

Document:-  
**A/CN.4/SR.730**

**Summary record of the 730th meeting**

Topic:  
**<multiple topics>**

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

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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 multi-lateral 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,<sup>1</sup> 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

<sup>1</sup> *I.C.J. Reports*, 1963, p. 15.

was obvious that a treaty was valid in respect both of what it expressly stated and of what it implied.

7. The second principle was that a treaty must have immediate effect. Of course, when a new treaty came into force and was to be applied to a continuing situation, it took effect immediately, not retroactively. The new treaty governed the legal situation from the moment that situation came under the new rule; that principle was well explained in the commentary.

8. The third principle was that a treaty applied to facts of matters arising while it was in force, even after it had been terminated or suspended; that was an aspect of what might be called the survival of treaties. When a treaty was terminated or suspended, naturally it could not remain in force, but it nevertheless continued to apply to facts or matters which had arisen while it had been in force. That principle could be stated in clearer terms.

9. The expression "retroactive interpretation" should be avoided in the commentary; although it was borrowed from the International Court of Justice, which had used it in the *Ambatielos* case,<sup>2</sup> that expression was liable to be misunderstood. What was meant, of course, was an "interpretation permitting retroactive application"; interpretation itself, in the sense of understanding a rule, was generally retroactive.

10. The CHAIRMAN said that in order to facilitate discussion, he would like to ask the Special Rapporteur to clarify a few points. First, in paragraph 1, he appeared to be referring to certain types of treaty, in particular those which provided for the pacific settlement of disputes. But did the rule which was valid for that type of treaty extend to all treaties?

11. Secondly, in the case of treaties for the pacific settlement of disputes, should the procedure contemplated in those treaties be held to be automatically applicable only to disputes arising out of facts or matters subsequent to the treaty? The fact that the parties often thought it necessary to include in their treaty a clause specifying that the procedure laid down in it applied only to facts subsequent to the acceptance of the treaty surely seemed to suggest that the usual principle was, on the contrary, that when that precaution was not taken the procedure applied to all disputes, even those arising out of prior facts.

12. Thirdly, did paragraph 2 apply to certain types of treaty, such as the constituent instruments of international organizations, or to treaties in general? If it was meant to apply to treaties in general, was not the proposed rule rather too absolute in character, since there were treaties whose termination put an end to all the rights and obligations stipulated in them, even with respect to facts which had supervened while they had been in force?

13. Sir Humphrey WALDOCK, Special Rapporteur, replying to the Chairman's first question, said that he thought the rule in paragraph 1 was one of general application and was not limited to jurisdictional

treaties. It applied unless, as indicated in paragraph 1, a contrary intention appeared from the clauses of the treaty or from its very subject matter. A good example was the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>3</sup> which undoubtedly contained jurisdictional provisions, but also had very important substantive effects relating to the human rights of individuals. The European Commission on Human Rights had had no hesitation in saying that the provisions of that treaty applied only with respect to matters arising or subsisting after its entry into force.

14. In reply to the Chairman's second question, he said that the difficulties with regard to clauses of judicial settlement arose mainly over the meaning of the term "disputes" and the question whether that term should be construed narrowly as covering only disputes which had arisen after the entry into force of the jurisdictional clause in question. The case-law of the International Court of Justice supported the general principle that a jurisdictional treaty applied to all disputes unless the parties stipulated the exclusion of disputes having their genesis in events prior to the conclusion of the treaty.

15. In reply to the Chairman's third question, he said that paragraph 2 also stated a general rule. He would, however, accept the qualification suggested by Mr. Yasseen in order to safeguard the position regarding treaties which had been executed; the execution of those treaties was intended to have permanent effects. In general, however, when a treaty was terminated, the rights of the parties with respect to facts or matters which had arisen while the treaty was in force must be determined by reference to the treaty provisions. Even in the *Northern Cameroons* case it was clear, both from the language of the Court and from the individual opinions, that the assumption was that, in principle, the obligations were still obligations which could be invoked after the termination of the treaty for the purpose of claiming reparation. In fact any different conclusion might be disastrous, since it was common for the parties to a treaty to have the right to terminate their obligations by giving three or six months' notice, and unless the rule in paragraph 2 were accepted, there might be a temptation to terminate a treaty merely in order to escape the consequences of a breach of its provisions while the treaty was in force.

