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Summary record of the 729th meeting

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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.

2. Mr. CASTRÉN said that the article stated two rules which were correct in themselves, at least in most cases, but which, when juxtaposed, gave the impression of being in some way contradictory. The Special Rapporteur himself stated in paragraph (5) of his commentary that the formulation of paragraph 2 had not been free from difficulty. It also appeared from the commentary that, although there were some problems concerning the relation between the two aspects of the so-called inter-temporal law, the second rule seemed just as valid as the first. It was true that the inter-temporal law was just as applicable to the interpretation of treaties as it was to their application.

3. In his opinion, it would be better to begin the article with the present paragraph 2, which stated the principal rule and related only to the application of the treaty. Mr. Verdross's comment concerning law-making treaty at the previous meeting [1] should also be borne in mind. The rule stated in paragraph 1 could be transferred to the commentary or to the section on interpretation. Another possibility would be to deal with the whole problem in that section.

4. Mr. PAL said that the principle enunciated in paragraph 1 was substantially acceptable, but its application must be made subject to the intention of the parties. The contemplated light of the law would also include that of the then prevailing law of interpretation.

5. Paragraph 2 was not acceptable and did not seem to him to reflect accurately the principle underlying Judge Huber's pronouncement on the inter-temporal law. In the *Island of Palmas* case [2] the matter for decision had related to a right conferred by law and not by treaty, and the pronouncement in question had been made in that context. The present provision would be a wrong projection of that principle. In the *North Atlantic Fisheries arbitrations* [3] the relevant treaties did not cover the issue in dispute. The treaties determined the land boundaries, about which there was no dispute. As at present drafted, paragraph 2 embodied a conception of application different from that with which the cases cited in the commentary were concerned. Application, in the present context, might refer to obligations under a treaty, performance, remedy on breach, or relief available. It might also mean supplying some fact collateral to an issue arising otherwise, as in the *Fisheries* cases. Application would not be governed in all respects by the rules in force at the time.

6. Mr. TABIBI said he shared the doubts expressed by some other members of the Commission as to whether the article was in its proper place. Perhaps the matter dealt with in paragraph 1 should either be transferred to the commentary or put among the provisions concerning interpretation.

7. Admittedly, there was a close connexion between interpretation and application, but the two paragraphs dealt with entirely different matters and were mutually contradictory, the latter nullifying the former. Paragraph 2 could be retained, however, since for purposes of application the rules of international law in force at the time must be taken into account.

8. Mr. REUTER said that the essential question raised by article 56 lay in the title rather than the text. The Special Rapporteur had been right to devote an article to the problem of the "inter-temporal law", although the term was not perhaps a very happy one.

9. It did, however, refer to a very important problem, the conflict between legal rules in time. If the Commission confined itself to treaties, it should consider the relation between an earlier treaty and later rules. Article 45, adopted at the previous session,[4] settled the question of a conflict between an earlier treaty and supervening rules of *jus cogens*. Article 65, in the report before the Commission, dealt with the relation between two treaties concluded at different times. There remained the question of the relation between two treaties and a custom formed subsequently or a subsequent principle of law, but not of *jus cogens*; there were only allusions to that problem in articles 53 and 64.

10. In the case of article 56 the Commission had a choice between two solutions. First, it could consider that the article was included *pro memoria* and should be rather cautiously worded, because the subject-matter was extremely complicated. In that case, paragraph 1 should certainly be retained, for to delete it would mean ignoring the whole problem. Perhaps, to be on the safe side, the words "more particularly" should at the very least refer to all the articles that dealt with similar problems. Secondly, the Commission could deal with the problem as a whole, which would obviously be a very difficult task, since it would mean drafting a new text covering the relation between treaty rules and non-treaty rules in the various possible cases. He had formed no opinion as to which of those two solutions was to be preferred.

