that it was desirable to modify the United Nations regulations with a view to ensuring an adequate exchange of documents and to authorize the Secretariat to negotiate with other bodies to that end.

The meeting rose at 11.30 a.m.

716th MEETING

Monday, 8 July 1963, at 5.20 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Programme of work for 1964

1. The CHAIRMAN announced that at its private meeting the Commission had approved the following programme of work for 1964:

1. Law of Treaties: Application, interpretation and effects of treaties;
Treaties of international organizations (as part of topic of Law of Treaties);
2. State Responsibility: Preliminary report;
3. Succession of States and governments: Aspect of treaties (preliminary report);
4. Relations between States and Intergovernmental Organizations: First report and general directives; second report, with draft articles;
5. Special Missions: First report, with draft articles.

2. Since it would not be possible to deal with all the items at the main summer session, which should be mainly devoted to the Law of Treaties and, if possible, to a discussion of the preliminary reports on State Responsibility and State Succession, it was suggested that a three-week winter session of the Commission should be held from 5 January to 24 January 1964.

3. At that session the Commission would consider the draft articles submitted by the Special Rapporteur on Special Missions, the first report on Relations between States and Intergovernmental Organizations and the general directives to be given to the Special Rapporteur on that subject. If time permitted, a first reading might also be given to the draft articles submitted by the Special

Rapporteur on Relations between States and Intergovernmental Organizations in his second report.

4. It was suggested that steps should be taken at once to arrange for another winter session in January 1965, at which the Commission could continue consideration of the same two topics and complete the codification of diplomatic law without encroaching on the time required for its work on the Law of Treaties.

5. Some members had expressed the hope that it would be possible to meet at a place other than Geneva, but no formal proposals had been made; it was realized that a decision on the matter would depend on a number of factors, many of them beyond the Commission's control.

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

[Item 1 of the agenda]

(resumed from the 714th meeting)

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

6. The CHAIRMAN invited the Commission to resume consideration of the articles submitted by the Drafting Committee.

ARTICLE 3 [26] (SEPARABILITY OF TREATY PROVISIONS FOR THE PURPOSES OF THE APPLICATION OF THE PRESENT ARTICLES)

7. Sir Humphrey WALDOCK, Special Rapporteur, said it would be appropriate to examine the new article 3 (formerly article 26, A/CN.4/156/Add.2) on the separability of treaty provisions, that being the term now accepted by the Drafting Committee. The article read:

“1. Except as provided in the treaty itself or in articles 7, 8, 11, 20, 21, 22 and 22 *bis*, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall relate to the treaty as a whole.

“2. The provisions of articles 7, 8, 11, 20, 21, 22 and 22 *bis* regarding the partial nullity, termination or suspension of the application of a treaty or withdrawal from particular clauses of a treaty shall apply only if:

“(a) The clauses in question are clearly severable from the remainder of the treaty with regard to their operation; and

“(b) It does not appear either from the treaty or from statements made during the negotiations that acceptance of the clauses in question was an essential condition of the consent of the parties to the treaty as a whole.”

8. The method adopted by the Drafting Committee to deal with the question of separability was a compromise between the various views expressed during the discussion. A general article laying down the conditions for severance had been formulated as article 3, but provisions on separability were to be included in each of the other articles it referred to. The Commission would thus be called upon to consider whether it would be

appropriate and useful to permit severance for the purposes of each of those articles.

9. The provisions of paragraph 2 were based on the consideration that, where separability was recognized, it must be subject to certain conditions in order to ensure that the severance of certain provisions did not lead to an absurd result or to an inequitable application of the treaty.

10. Since article 3 laid down the minimum conditions to which separability would be subject in all cases, the Commission should examine it before taking up articles 7, 8, 11, 20, 21, 22 and 22 *bis*.

11. The Drafting Committee had not yet decided on the position of the general article on separability, which might perhaps be placed with article 4 in a small section between sections III and IV: that explained the retention of the former number [26] as an alternative.

12. Mr. ROSENNE said that during the discussion of various articles, he had expressed reservations regarding the manner in which the question of severance had been dealt with. However, the cautious recognition of separability in article 3, and the guarded manner in which the conditions for severance were stated, went a long way towards removing his doubts. He would therefore support the proposed article.