16. The CHAIRMAN said he still thought it was open to question whether article 57 stated a general rule applicable to all treaties or a rule relating only to certain kinds of treaty.

17. Mr. REUTER said that, since the Commission was thinking of redrafting article 56, it should consider whether the substance of article 57 should not be combined with the substance of the new article 56; both articles dealt with the same problem, and that would be quite evident if the expression "inter-temporal law" were used to describe article 56.

18. With regard to substance, it must be recognized that the subject-matter was very complicated. The

<sup>2</sup> *I.C.J. Reports*, 1952, p. 40.

<sup>3</sup> *United Nations Treaty Series*, Vol. 213, p. 222.

Commission should proceed cautiously, for it was to be feared that it would not be able to provide for all cases and state all the rules. The various systems of municipal law contained many detailed rules relating to the matter dealt with in article 57; they drew very subtle distinctions between acquired rights and expectancies, and between the establishment of juridical situations and their effects. Where they laid down a principle, they immediately attached a number of exceptions to it. The Special Rapporteur had referred to the rules governing territorial jurisdiction; the text under study would also be certain to have major consequences in regard to the succession of States. The Commission might therefore find itself going much further than it had expected.

19. It seemed that two practical conclusions must be drawn. First, it was desirable to draft very general and rather vague provisions. Far from wishing to delete the words "expressly or impliedly" altogether, as Mr. Yassien did, he would prefer wording similar to that used by the International Court of Justice, for example, "in the absence of special reasons inherent in the purpose of the treaty or in some other circumstance", which would leave room for all the exceptions. Secondly, the most difficult problem was probably that raised by the use of such words as "facts", "matters", "arising", and "subsisting". In articles 53 and 54<sup>4</sup> adopted at the previous session, which related to similar problems, the Commission had used the words "act" and "situation"; it might be wise to make the wording uniform and leave article 57 as vague as possible.

20. Mr. BRIGGS said that while he sympathized with the intention of both paragraphs of article 57, although it was already expressed elsewhere in the draft, he had difficulty in accepting the manner in which the contents were expressed.

21. The purpose of paragraph 2 was, in a great measure, already served by paragraphs 1 (b) and 3 (c) of article 53, on the legal consequences of the termination of a treaty, and paragraph 1 (c) of article 54, on the legal consequences of the suspension of the operation of a treaty. Incidentally, the opening sentence of article 53 referred to the "lawful termination" of a treaty, an expression which was not used in article 57. He questioned the need to retain paragraph 2 at all.

22. The rule in paragraph 1 was very similar to that stated in paragraph 4 of article 23,<sup>5</sup> which dealt with entry into force. Its purpose would seem to be largely to exclude prior facts or matters from the application of a treaty except where a treaty "expressly or impliedly provides otherwise". Unfortunately, the exact scope of the exclusion was not altogether clear, mainly because of the difficulty created by the words "facts or matters arising or subsisting", regarding which he shared many of the misgivings expressed by Mr. Reuter.

23. Much would depend on the nature of the treaty. It was clear, for example, that a treaty of alliance or

a commercial treaty could not be invoked with reference to past facts or situations. It was difficult, however, to decide whether the same would be entirely true of a treaty of extradition, for example. A person charged with a criminal offence might escape to a country with which the country where he had committed the offence had no extradition treaty. If that country subsequently entered into such a treaty with the country of refuge, the question would arise whether the person charged could claim that no extradition was possible because the acts alleged to have been committed by him had occurred before the treaty came into force. In order to get round the difficulty it might, of course, be possible to say that the charge was of a "continuing" character. A similar problem would arise if the person concerned, instead of being merely charged with an offence, was an escaped criminal under sentence; in that event it might perhaps be said that the sentence "subsisted".

