Document:-
A/CN.4/SR.731

Summary record of the 731st meeting

Topic:
Law of Treaties

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

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.

731st MEETING

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

Chairman: Mr. Roberto AGO

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 [1] 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,[2] 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,[3] 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

[1] United Nations *Treaty Series*, Vol. 402, p. 72.

[2] *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 175-176.

[3] Schwarzenberger G., "International law in early English practice", in the *British Yearbook of International Law, 1948*, p. 63, footnote 3.

had had occasion to deal with the problem of an instrument of accession, to be deposited on behalf of the Syrian region, to a multilateral convention to which Egypt was already a party. Since the UAR was already a party to the treaty, it had been agreed with the Legal Office of the United Nations not to use the term "accession", but to refer instead to the "extension" of the treaty to the Syrian region.

10. In so far as article 58 was intended to express that rule it did not cause him any difficulty. But unfortunately the text involved a discussion of the so-called "colonial clause", which the Special Rapporteur had wished to avoid. That clause had already been the subject of intense controversy and sharp criticism in the United Nations. At its fourth session, the General Assembly had decided against including it in the Convention on the Traffic in Persons. There was a widespread feeling that treaties, especially those drafted and adopted by the United Nations with social and humanitarian objectives, should be universal in their application. That feeling could not be reconciled with the colonial application clause, which appeared to be a means of perpetuating colonial dependance by keeping large areas of the world outside the province of international regulation.

11. Article 58 should be confined to stating the general rule in normal situations. That approach would be in keeping with the articles already adopted by the Commission on other branches of the law of treaties. For example, in its discussion on article 3 (Capacity to conclude treaties)[4] the Commission had decided not to deal with the question of the limitations on a State's capacity to conclude treaties; and in paragraph 14 of the report on its fifteenth session[5] it had explained that it would not consider the effect of the outbreak of hostilities upon treaties, which could not conveniently be dealt with in the context of its present work on the law of treaties. Equally relevant was the remark at the end of paragraph (3) of its commentary on article 37, that "if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles".[6] A similar approach should be adopted to article 58 so as to avoid involvement in matters outside the law of treaties.

12. With regard to the wording of the article, it was difficult to define the expression "territory or territories for which the parties are internationally responsible". That formula had recently gained currency in international practice, having first been used in the General Agreement on Tariffs and Trade.[7] In earlier conventions, such as the ILO Conventions, different language had been used. For example, article 16 of the Hours of Works (Industry) Convention, 1919, stated that "Each member of the International Labour Organisation which ratifies this Convention engages to apply it to its colonies, protectorates and possessions which are not fully self-governing".[8] The Charter of the United Nations used the expressions "trust territory" and "non-self-governing territory". In the Secretariat memorandum on Succession of States the expression "dependent territories" was used.[9] With such a diversity of language, it would be difficult for the Commission to decide what territories were to be considered as "territories for which the parties are internationally responsible".

13. His objection to that formula was based not only on technical grounds, but also on considerations of principle. The Commission should regulate normal rather than exceptional situations. The colonial system was fast disappearing. Article 73 of the Charter placed Members of the United Nations under an obligation to develop the self-government and promote the independence of "territories whose peoples have not yet attained a full measure of self-government" and for the administration of which they were responsible. It was expressly stated that that obligation was to be performed "within the system of international peace and security established by the present Charter", in other words within the international system and not within the constitutional systems of the States concerned. Some countries might have constitutional problems, but they should find means of solving them in order to perform their international obligations under the Charter.

14. Since the Charter thus laid down the principle of the liquidation of the colonial system, and since machinery for that purpose had been set up by the General Assembly on 14 December 1960 when it had adopted resolution 1514 (XV), its "Declaration on the granting of independence to colonial countries and peoples",[10] it was clear that the colonial system would be a thing of the past before the Commission's draft on the law of treaties had completed the various stages necessary to make it a binding international instrument.

15. He therefore suggested that in the title of the article the words "Territories of a Contracting State" should be replaced by the words "territory of a Contracting State", since although the territory could consist of different parts, it would still constitute one territory. In the article itself, the words "the territory or territories for which the parties are internationally responsible" should be replaced by a reference to the "territory under the jurisdiction of the State concerned"; that would be consistent with the wording used by the Commission in the Draft Declaration on Rights and Duties of States, adopted at its first session.[11]

16. Sir Humphrey WALDOCK, Special Rapporteur, said that nothing could have been further from his intention than to involve the Commission in a contra-

[4] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 164.

[5] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 2.

[6] *Ibid.*, p. 12.

[7] United Nations *Treaty Series*, Vol. 55, p. 274, article XXVI, para. 4.

[8] *ILO Conventions and Recommendations 1919-1949*, Geneva, 1949, p. 7.

[9] A/CN.4/150, para. 138.

