Document:-
A/CN.4/SR.728

Summary record of the 728th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1964, vol. I

728th MEETING

Thursday, 21 May 1964, at 12.20 p.m.

Chairman: Mr. Roberto AGO

Prolongation of the Session

[Item 2 of the agenda]

1. The CHAIRMAN announced that at a private meeting held to consider item 2 of the agenda, the Commission had decided to express in its report its deep regret that it would be unable to hold a winter session in 1965 as it had wished. The report would state that its inability to do so was due solely to the fact that because the General Assembly had changed the dates of its regular session, certain members of the Commission who also represented their countries at the Assembly would be unable to attend. The Commission would at the same time express its desire to hold a winter session from 1966 onwards. It had decided to submit to the General Assembly a proposal that the Commission should meet for a total of twelve weeks every year: eight weeks in the summer and four weeks in the winter, preferably in January, on the understanding, however, that it reserved the right to fix the exact dates according to circumstances.

2. With regard to the exceptional arrangements to be made for 1964, while bearing in mind the sacrifice which further prolongation of an already very long session might represent for some of its members, the Commission had accepted the Secretariat's offer in the interest of its work and decided to prolong the present session by one week. The session would accordingly end on 24 July.

Law of Treaties
(A/CN.4/167)
(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 56 (The inter-temporal law)

3. The CHAIRMAN invited the Commission to take up article 56 in the Special Rapporteur's third report (A/CN.4/167).

4. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 56, said that although the application of the inter-temporal law might arise more frequently in the realm of interpretation than in that of application, it seemed more convenient to include the provision in section I (Application and effects of treaties) than among technical provisions concerning interpretation. He had always found the inter-temporal rule a particularly difficult one, even in territorial matters, to which Judge Huber had primarily applied it. The difficulty was to reconcile the idea that the interpretation of a juridical fact had to be made in the light of the law in force at the time the fact occurred, with the proposition that the application of a treaty must be governed by the law in force at the time it was applied. He had attempted to explain his views on the matter in the commentary.

5. Mr. VERDROSS said that as paragraph 1 dealt with the legal interpretation of a treaty, it might be preferable to state the rule in the articles to be drafted on interpretation; but that was mainly a question of form.

6. He did not think it was possible to draw a distinction between the interpretation of a treaty and its application, as the Special Rapporteur had attempted to do: for once a treaty had been correctly interpreted, in had to be applied according to that interpretation. In his opinion the question of the inter-temporal law arose only in the exceptional cases in which international law had changed after the conclusion of the treaty. Even then, the problem was not that there was a discrepancy between the interpretation of the treaty and its application, but the very different one of the treaty being modified by subsequent law — the problem of *lex posterior* which the Commission had settled at its previous session. The idea expressed in the article was correct; what was needed was to change the wording of paragraph 2 to state that if international law changed after the conclusion of a treaty, the obligations arising from the treaty were thenceforth governed by the subsequent rule of international law.

7. There was another problem, however: was the principle stated in the article equally valid for law-making treaties? In the case of bilateral or multilateral treaties covering specific matters, it was clear that the law applicable was that applied at the time when the treaty entered into force. But the position was quite different in the case of a law-making treaty, for such a treaty took on a life of its own, independent of the will of the parties at the time of its conclusion. It might be interpreted in a manner contrary to that will, as had happened, for instance, in the case of Article 27 of the United Nations Charter, the meaning of which had been entirely altered by practice, although the wording had remained unchanged, and of Article 18 of the League of Nations Covenant.

8. Mr. JIMÉNEZ de ARÉCHAGA, after congratulating the Special Rapporteur on his third report, said that he found Article 55 generally acceptable, but he was in some perplexity over Article 56, because he was not altogether convinced that the inter-temporal rule was already, or would become, part of the law of treaties. Contrary to his usual practice, the Special Rapporteur, in his commentary, had not adduced authorities in support of his proposal.