24. Mr. ROSENNE said that both paragraphs of article 57 stated the law as he had always understood it and he believed that the rules laid down in those paragraphs applied in principle to all treaties.

25. The Special Rapporteur's quotations from the *Ambatielos* case and the *Mavrommatis Palestine Concessions* case and his oral reference to the *Northern Cameroons* case were convincing on that point. It was clear that in those cases the International Court of Justice had applied the rule not merely to the jurisdictional clauses, but to the substantive clauses of the treaty as a whole. In the final commentary too much emphasis should not be placed on the jurisdictional problem, which was largely one related to the definition of a "dispute", and a suitable reference to the *Northern Cameroons* case should be inserted.

26. He had been rather surprised to hear State succession mentioned during the discussion. As he read article 57, both paragraphs referred specifically to "parties" in the meaning given to that term in Part I of the draft,<sup>6</sup> namely, States which became parties to a treaty by their own action; hence the question of State succession did not arise.

27. With regard to the expression "expressly or impliedly", he believed a more fundamental issue was involved and that the use of the word "impliedly" could give rise to difficulties. It might be better to refer instead to the circumstances of the conclusion of the treaty as in articles 12 and 39.

28. With regard to paragraph 2, he had some misgivings over the reference to "suspension of the operation of a treaty", which seemed to him to conflict with article 54. The term "termination" was appropriate for bilateral treaties, but consideration should also be given to the question of the withdrawal of a party from a multilateral treaty. Paragraph 2 should perhaps be linked more closely with articles 53 and 54. The question also arose whether the principle embodied in article 48, especially insofar as it concerned the constituent instruments of international organizations, should not also be applied to articles 53, 54 and 57.

<sup>4</sup> *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, pp. 28-29.

<sup>5</sup> *Yearbook of the International Law Commission, 1962, Vol. II*, p. 182.

<sup>6</sup> *Yearbook of the International Law Commission, 1962, Vol. II*, pp. 161 *et seq.*

29. He was puzzled by footnote 23 to paragraph (2) of the commentary. As he understood it, the Commission's general approach was to place the emphasis on the contractual aspect of a treaty and not to over-emphasize the concept of "*traité-loi*".

30. Mr. de LUNA said that the two paragraphs of article 57 dealt with two different problems. Paragraph 1 stated a general principle of international law, namely, that the provisions of a treaty applied only with respect to facts or matters which existed while the treaty was in force; that was the principle of non-retroactivity of the effects of a treaty. But that principle should not be made an absolute rule, for the parties were completely free to give retroactive effect to all or some of a treaty's provisions. Even if the treaty itself stipulated that it would not enter into force until a certain date, it could, if such was the intention of the parties, apply to matters existing before that date.

31. Moreover, it was certain that there could be no exceptions to the general principle of the non-retroactivity of effects unless the parties had unmistakably manifested their will to permit exceptions; that manifestation of will could be expressed or implied. Whether the Commission deleted the words "expressly or impliedly", as Mr. Yasseen had suggested, or adopted Mr. Reuter's suggestion, the consequences would be the same.

32. But paragraph 1 and the commentary on it could give rise to another difficulty, relating mainly to the word "subsisting". As the Chairman had rightly observed, paragraph 1 had been drafted having mainly in mind the jurisdictional clauses in treaties for the settlement of disputes. He (Mr. de Luna) supported the view of the Special Rapporteur, who had very well explained, in paragraph (5) of his commentary in particular, how the rule he had drafted should be understood. But in order to avoid any possibility of misunderstanding, it might perhaps be necessary to amend the wording of paragraph 1 so as to make it even more unambiguous.

33. Paragraph 2 raised the problem of acquired rights. It was a general principle of international law that when a treaty terminated, all the obligations under it, especially continuing obligations, ended with the treaty. But where acts performed under the treaty had created a certain situation, the rights so acquired were not affected by the termination of the treaty. Like Mr. Briggs and Mr. Rosenne, he thought it might be preferable to link paragraph 2 of article 57 with articles 52, 53 and 54, which related to the nullity, termination and suspension of treaties.