11. Mr. ROSENNE said that the article was acceptable in principle and fulfilled a useful purpose by drawing attention to an issue that could prove troublesome in practice. McNair treated the inter-temporal law as something more or less to be taken for granted and made the important point that the rule formulated by Judge Huber did not mean that all treaties should be brought up to date for the purpose of their application,[5] while Rousseau pointed out that Judge Huber's statement was not in principle limited to territorial disputes.[6] It was noteworthy that the part of that statement quoted in paragraph (1) of the commentary on article 56 had been preceded by the words "Both parties are also agreed that", which could be taken as evidence of State practice in support of the rule.

12. He had not been convinced by the argument that the inter-temporal law was something too general for

[1] Para. 7.

[2] *United Nations Reports of International Arbitral Awards*, Vol. II, p. 829.

[3] *Op. cit.*, Vol. XI, p. 167.

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

[5] *Law of Treaties*, 1961, p. 468.

[6] *Principes généraux de droit international public*, Vol. I, p. 498.

inclusion in a draft codifying the law of treaties. The Commission had, after all, framed a number of provisions deriving from general principles in their special application to the law of treaties and there was no reason why it should not follow the same course in the present instance.

13. With regard to the wording of the article, he understood the opening words of paragraph 1, " A treaty is to be interpreted ", as referring essentially to the exegetical process of establishing the meaning of individual words and phrases rather than the meaning of the treaty as a whole. That was borne out by the case cited in paragraph (2) of the commentary, where the reference to the *Grisbadarna* case and to the fact that territorial waters, when mentioned in a seventeenth-century treaty, must be understood in the terms current at that time, indicated that such should be the common-sense rule. Accordingly, he did not consider that the text of paragraph 1 did violence to the fundamental rule of interpretation that the intention of the parties must prevail.

14. He questioned whether it was always correct to state that the point of time for the purposes of paragraph 1 of the article was the moment when the treaty was drawn up. His provisional conclusion on that point was that it was the date of the adoption of the text that was relevant.

15. Paragraphs 1 and 2 dealt with two separate principles of equal importance, neither of which was subordinate to the other, and he therefore hesitated over the words " subject to paragraph 1 " in paragraph 2. He hoped it would prove possible to draft the substantive articles concerning application without actually using the word " application " itself.

16. Referring to the examples given by Mr. Verdross concerning the interpretation and application of the Covenant of the League of Nations and the Charter of the United Nations, he said that in due course the Commission would have to consider whether and to what extent the provisions of article 48 in Part II would have to be applied to the articles now being examined.

17. With regard to the position of the article, he wondered whether it should not be moved nearer to article 65. There was inevitably some overlapping between the articles in Part III, as there had been between the articles in Part II, but that was a matter which would have to be reviewed during the final reading.

18. Mr. ELIAS said he questioned whether the inter-temporal rule could be regarded as relevant only to the law of treaties. A study of the cases mentioned in the commentary had increased his misgivings about the juxtaposition of the two elements now contained in the article which, as the Special Rapporteur himself had pointed out in paragraph (5) of the commentary, were not always easy to reconcile.

19. He therefore suggested that further consideration of the article be deferred until the Commission discussed the provisions on the general principles of interpretation being prepared by the Special Rapporteur. It would then be easier to decide whether an article on the inter-temporal rule should be included at all.

20. Mr. BARTOŠ said he fully approved of the formulation proposed by the Special Rapporteur. A study of treaties showed that they could have two entirely different aspects, as was indicated, incidentally, in the Statute of the International Court of Justice. On the one hand a treaty was a legal act concluded between the parties, in which the will of the parties was dominant ; in that case, it was the positive international law existing at the time when the treaty was drawn up that should be considered in interpreting the will of the parties and, hence, in applying the treaty (article 36, para. 2.a of the Statute of the Court). On the other hand, treaties were also sources of international law, in other words, normative rules of law (article 38, para. 1.a). Whereas the will of the parties remained fixed at the time at which it was expressed, normative rules were dynamic and evolved with time, as did the whole system of positive international law.