9. The inter-temporal rule applied to juridical facts, whereas a treaty was more in the nature of a juridical act and the rule seemed more relevant to the matters covered in Parts I and II of the report, such as authority to enter into a treaty and its validity. Persons authorized to bind a State at the time the treaty was entered into did so bind it whatever happened afterwards, and the

validity of the instrument was determined according to the law in force at the time it was drawn up. *Tempus regit actum.* In the *Grisbadarna* and the *North Atlantic Fisheries* arbitrations,[1] the rule had been applied not to the treaties as juridical acts, but to certain concepts contained in them that had undergone a process of historical evolution. The resulting decisions would have been the same whether applied to specific treaty provisions or to rules of customary international law, as in the *Island of Palmas* case.[2]

10. The wording of article 56 had increased his doubts, and he thought it unlikely that the rule proposed in paragraph 1 would prove workable. The intention of the parties should be controlling, and there seemed to be two possibilities so far as that intention was concerned: either they had meant to incorporate in the treaty some legal concepts that would remain unchanged, or, if they had had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belonged. The free operation of the will of the parties should not be prevented by crystallizing every concept as it had been at the time when the treaty was drawn up, as proposed in paragraph 1.

11. Paragraph 2, which laid down more or less the opposite rule to that given in paragraph 1, could give rise to serious practical difficulties, because it was hard to draw the dividing line between interpretation and application. Perhaps the Commission should not go beyond the particular application of the inter-temporal rule laid down in article 45,[3] adopted at the previous session. The more general formulation now submitted by the Special Rapporteur might result, for instance, in long-standing treaties concerning frontiers being called in question on the ground that they had been secured by coercion, as proposed by the Commission the previous year.[4] That might encourage a move towards revision beyond what was reasonable and justifiable. The Special Rapporteur had discussed, in his commentary, instances in which the rule proposed in paragraph 2 was not in fact applied because the intention of the parties had been to reach a definitive settlement. As that was surely the purpose of most treaties, the intention of the parties should be upheld rather than the rule proposed in paragraph 2.

12. Mr. PAREDES said that if the treaty corresponded, as it should correspond, to the will of the parties, and if it was the measure of the agreement reached, its interpretation must clearly be based on what the negotiators had had in mind when they contracted their obligations, that was to say on the circumstances or the prevailing doctrines and practices at the time. Consequently, the rule stated in paragraph 1 that "a treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up" seemed to him to be clear and reasonable. He would prefer the words "at the time when the treaty was negotiated" because they covered, or might cover, a much longer period than the time when it was "drawn up" — a period during which much experience could be gained and there might sometimes be very substantial changes in accepted doctrine. During that period the parties would learn various things which could change their legal thought. The purpose of the treaty would be greatly clarified by those antecedents; the commitment would be illustrated and defined.

13. He could not quite understand the scope of paragraph 2, which at first sight appeared to be a contradiction, for it provided that "...the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied". Which took precedence, the rule in paragraph 1 or the rule in paragraph 2? The ideas and intentions at the time when the treaty was drawn up or those at the time when it was applied? In practice, interpretations were made in order to perform the treaty, to put it into effect, not merely for the sake of speculation: consequently, interpretation and application coincided in time. And if the logical rule of the time of drawing up the treaty was to be accepted, it was not possible to adopt the rule at the time of application if it had changed. That was the general case, but there were cases in which a particular rule prevailed: where the changes had occurred in the field of *jus cogens* or where they made it easier to fulfil the obligations, so that it was certain that if the parties had known of the changes at the time of concluding the treaty they would have accepted them.

14. Mr. Verdross had referred to cases in which the procedure was changed. That raised a very general principle of law: that procedural rules took precedence over former ones from the moment they came into effect. Hence it was necessary to separate and distinguish between substantive rules which created rights and subsidiary rules on the procedure for claiming them.

The meeting rose at 1 p.m.

729th MEETING

Friday, 22 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(A/CN.4/167)

[Item 3 of the agenda]
(continued)

ARTICLE 56 (The inter-temporal law) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 56 in the Special Rapporteur's third report (A/CN.4/167).

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[1] United Nations: *Reports of International Arbitral Awards*, Vol. XI, pp. 147 and 167.

[2] *Op. cit.*, vol. II, p. 829.

[3] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 23.

[4] *Ibid.* p. 10.