[10] *Official Records of the General Assembly, Fifteenth Session, Supplement No. 16*, pp. 66-67.

[11] *Yearbook of the International Law Commission, 1949*, pp. 287-288.

versial discussion on the colonial clause. He had used the expression " territory or territories for which the parties are internationally responsible " because it had been introduced into certain recently concluded multilateral treaties at the insistence of the opponents of the colonial clause, who had objected to other formulas. The question of the territorial application clause was, in any given case, a matter for the contracting States. He was prepared to accept any form of words the Commission might agree on for the purpose of stating the general rule which avoided connotations that might be objectionable to some of its members.

17. It must be remembered, however, that the problem dealt with in article 58 was a real one and that it was necessary to state the general rule that a treaty applied to the whole territory of a State unless some provision of the treaty, or the circumstances of its conclusion or the statements of the parties, indicated a contrary intention.

18. Mr. de LUNA said that he supported the principle of article 58 as explained in the commentary. In the case of a protectorate, for example, the protecting Power was responsible for the international relations of the State protected, but the latter was nonetheless a State. If such situations still existed in future, they would be covered by the present wording of article 58, but would also come within the scope of article 60. He agreed with Mr. El-Erian, however, that that kind of problem was disappearing. The wording of the opening sentence should perhaps be amended so as to dispel any misunderstanding.

19. Another question, to which Mr. Pal had drawn attention, was that of the mobility of contractual frontiers. The opening words of the article did not deny such mobility, but neither the article nor the commentary were very explicit on the point. It was a fact that the territory of a State was not fixed; it could expand or contract and its frontiers could be rectified without affecting the political reality of the State, except in the case of dissolution or union of States. It would be well to affirm the principle of the unity of the State and the mobility of contractual frontiers, either in the commentary or by adding the words " at that time ", or any other expression the Commission might prefer, in the opening sentence of the article after the phrase " for which the parties are internationally responsible ".

20. Mr. ROSENNE said that, as a general and residual rule, he was prepared to accept a provision along the lines of article 58. Apart from the questions already raised by other speakers, however, he thought that a number of points needed clarification.

21. First, the article could have a direct bearing on the question of State succession, even though that had not been the intention of the Special Rapporteur; the wording should therefore be amended to state clearly that the term " parties " was to be construed in the sense in which it was used in the provisions of Part I.

22. He agreed with Mr. Pal's remarks concerning changes in the territorial position.

23. The use of the word " all " in the first line of the article was correct in principle, within the context of the article as applied to " parties " in the sense of Part I; but it did not necessarily apply in the case of a State which regarded itself, or was regarded, as a successor State, assuming that there existed a rule of international law on succession to treaties. The Secretariat memorandum on succession of States with its references to the cases of the United Arab Republic, already mentioned (para. 48), the Federal Republic of Cameroon (para. 59), and Somalia (para. 102), showed that in those circumstances a treaty might not be applicable to " all " the territory of a State.

24. The expression " for which the parties are internationally responsible " established a connexion with article 55, paragraph 4, concerning the international responsibility arising from the failure of a State to comply with its obligations. He was prepared to accept the suggested alternative of referring to territories " under the jurisdiction of the parties ". But both expressions involved the temporal problem mentioned by Mr. de Luna; the point was that the rule would apply while a territory was under the jurisdiction of a State, so that that State was internationally responsible for it.

25. There was a certain amount of State practice in the matter, which was illustrated by the United Kingdom note of 2 July 1962 concerning Tanganyika, quoted in the Secretariat memorandum (para. 128); the formula employed there had also been used on a number of other occasions. But none of those expressions had the same meaning as the expression " territories under the sovereignty of the contracting parties ", used in paragraph 4 of the commentary. It was hardly possible for a territory over which a State exercised jurisdiction, and for which it was therefore internationally responsible, to be bound by a treaty under the provisions of article 58, unless that territory became a party to the treaty, either in accordance with the provisions of Part I of the draft or by succession.

26. With regard to sub-paragraph (*c*), he wondered whether that concept of a reservation was compatible with the definition of a " reservation " in article 1, paragraph 1 (*f*).[12] As he understood that definition, reservations related to the substantive provisions of a treaty; a reservation dealing with the territorial application of a treaty would be of a different character, unless the treaty expressly provided for that type of reservation. He would have no objection to the concept of a reservation being broadened so as to cover that type of quasi-reservation, but the wording of the definition would have to be adjusted.

27. The rule stated in article 58 was valuable as a residual rule, which did not itself make a State a party to a treaty when it would not otherwise be a party; but it should be drafted so as not to prejudice any developments regarding the different types of clause on the territorial application of treaties or other formulas devised to meet the practical needs of States.

28. Mr. CASTRÉN thought that the rule stated in article 58 was correct. It was based on the practice of

[12] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 161.