34. Mr. PAREDES said that the Special Rapporteur appeared to be maintaining two principles in article 57 of the draft: the principle that treaties had no retroactive effect unless the parties had agreed otherwise, and the principle that there was continuity in the life of nations which could not be suddenly broken without taking account of the consequences of acts lawfully performed. Both those principles were of great importance in law, but they were not fully applicable in every case: it was necessary to consider the nature of the treaty and the transaction concluded in it.

35. On that point, he agreed with the Chairman that the rule in paragraph 1 seemed to be too broad. There were many treaties whose main purpose was to settle a pre-existing problem; such treaties necessarily referred to matters that had arisen earlier and by their very nature had retroactive effects. The rule in paragraph 1 applied, therefore, to a treaty which created a new legal situation.

36. There were, of course, void, voidable and valid treaties, and treaties that were terminated or suspended for various reasons. A void treaty might have been in force for some time before its nullity was invoked. What happened then "with respect to facts or matters arising or subsisting while the treaty is in force"? A treaty which was absolutely void was treated as though it had never been concluded, and it could not have positive legal effects. There was a kind of restitution *in integrum*, intended to restore the former situation as far as possible. The same did not apply to treaties that were voidable, or could be denounced, or were terminated for any reason after having had legal existence: in such cases the rules of the article were applicable, with a few exceptions.

37. There were treaties whose termination or suspension required the immediate termination of their effects. For example, there might be an agreement for the supply of armaments which was subsequently held to be immoral or unjust or had been prohibited by the competent authority; no purchase or shipment could then be made on the pretext that it had been agreed on before the termination or suspension of the contract. There were voidable treaties which lost all their effects from the moment they became void: if they were voided because of non-fulfilment by one of the parties, the other could not be held to obligations prejudicial to it, and he did not see how it could be maintained that the injured party was still required to fulfil its obligations under the treaty.

38. Lastly, suspension of the operation of a treaty by reason of war between the parties must also entail suspension of all its effects.

39. Mr. BARTOŠ endorsed Mr. Reuter's comments. Article 57 brought into operation general principles which gave rise to a multiplicity of rules of application, and the Commission would therefore be well advised not to go into details. For the time being he would offer only a few comments to show that there were many kinds of situation requiring special rules. It was clear from the case-law and from treaties that there was a difference between the retroactive effect of a treaty and the retroactive application intended by the parties with respect to facts or matters already existing before the treaty had been concluded. It could hardly be said that such facts or matters were "arising or subsisting"; they might already have ceased to exist at the time when the treaty had been concluded.

40. The situation was particularly complicated in the case of a treaty containing a most-favoured-nation clause. Serious disputes had arisen because some States had considered themselves injured by amendments made by third States *inter se* and imposed on them by retroactive application, which did not give satisfaction

to the other States entitled to benefit under the clause. That applied not only to trade treaties, but to other kinds of treaty as well.

41. The rule stated in paragraph 1 could be interpreted in two ways: it could be regarded either as a rule establishing the validity of the treaty at the time of the occurrence of the facts or matters in question, or as a guarantee of respect for acquired rights. That question might be very serious in certain circumstances: for example, if the guarantee had to be maintained even after the proclamation of a State's independence, and required it to observe a former treaty concluded by the colonial Power.

42. The Commission should avoid going beyond general principles. At the most, it might add a third paragraph to the article stating that in certain special situations — which would not be specified — other rules designed to meet such situations might also apply.

43. The CHAIRMAN, speaking as a member of the Commission, said that as Mr. Rosenne had observed, the Special Rapporteur had perhaps given rather too much prominence to jurisdictional clauses, whereas the main subjects of the article should be fundamental obligations. But the first difficulty that arose was that the Commission wished to state a rule applicable to all treaties. There were treaties which imposed obligations without linking them to facts or matters that would arise in the future. A peace treaty or a treaty terminating a colonial regime, for example, settled former matters. The difficulty was, therefore, to find a way of stating the principles so that the rule would apply in the cases in which it was appropriate, but not to treaties which did not refer to facts or matters that might arise at some future time.