21. Consequently it was not only logical, but essential to distinguish between the two points of time mentioned in the article. It was necessary to understand what the parties had wished to do and to determine what legal relationships they had wished to establish (which might raise the question of the objective interpretation of the will of the parties, especially in collective treaties), but it was also necessary to consider the effects of treaties as legal norms. Both ideas had been present in Judge Huber's mind, although, like all jurists of his time, he had shown a preference for the unity of the act and the autonomy of the will.

22. He agreed with Mr. Reuter that the term " inter-temporal law " raised difficulties, but he hoped the Drafting Committee could settle that problem.

23. With regard to the time to be considered in determining the will expressed in a treaty, he approved of the wording proposed by the Special Rapporteur : it was the time when the treaty had been " drawn up ", not the time when it had been concluded or accepted. However, when a treaty was not accepted until many years after it had been drawn up and was only accepted with reservations, that could be taken as equivalent to drawing it up anew, and consequently, in that exceptional case, the decisive time was the time of acceptance. But the text submitted by the Special Rapporteur certainly stated the fundamental principle.

24. Mr. TSURUOKA said that article 56 raised the problem of the relation between the autonomy of the will and the development of conventional and customary international law. It was necessary to reconcile, as far as possible, the stability of conventional international law and the flexibility of customary international law. After careful consideration he had reached the following conclusion : A treaty expressed the will of the parties. If that will was expressed rather vaguely, the treaty needed interpretation. In so far as it did not conflict with rules of *jus cogens*, the will expressed must be interpreted in the light of the international law prevailing when the treaty had been concluded. But there were also cases in which the will of the parties was not expressly stated : then the implied will of the parties had to be determined by interpretion. If the interpretation showed that the parties

had wished to follow the evolution of international law, it was international law at the time when the treaty was interpreted which prevailed. Otherwise, it was the implied will of the parties at the time when the treaty was concluded that should be applied.

25. It was also obvious that when a new rule of *jus cogens* supervened, that rule prevailed, bringing about the nullity of all or part of the previous treaty; there was then no longer any problem of application or of interpretation, apart from the interpretation required to determine the conflict with *jus cogens*.

26. If that interpretation of article 56 was not too strained, he approved of the Special Rapporteur's proposal.

27. Mr. de LUNA congratulated the Special Rapporteur on the scientific honesty he had shown once again in the drafting of article 56. He approved of what was said in paragraph (6) of the commentary, and saw no contradiction between the two principles stated. In proposing that solution, the Special Rapporteur had been aware, as he said in paragraph (3) of his commentary, that the "interpretation" and "application" of treaties were closely inter-linked; and in paragraph (5) of the commentary he had made it clear that he had seen the difficulties.

28. The interpretation with which the Commission was concerned in that context was normative interpretation, the purpose of which was to determine the legal rule that the legislator or the parties to a contract wished to be applied. Even though, logically, interpretation was distinct from application, from the practical point of view a treaty was interpreted so that it could be applied. Paragraphs 1 and 2 of the article dealt with two entirely different problems. What caused a shock at first sight was the fact that the two principles stated, both of which were correct, were placed in the same article.

29. Moreover, the examples quoted in the commentary did not throw much light on the question. The *Island of Palmas* case, and many others, were cases of *jus non scriptum*, or of what was sometimes called spontaneous law. Custom was essentially a sociological phenomenon; it arose spontaneously, independently of any previous form, and its action was diffuse and continuous. It was formed and reformed imperceptibly. Treaty law, on the other hand, was *jus positum*; it was discontinuous, and generally in written form. The impression of contradiction felt by some members might perhaps be due to the fact that the function of interpretation was not the same for treaty law as it was for customary law. The problem of the transformation and abrogation of rules of law raised by paragraph 2 also differed considerably according to whether customary rules or treaty rules were concerned.

30. As to what was called inter-temporal law, it was not so much a matter of distinguishing between the rules successively in force as between established rights and expectations of rights: in other words it was necessary to know the rule in force *medius tempore*. Most civil codes in continental Europe contained transitional provisions relating to situations of that kind.