13. Mr. TABIBI said that he too had had reservations regarding the provisions on severance. He was satisfied with the solution adopted in article 3, however, particularly sub-paragraphs (a) and (b) of paragraph 2, and would accept the article on the understanding that the commentary would be adjusted to the new terminology.

14. Sir Humphrey WALDOCK, Special Rapporteur, assured Mr. Tabibi that, as in the case of all the other articles of the draft, the commentary would be adjusted to the text adopted.

15. The CHAIRMAN put article 3 to the vote.

Article 3 was adopted unanimously.

ARTICLE 5 (PROVISIONS OF INTERNAL LAW REGARDING THE PROCEDURES FOR ENTERING INTO TREATIES)

16. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 5, which read:

“When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding the procedures for entering into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree.”

17. Mr. VERDROSS said he thought that the idea underlying the article could be better expressed by

adding after the words "regarding competence to enter into treaties" after the words "violation of its internal law". There might be other violations of internal law regarding the procedure for entering into treaties which in no way affected their international validity. For example, there might be violations in respect of the parliamentary quorum or provisions requiring a two-thirds or three-fourths majority, which, although manifest, did not affect the international validity of treaties.

18. Mr. de LUNA, supporting Mr. Verdross, added that it was not only a matter of procedure; there might be a formal violation of the constitution, but there could also be a substantive violation. A parliament might, for example, approve a treaty in violation of substantive constitutional rules.

19. Mr. YASSEEN asked why the provision referred only to internal law regarding procedure. Was it intended to exclude the substantive rules on treaty-making?

20. Sir Humphrey WALDOCK, Special Rapporteur, replied that the point raised by Mr. Yasseen could be met by replacing the words "procedures for entering", both in the title and in the text of the article, by the words "competence to enter".

21. Mr. YASSEEN thought that retention of the word "procedures" definitely favoured his own position, as all the rules concerning the substance then remained reserved. He had confined himself to asking the question, for he personally favoured the constitutionalist doctrine.

22. Mr. de LUNA agreed with Mr. Yasseen. The usual phrase was "treaty-making power", which might be rendered in French by the word "*compétence*". The substitution of the word "competence" for "procedures", as suggested by the Special Rapporteur, would meet Mr. Verdross's point without the need for any addition.

23. Mr. VERDROSS agreed and withdrew his proposal.

24. The CHAIRMAN put article 5 to the vote with the amendment suggested by the Special Rapporteur.

Article 5, thus amended, was adopted unanimously.

ARTICLE 6 (LACK OF AUTHORITY TO BIND THE STATE)

25. The CHAIRMAN invited the Commission to consider the new text of article 6 proposed by the Drafting Committee, which read:

"1. If the representative of a State, who cannot be considered under the provisions of Article 4 of Part I as being furnished with the necessary authority to express the consent of his State to be bound by a treaty nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

"2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty had been made subject to particular restrictions, his omission to observe those restrictions shall not invalidate the consent to the treaty expressed

by him in the name of his State, unless the restrictions upon his authority had been brought to the notice of the other contracting States."

26. The CHAIRMAN put article 6 to the vote.

Article 6 was adopted unanimously.

ARTICLE 7 (FRAUD)

27. Sir Humphrey WALDOCK, Special Rapporteur, said that article 7 was the first of the articles referred to in article 3 in which a provision on separability was included. Paragraph 2 provided that the power of a State to invoke fraud as invalidating its consent only with respect to the particular provisions of the treaty to which the fraud related was subject to the conditions specified in article 3. The article read:

"1. If a State has been induced to enter into a treaty by the fraudulent conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty.

"2. Under the conditions specified in article [3], the State in question may, if it thinks fit, invoke the fraud as invalidating its consent only with respect to the particular provisions of the treaty to which the fraud relates."

28. Mr. YASSEEN said that paragraph 2 was a first application of the principle stated in article 3. It gave the injured party only the right to invoke the partial nullity of a treaty, which was perfectly understandable.

29. Mr. LACHS asked the Special Rapporteur whether the words "if it thinks fit", in paragraph 2, added anything to the meaning.