44. If the rule were formulated expressly in respect of fundamental obligations, he could agree that it was sound. But jurisdictional treaties must nevertheless be taken into account. The Special Rapporteur had spoken of existing disputes, which he understood to include even disputes about prior facts or matters. It was to be feared, however, that the words "facts or matters", which were so often used in treaty clauses for the pacific settlement of disputes, might be ambiguous and admit of an inference contrary to the Special Rapporteur's intention, namely, that what was meant in all cases was facts and matters arising after the date of concluding the treaty.

45. Mr. LACHS said that the general rule stated in paragraph 1 was clear, but greater latitude should be given to the parties to make known, either explicitly or by implication, their intention that the treaty should not only apply to the period during which it was in force. For that purpose, he doubted whether it would prove helpful to try to distinguish between different kinds of treaty, including those which confirmed existing principles or rules.

46. As far as paragraph 2 was concerned, he did not believe that suspension should be assimilated to termination; it would therefore be best to remove all reference to the suspension.

47. There were many kinds of treaty, and if too much emphasis was placed on treaties being applicable after their termination, serious legal and material difficulties might arise; for example, on the emergence of a new rule of *jus cogens*. Similarly, circumstances might change in such a way as to render the rights and obligations deriving from the treaty a dead letter and make execution impossible.

48. There was a close connexion between articles 56 and 57, and the time factor was of decisive importance in both cases. It seemed to him that paragraph 2 of article 57 would need to be radically recast.

49. Mr. TSURUOKA said that admittedly the rule stated in article 57 might not be of very much use, for as several members of the Commission had observed, there were so many special cases to which it did not apply; but it did have a place in the general structure of the draft. The idea on which it was based was correct in principle; the Commission might accordingly try to work out as general and flexible a formula as possible and, as it had often done before, deal with points of detail in the commentary.

50. Mr. CASTRÉN said that he had at first been prepared to accept article 57 without much change, but the comments he had heard during the discussion had made him rather hesitant. He thought that very flexible wording should be used, so as to cover both the general case and the exceptions to which several speakers had drawn attention. Paragraph 2 might be deleted and paragraph 1 redrafted to read: "Subject to articles 52 to 54 and unless a contrary intention can be inferred from the purpose or provisions of a treaty, from the circumstances of its conclusion or from the statements of the parties, the provisions of the treaty apply to each party only with respect to facts or matters arising or subsisting while the treaty is in force with respect to that party".

51. Mr. TUNKIN said that the Chairman's comments had strengthened some of his misgivings about paragraph 1, but the Drafting Committee might succeed in finding satisfactory wording.

52. He was inclined to support Mr. Castrén's proposal to delete paragraph 2, which dealt with a complex and delicate matter in a manner unlikely to be acceptable in the context of modern international law. As Mr. Lachs had pointed out, the reasons for the termination of certain treaties might be such as to preclude their remaining applicable, an obvious example being treaties concluded by colonial Powers which, again, might raise the problem of acquired rights.

53. Mr. YASSEEN observed that the rule stated in paragraph 2 was admittedly a general rule, but it could be overridden by the rule in paragraph 1. A new treaty could be retroactive in the sense that it prevented the effects of the application of a prior treaty from being recognized as valid in the past. Recognition of the effects of a prior treaty, even with respect to the past, might sometimes appear incompatible with international public order. Those comments might perhaps allay the misgivings expressed by Mr. Lachs and Mr. Tunkin.