31. Frontier treaties, which had been mentioned by Mr. Jiménez de Aréchaga, created a situation that entered into the subjective heritage of the State. A frontier treaty had a constitutive and definitive effect depending on agreed principles.

32. While he agreed with the Special Rapporteur on the principles proposed, he did not agree with him on where they should be stated. Paragraph 1 would be more appropriate in the section on the interpretation of treaties, and paragraph 2 should be linked to the whole problem of the transformation and duration of treaty rules.

33. Mr. Yasseen said that the article 56 dealt, not with problems of conflict of legal rules in time, as its title might suggest, but with a problem of the interpretation of treaties, namely, whether, in interpreting a rule, it was the time when the treaty was drawn up that should be considered or the time when it was applied. Needless to say, since the international legal order was an individable whole, each of its rules was influenced by the development of that order. On the other hand, a treaty rule was to some extent an act of will in the sense that, in order to understand the rule, it was necessary to refer to the intention of the parties, in the same way as the intention of the legislator was referred to in municipal law.

34. With regard to paragraph 1, it was clear that a legal rule in a treaty was formulated in the light of several factors: first, a state of law, but also a state of fact. It was fair to presume that when formulating the rule the parties had considered the state of the law at the time. But paragraph 2, concerning the application of the treaty, was drafted in too general terms, so that it appeared to contradict paragraph 1.

35. Yet in speaking of application it was necessary to speak of interpretation. And if, in interpreting a legal rule, the state of the law at the time of its application was considered, the effect attributed to it might differ from that which it would have had if only the law in force at the time of its drafting had been taken into account. Of course, all treaty rules were not of the same nature. A treaty was a source of law, but it involved a technical process which could also create individual situations. Where an objective rule had to be interpreted, however, it was not possible to defer in the same way to the intention of the parties, because rules affecting the international community were involved, and changed circumstances could have a greater effect on those normative rules than on the individual situations established by a convention. That was a first exception to be made to the principle stated in paragraph 1: in the case of normative rules, it was necessary to take account of changes in circumstances and the development of the international legal order.

36. Another exception of a general character which the Special Rapporteur had mentioned in his commentary, was the supervention of a rule of *jus cogens*. Where that occurred, it was not possible to interpret the treaty according to the law in force at the time when it had been drawn up; but it could also be presumed that the intention of the parties at that time had not been to rule out the possibility of some adap-

tation of the provisions of the treaty to the developing legal order.

37. Article 56 raised serious problems of interpretation, and for considerations of logic it was necessary to retain paragraph 2, in order to qualify the principle laid down in paragraph 1, and to determine the conditions under which that principle could be departed from and the treaty should be interpreted, and hence applied, according to the law in force at the time of its application.

38. Mr. BRIGGS said that the substance of the article was entirely acceptable, but some drafting changes would be needed. He was in broad agreement with what had been said by Mr. Rosenne.

39. In the *Island of Palmas* arbitration, when the onus had been laid on the United States to prove that in 1898 Spain possessed a valid title to cede the island, the United States had relied on the fact that in the fifteenth century discovery was sufficient to establish title even when not followed by occupation. In fact, Spain had withdrawn from the island, which had subsequently been occupied by the Dutch for over two centuries. Judge Huber had found that "a juridical fact must be appreciated in the light of the law contemporary with it", but he had also found that the continued existence of the right "must follow the conditions required by the evolution of the law[7]".

40. There was no contradiction between those two principles — a fact which had been convincingly demonstrated by Mr. de Luna — and he believed that paragraphs 1 and 2 were complementary; they could be combined in a single paragraph by substituting the word "but" for the words "subject to paragraph 1". There was no reason why a principle of wider application than the law of treaties as such should not be incorporated in the draft. It was concerned not with changes in circumstances — the subject of article 44 — but with changes in rules of international law.