30. Sir Humphrey WALDOCK, Special Rapporteur, explained that the expression was commonly used in English to stress the fact that a certain discretion was allowed to the party concerned.

31. Mr. LACHS said that while he had no objection in principle to the retention of the words, he must point out that they were not used in certain other articles where discretion was allowed.

32. Mr. CASTRÉN said he accepted the new paragraph 2 and had only one comment to make on the wording. The word "provisions" was used, whereas the word "clauses" appeared elsewhere; the same applied to article 11. The terminology should be made uniform.

33. Sir Humphrey WALDOCK, Special Rapporteur, agreed that the word "provisions" in paragraph 2 should be replaced by the word "clauses".

34. Mr. TABIBI said that he accepted article 7, but had doubts about the expression "may, if it thinks fit".

35. Mr. de LUNA said he had meant to make the same remark about the French text as Mr. Lachs had made about the English, but the explanations given by

the Special Rapporteur had made him hesitate. The expression in question referred to a faculty reserved to the State, which it would exercise after weighing the pros and cons.

36. Mr. AGO said that, if he had correctly understood the meaning of the words "if it thinks fit", as explained by the Special Rapporteur, in order to bring out the discretionary element the French text should be amended to read "*à sa discrétion*" instead of "*s'il le juge bon*".

37. Sir Humphrey WALDOCK, Special Rapporteur, explained that there was a shade of difference between the provisions of paragraph 2 of article 7, on fraud, and those of paragraph 3 of article 8, on error. In the case of fraud, there was always an injured party, but in the case of error, there was generally no injured party; injury would only be conceivable where the error had been induced by misrepresentation by one of the State concerned.

38. In view of the difference between the two situations, there was perhaps some advantage in emphasizing the discretionary element in the case of fraud. That explained why the words "if it thinks fit" were used in article 7, but not in article 8. But since those words had raised some difficulty, he would be quite prepared to omit them.

39. The CHAIRMAN put article 7 to the vote with the deletion of the words "if it thinks fit" and the substitution of the word "clauses" for "provisions".

Article 7, thus amended, was adopted by 19 votes to none, with 1 abstention.

The meeting rose at 5.50 p.m.

717th MEETING

Tuesday, 9 July 1963 at 9.30 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

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

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

Articles submitted by the Drafting Committee

1. The CHAIRMAN invited the Commission to continue consideration of the articles submitted by the Drafting Committee.

ARTICLE 8 (ERROR)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a new text for article 8, which read:

"1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at

the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

"2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.

"3. Under the conditions specified in article [3], an error which relates only to particular clauses of a treaty may also be invoked as a ground for invalidating the consent of the State in question with respect to those clauses alone.

"4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and Articles 26 and 27 of Part I then apply."

3. Paragraphs 1, 2 and 4 reproduced paragraphs 1, 2 and 3 of the text adopted by the Commission at its 705th meeting (paras. 1-18); paragraph 3 was new and dealt with the question of separability.

4. Mr. YASSEEN suggested that in paragraph 3 the word "also" should be dropped, as it was unnecessary.

5. Sir Humphrey WALDOCK, Special Rapporteur, accepted that suggestion.

6. Mr. PAREDES suggested that, in the Spanish text of paragraph 1, the word "*suponía*" should be replaced by the word "*aceptaba*". Since the State concerned felt certain that the fact or state of facts actually existed, in other words, acknowledged their existence, what was involved was not a supposition, but a certainty.

7. Sir Humphrey WALDOCK, Special Rapporteur, said that the change was one of substance and would involve amending the English and French texts as well; the word "assumed" would have to be replaced by "acknowledged". He must oppose that change because it would not reflect the intended meaning.

8. The CHAIRMAN said that there was no support for Mr. Paredes' suggestion. If there were no objection, he would put article 8 to the vote as amended by the deletion of the word "also" in paragraph 3.

Article 8, thus amended, was adopted by 13 votes to none with 1 abstention.

ARTICLE 11 (PERSONAL COERCION OF REPRESENTATIVES OF STATES)

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a new text for article 11, which read:

"1. If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect.

"2. Under the conditions specified in article [3], the States whose representative has been coerced may, if it thinks fit, invoke the coercion as invalidating its