54. Mr. ROSENNE said that Mr. Lachs had drawn attention to the relevance to article 57 of the reason for the termination of a treaty; the manner of its termination might also have an important bearing.
55. As he understood it, the Special Rapporteur had not sought to deal, in article 57, with conflicts between treaties — a problem which was treated elsewhere — but with cases in which a treaty was terminated without another coming into existence.
56. The CHAIRMAN, speaking as a member of the Commission, said that the difficulties raised by paragraph 2 seemed to be due to the fact that the rule might or might not be satisfactory, depending on the reason for which a treaty was terminated. For example, in the case contemplated in article 42 of the draft,<sup>7</sup> concerning termination of a treaty as a consequence of its breach, could it be said that a State which had invoked a breach in order to terminate the treaty was still bound to comply with obligations created by the treaty? That would lead to paradoxical situations.
57. Mr. Castrén's conclusion that paragraph 2 should be deleted was perhaps too pessimistic, however.
58. Sir Humphrey WALDOCK, Special Rapporteur, said that on further reflection he thought Mr. Castrén was justified in proposing the deletion of paragraph 2, since article 53, paragraph 2, expressly covered the case of treaties terminating or becoming void on the emergence of a new rule of *jus cogens*. The question whether some cross-reference to article 53 should be made in article 57 could be left to the Drafting Committee.
59. He had originally included paragraph 2 in order to cover the possibility of a treaty remaining applicable after its termination and being invoked in a case brought before the International Court of Justice in support of a contention that a right or obligation existed by virtue of its provisions.
60. Mr. Rosenne's objection to the word "applicable" was convincing. When the Commission came to review article 53 on second reading it might wish to bear in mind some of the points raised during the discussion of article 57 and not previously considered, such as the manner of termination, or termination as the result of breach by a party in the example mentioned by the Chairman.
61. As far as paragraph 1 was concerned, he still thought it came close to expressing the existing rule. There were, of course, many different kinds of treaty and the nature of some of them showed that they were intended to apply retroactively, because they were concerned with a past situation; he would have thought that point was covered by the expression "impliedly", which he had used in paragraph 1, but in order to meet some of the objections raised during the discussion, perhaps the paragraph might be redrafted on the lines of article 39 and include a reference to the nature of the treaty. Possibly what was involved was essentially a drafting point.
62. The expression "with respect to facts or matters" had come under fire, but members would recognize that it was not easy to find an appropriate phrase to express the idea and emphasize what, in substance, he regarded as a correct statement of the rule. A similar difficulty must have confronted anyone responsible for drafting jurisdictional clauses.
63. The CHAIRMAN, speaking as a member of the Commission, asked the Special Rapporteur whether he was really convinced that the point dealt with in paragraph 2, which it was proposed to delete, was covered by article 53. He did not think so; for article 53 in fact merely released the parties from the obligation to continue to apply the treaty, and its provisions did not affect the lawfulness of an act performed in conformity with the provisions of the treaty. Paragraph 2, however, dealt with an obligation created by a fact which had existed before the treaty was terminated and which was still producing effects.
64. Sir Humphrey WALDOCK, Special Rapporteur, replying to the Chairman, said that he had included paragraph 2 because he had not been entirely sure that the point was fully covered in article 53. As to the example he had mentioned, namely, the invocation of an established right or obligation arising from a treaty, article 53 would cover that case except for the type of treaty which had executed effects or established a situation, when reliance would be placed not so much on the treaty as the historical source of the right or obligation, as on the situation it had created.
65. As he had already said, further reflection had led him to the conclusion that article 53 largely covered the point dealt with in paragraph 2.
66. Mr. ROSENNE said that after studying article 57 in the light of article 53, he had concluded that the substance of paragraph 2 was not covered by article 53, but ought to be. The best course would probably be to make the necessary change in article 53 on the second reading.
67. Sir Humphrey WALDOCK, Special Rapporteur, said he favoured that course. If it proved impossible to revise article 53 satisfactorily, the Commission could always reconsider whether article 57 ought to be amplified.
68. Mr. YASSEEN asked whether the deletion of paragraph 2 would mean that the Commission did not accept the provisions proposed in it, or whether they would be included in some other article.
69. The CHAIRMAN said that the idea expressed in paragraph 2 went beyond the provisions of article 53, but could be inserted there. For the time being, the Commission had not decided either for or against the deletion of paragraph 2.
70. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Bartoš had mentioned some interesting examples of the most-favoured-nation clause, but that was a complex and rather special problem and he had decided not to deal with it in his draft.

<sup>7</sup> Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, pp. 16-17.

71. Mr. BARTOŠ explained that in taking the most-favoured-nation clause as an example, he had meant to show that various clauses might affect the rights of third States, not only the most-favoured-nation clause.