41. Mr. TUNKIN said that the brief text of article 56 had many complex implications. Paragraph 1 related to interpretation and should be discussed in the context of that subject when the Commission came to deal with it. Hence he would not dwell on that paragraph, but would merely indicate his doubts both as to the meaning of the term "interpretation" and as to the actual rule proposed. For example, the question arose whether any new rules of interpretation that had emerged since the treaty had been drawn up should not also be applied.

42. With regard to paragraph 2, he agreed with Mr. Reuter that it involved the problem of the relation between the treaty and subsequent rules of international law, both conventional and customary. That problem had been dealt with in part in article 45 (Emergence of a new peremptory norm of general international law), but paragraph 2 of article 56 covered a much wider field since it referred to the emergence of any norm of international law that conflicted with the clauses of the treaty.

43. There was also the problem of the possible transformation of the clauses of a treaty by custom and tacit agreement of the parties. Since it was generally accepted that conventional and customary rules of international law were equally binding, it should also be recognized that the provisions of a treaty could be changed by tacit agreement of the parties; international practice provided many examples of that situation, which involved a problem not of interpretation, but of the modification of a treaty.

44. With regard to the procedure to be followed, his position was the same as that of Mr. Elias; in view of its close connexion with other articles which the Commission had already adopted during past sessions or would be considering during the present session, he suggested that further discussion of article 56 be postponed.

45. Mr. AMADO said that on reading article 56 he had been struck by the use of the word "interpreted", and, like other speakers, had inferred that the article was concerned with rules of interpretation. But paragraph 2 referred to the application of treaties. The article was a reformulation of the rule laid down in the *Island of Palmas* arbitration by Judge Huber, who had used the verb "appreciate" instead of "interpret". It seemed difficult to imagine that when two States jointly drew up a legal instrument expressing the agreement of their wills to the reciprocal granting of benefits, they would not take account of the legal order prevailing at the time. That being so, it was right to say that a juridical fact must be appreciated in the light of the law contemporary with it; that was the rule stated by the Special Rapporteur in paragraph 1, and it was clear that account must be taken of the legal order and even of the interest existing at the time when the legal instrument had been drawn up. Up to that point, the Special Rapporteur's text followed Judge Huber's dictum.

46. But Judge Huber had been referring to the time when a dispute in regard to a juridical fact arose or fell to be settled. He had been thinking of the problems to which performance of the treaty might give rise as a result of differences of opinion between the contracting States regarding that instrument. The Special Rapporteur's application of the dictum seemed to go beyond what Judge Huber had said.

47. He therefore concluded that if the rule stated in article 56 was regarded as a rule of interpretation, it ought not to be discussed until the Commission came to deal with the rules of interpretation as a whole. But if the article was concerned with the effects of the inter-temporal law, and if it was based on the definition given by Judge Huber, it should be retained. States could not conclude a treaty in disregard of the law contemporary with it; but neither could they ignore the development of law.

48. Mr. EL-ERIAN said that, as a general statement of rules of treaty law, the article was not difficult to accept, especially if the words "more particularly" were inserted in paragraph 1, as suggested by Mr. Reuter, so as to make its provisions less general

[7] *United Nations Reports of International Arbitral Awards*, Vol. II, p. 845.

in scope and less exclusive of other elements of interpretation.

49. With regard to the placing of the article, its relation to some of the provisions in Part II and its relation to the other sections of Part III, however, he had some misgivings, which the discussion had only strengthened. It was clear that the article needed further study and he supported Mr. Elias' suggestion that the Commission should postpone further consideration of it.

50. The CHAIRMAN, speaking as a member of the Commission, said he thought that some of the difficulties mentioned during the discussion arose from the juxtaposition of two quite distinct matters in the same article. In reality, paragraph 1 dealt with interpretation and paragraph 2 with a problem of application. In interpreting a treaty, it was impossible not to take into consideration the legal concepts which the parties had had in mind when they drew it up, and that applied even more strongly to the legal terms used in the treaty, which must necessarily be taken in the sense in which they had been used when it was drafted. But the rules of interpretation were numerous and then complemented one another. Although one rule was that in determining the will of the parties account must be taken of the conditions under which the treaty had been drawn up, there was no reason why that will should not have changed with the passage of time. In particular, there was a rule that the subsequent practice of the parties must be taken into account, for it might show that at a certain moment the parties had agreed to interpret the treaty in a manner different from that originally intended. He therefore thought it advisable to defer consideration of that question and take it up in conjunction with the rules of interpretation as a whole, which might complement it.

51. Paragraph 2 dealt with the rules that should govern the application of a treaty. A treaty contained a number of rules and obligations, the definition of which was bound to be affected by the development of international law. For example, if there was a change in the rules on the breadth of the territorial sea, a treaty granting special rights in that sea must necessarily be applied to the whole area provided for in the new rules. Moreover, apart from the extremely rare case in which a treaty conflicted with a new rule of *jus cogens*, a number of other rules had to be taken into account, such as those governing the grounds for termination of a treaty. A new ground for termination might make it impossible to apply the treaty even if it had been concluded at a time when that ground for termination had not been foreseen.

52. The ideas expressed in the article were correct, but it was difficult to accept them because they were placed together and paragraph 2 seemed to contradict paragraph 1. The rule laid down in paragraph 1 would be better placed among the set of rules to be drafted on interpretation. As to paragraph 2, the Special Rapporteur would have to decide whether it should be left in its present position or transferred to a more appropriate part of the draft.

53. Mr. LACHS said that article 56 dealt with one of the fundamental aspects of the law of treaties — one of the basic dimensions in which the law moved: the dimension of time. In principle, he had little against the provisions in either of the paragraphs of the article, but he thought that they said either too little or too much on issues that called for a wider and clearer formulation of rules.

54. He agreed with Mr. Briggs that there was no real conflict between the provisions of paragraph 1 and those of paragraph 2, but, as formulated, they did appear to conflict. In the circumstances, the best course was perhaps that suggested by the Chairman — to separate the two distinct issues involved. Paragraph 2 could remain where the Special Rapporteur had placed it, but paragraph 1 should be with the articles on interpretation.

55. With regard to the wording of the article, he would deal with paragraph 1 when the Commission came to consider its substance; he hoped the suggestion to postpone further consideration would be adopted. On the wording of paragraph 2 he agreed with Mr. Reuter. Although the title of the article was not one of its essential features, he thought it should be amended, particularly if paragraph 1 were moved elsewhere.

56. Sir Humphrey WALDOCK, Special Rapporteur, replying to the observations of members, said that the fact that paragraph 1 expressly dealt with interpretation did not exclude the possibility of placing it in that part of the draft articles which dealt with the application of treaties. He understood that the majority of the Commission would prefer to have the provision in paragraph 1 placed among the rules on the interpretation of treaties, but he must point out that many other articles of the draft, such as article 57, also involved interpretation as a preliminary to application of a treaty, and he would not wish to see too many of the provisions transferred to the section on interpretation.

57. There was a definite advantage in including in one and the same article the provisions of paragraph 1, on interpretation, and those of paragraph 2, on the application of treaties. Paragraph 2 was important to an understanding of paragraph 1 and, as Mr. Yasseen had pointed out, served as a corrective to it. It should also be remembered that interpretation was often a necessary preliminary to application.

58. He attached no special importance to the title "The inter-temporal Law"; he had taken it from the award by Judge Huber in the *Island of Palmas* arbitration, but would not press for its retention.

59. It was possible to formulate the provision in paragraph 1 in the rules on interpretation, but it would not constitute a complete statement of the law on the matter unless it was accompanied by the provision in paragraph 2. Mr. Reuter had rightly pointed out the connexion between paragraph 2 and other articles of the draft, especially article 65, dealing with conflict between treaties. The provision in paragraph 2 should not be left in its present position without that in paragraph 1, and he therefore suggested that both be moved to a later section of the draft.