72. The CHAIRMAN suggested that article 57 be referred to the Drafting Committee.

*It was so agreed.*

### Financial Implications of Decisions taken by the Commission

73. Mr. LIANG, Secretary to the Commission, said that under Rule 155 of the Rules of Procedure of the General Assembly, the Secretary-General was required to inform the Commission of the financial implications of two decisions which he understood were to be incorporated in its report, namely, the decision to extend the present session by one week and the decision to hold two sessions annually as from 1966.

74. The estimated cost of implementing the first decision would be \$9,000, made up of \$4,300 in subsistence allowances for members, \$4,000 for temporary assistance and \$700 *per diem* for staff. Detailed estimates of the cost of holding two sessions a year from 1966 onwards would be submitted in due course.

The meeting rose at 5.45 p.m.

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### 731st MEETING

*Tuesday, 26 May 1964, at 10 a.m.*

*Chairman: Mr. Roberto AGO*

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

*(resumed from the previous meeting)*

[Item 3 of the agenda]

#### ARTICLE 58 (Application of a treaty to the Territories of a Contracting State)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 58 in his third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the real problem was that of the territory with regard to which the treaty was binding, rather than the territory in which it was to be performed. In paragraph 1 of his commentary he had given the example of Antarctica; the parties to the Antarctic treaty<sup>1</sup> were numerous and the treaty was binding with

respect to all their territories; in other words, all their nationals would be bound to observe the treaty, the performance of which, of course, related to matters connected with the territory of Antarctica.

3. The rule embodied in article 58 was a residuary rule, as indicated by the proviso in sub-paragraph (a): "unless a contrary intention is expressed in the treaty".

4. The purpose of sub-paragraph (b) was to cover the case in which a contrary intention had been tacitly indicated by the circumstances of the conclusion of the treaty or the statements of the parties thereto.

5. Sub-paragraph (c) dealt with the case in which a contrary intention was indicated by means of a reservation which became effective either because it was accepted by the other parties or because they had not made any objection to it.

6. Mr. PAL said that he was in full agreement with the principle of article 58, which had been well explained in the excellent commentary. As he understood it, the assumption was that the territorial position would remain the same as at the time when the treaty had been concluded. Any changes in the territorial position were outside the scope of the article.

7. In sub-paragraph (c), it seemed unnecessary to refer to articles 18 and 19; those articles dealt with procedural aspects of reservations and a reference to article 20,<sup>2</sup> which contained the substantive rule on the effect of reservations would serve the purpose intended.

8. Sub-paragraphs (a) and (c) rather overlapped: as soon as a reservation became effective, it became expressed in the treaty and was therefore covered by sub-paragraph (a). Perhaps that point could be clarified in the commentary.

9. Mr. EL-ERIAN said it was a well-established rule that a treaty could apply either to the territory of a State as a whole or to a part of that territory. One of the earliest historical examples was the Treaty of Peace of 14 December 1528, between King Henry VIII of England and King James V of Scotland,<sup>3</sup> from which the Island of Lundy in England and the Lordship of Lorne in Scotland had been expressly excluded. A more recent example was the setting up of the United Arab Republic in 1958, by the union between Syria and Egypt. A UAR Foreign Ministry communication addressed to the Secretary-General of the United Nations had stated that the United Arab Republic would be bound by all treaties, agreements and commitments to which Syria and Egypt were parties, but that the treaties would apply each in its own territorial sphere. In working out the pattern of the treaty relations of the UAR, it had been found that whenever a treaty was of a general character, both the Syrian and the Egyptian regions were covered, except where only one of them had signed the treaty. While serving with the UAR delegation at United Nations Headquarters, he

<sup>2</sup> *Yearbook of the International Law Commission, 1962, Vol. II, pp. 175-176.*

<sup>3</sup> Schwarzenberger G., "International law in early English practice", in the *British Yearbook of International Law, 1948, p. 63, footnote 3.*

<sup>1</sup> *United Nations Treaty Series, Vol. 402, p. 72.*