60. As to subsequent practice, that issue was nearly always presented as one of interpretation. Moreover,

a clear distinction should be made between subsequent practice in the application of a treaty and the practice of the contracting States in the development of customary international law generally. The States parties to a treaty which laid down particular rules for a given subject as between themselves, might well be prepared to accept, outside that context, some general rule of international law, whether it was established by multilateral treaty or by new practice. The issue was one of the relation between special and general rules of international law.

61. Article 56 would have to be reconsidered in the light of the discussion. Perhaps paragraph 1 should be placed among the provisions on the interpretation of treaties and the drafting of paragraph 2 postponed until the Commission came to deal with the question of conflicting treaty provisions. He believed, however, that both paragraph 1 and paragraph 2 stated broad truths and should find a place in any draft on the law of treaties.

62. The CHAIRMAN, summing up the discussion, said that the principles stated in paragraphs 1 and 2 of article 56 were considered correct to a large extent, but it was feared that their drafting and juxtaposition might lead to misunderstanding.

63. He explained that when he had referred to the subsequent practice of States, he had meant what was called the subsequent conduct of the parties in applying a treaty, not practice in a more general sense, which was quite a different matter. That conduct itself, however, could either have a purely interpretative aspect or, in certain cases, comprise tacit agreements which were more in the nature of a modification than an interpretation.

64. He suggested that the Commission should postpone further consideration of the article and request the Special Rapporteur to reconsider the matter.

It was so agreed.

Communication from Mr. Padilla Nervo

65. The CHAIRMAN invited Mr. Jiménez de Aréchaga to read to the Commission a communication received from Mr. Padilla Nervo.

66. Mr. JIMÉNEZ de ARÉCHAGA said that Mr. Padilla Nervo had addressed to him, in his former capacity as Chairman of the Commission, a communication dated 9 May 1964, in which he submitted, with regret, his resignation from the Commission following his election as a judge of the International Court of Justice, and assured members that he would follow their important work with the greatest interest. He had had the privilege of participating for eighteen years in the activities of various organs of the United Nations, but had a special predilection for the International Law Commission, on which he had served for nine years.

67. The CHAIRMAN asked Mr. Jiménez de Aréchaga to thank Mr. Padilla Nervo for his communication.

The meeting rose at 12.50 p.m.

730th MEETING

Monday, 25 May 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

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

[Item 3 of the agenda]

ARTICLE 57 (Application of treaty provisions *ratione temporis*)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 57 in his third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 57 dealt with the scope of the application of a treaty to facts or matters, from the point of view of the time factor. Paragraph 1 stated the substantive rule. The matter appeared comparatively simple, but on closer examination revealed great difficulties, mostly with respect to jurisdictional clauses. Explanations and a number of examples were given in the commentary.

3. Paragraph 2 stated a reservation which made it clear that acceptance of the rule in paragraph 1 did not mean a State was freed from responsibility for what it might have done during the currency of the treaty. That point had been in issue in the *Northern Cameroons* case,[1] in which the International Court of Justice had almost certainly assumed that normally a State remained responsible, after the termination of a treaty, for what might have happened while the treaty was in force. In other words, the United Kingdom could have been held responsible for any breach of the Trusteeship Agreement that might have occurred while the agreement was in force, but since no claim for reparation had actually been made, and because of the special circumstances of the case, the Court had refused to adjudicate.

4. Mr. YASSEEN said that article 57 was of great importance and dealt with problems that arose very frequently; for whenever one treaty succeeded another, the question of the succession of the effects of the treaties had to be settled.

5. The article embodied three principles. The first was that, in general, a treaty could not have retroactive effect; that was an accepted principle, so paragraph 1 raised no difficulty.

6. Paragraph 1 also showed that that principle did not have the force of *jus cogens*, since exceptions could be provided for in the treaty itself; that could not be contested either. Nevertheless, he would prefer to see the words "expressly or impliedly" deleted, for it

[1] *I.C.J. Reports*, 1963, p. 15.