States, as the Special Rapporteur showed in his commentary, and there were several reasons why that practice should be confirmed in a general convention. He was not sure that the proposed wording meant acceptance of the so-called colonial clause, but if it did, the text should be amended, perhaps as suggested by Mr. El-Erian and Mr. Rosenne.

29. He would suggest combining sub-paragraphs (*a*) and (*b*); sub-paragraph (*a*) could be deleted and sub-paragraph (*b*) amended to read: "appears from the subject-matter or the terms of the treaty, the circumstances etc.". Paragraph 2 of the commentary showed clearly enough that what sub-paragraph (*a*) dealt with was precisely the subject-matter of the treaty.

30. Mr. LACHS, after praising the able manner in which the Special Rapporteur had dealt with an important and controversial issue in his commentary, said that the so-called colonial clause should be considered in the light of its history. It had appeared in two forms: affirmative and negative. The 1928 Convention on Economic Statistics concluded under the auspices of the League of Nations contained a colonial clause of the affirmative type,[13] but the 1948 Protocol amending that Convention [14] contained a negative formula. Examples of both types of clause were to be found in the various multilateral agreements signed in 1947 and 1948, but the more recent tendency had been to drop the clause altogether.

31. The first step in that process had been the adoption of a colonial clause coupled with a recommendation to States parties to the treaty to take the necessary measures to extend the benefits of the Convention to all the territories under their administration; the existing legal position was noted, but the contracting States were requested to overcome any constitutional obstacles to the extension of the treaty to other dependent territories. The next step had been the omission of the clause altogether, and in the light of that situation he suggested that article 58 be limited to the contents of sub-paragraph (*c*). The Commission would thus avoid all reference to an obsolete institution and any suggestion of perpetuating a colonial practice.

32. Mr. TUNKIN said that a distinction should be drawn between two problems that were often confused because they usually arose together: the territorial application of a treaty and participation in a treaty. The Special Rapporteur had shown that the distinction existed, but he had not wholly succeeded in dispelling the mists of doctrine in which it was enveloped. Some treaties brought out clearly that territorial application and participation were quite separate matters. For example, the Antarctic Treaty did not raise the question of application to the territory of the parties; in the case of the Treaty concerning Spitsbergen,[15] on the other hand, Norway was a party as a sovereign State, and the territorial application of the treaty was restricted to a part of its territory. A party to a treaty was always a subject of international law; a State bound itself as a single entity. Mr. El-Erian had been right in saying that a State's territory was a legal entity, although it might be divided geographically into several parts.

33. The problem dealt with in article 58 could be raised only with respect to the territory of federal States. The Special Rapporteur had mentioned the USSR as an example. If the USSR alone signed a treaty, the position was perfectly clear; if the USSR and, say, the Ukrainian SSR both signed a treaty, then there were two subjects of international law which were parties to the treaty, though that did not mean that the USSR was acting for only part of the Union; if the Ukrainian SSR alone signed a treaty, it bound only itself, not the USSR.

34. Article 58 was inspired by colonial practice; that was shown by the fact that most of the examples quoted in the commentary and in the literature were drawn from that practice, and by the words "territories for which the parties are internationally responsible".

35. The colonial system was contrary to modern international law, was fast disappearing and would soon have disappeared entirely. Modern international law imposed the duty to respect the right of peoples to self-determination. The General Assembly of the United Nations had confirmed that principle in 1960 in its "Declaration on the granting of independence to colonial countries and peoples", embodied in resolution 1514 (XV). Non-self-governing territories and protectorates still existed, but was it appropriate for the Commission to act as if the world had stood still and give its approval to colonial institutions? Manifestly, it was not.

36. The next question, then, was whether article 58 was necessary. He doubted whether it was advisable to formulate a special rule by which a State might become a party to a treaty only in part. A State must become a party as a single entity. If the Commission insisted on formulating a rule, it would have to draw a clear distinction between territorial application and participation.

37. Mr. ELIAS said that he shared the misgivings of many members about the way in which article 58 had been formulated; indeed, the Special Rapporteur had failed to avoid the very pitfalls he had mentioned in his commentary. The text would need to be considerably simplified to render it acceptable, particularly to newly independent States Members of the United Nations; it must be shorn of any implication that its purpose was to perpetuate something which had become obsolete.

38. If the rule was to apply to territories that were not contiguous to the metropolitan territory, account must be taken of the tendency for third parties to insist on some evidence of consent by the non-metropolitan territory to be bound.

39. The expression "or territories for which the parties are internationally responsible" might give rise to difficulties of interpretation and should be omitted. The

[13] League of Nations *Treaty Series*, Vol. CX, p. 189, article 11.

[14] United Nations *Treaty Series*, Vol. 20, p. 242.

[15] League of Nations *Treaty Series*, Vol. II, p. 8.

article should be strictly limited to territorial application and should not be extended to cover participation.

40. The subject matter of the article could not be divorced from the topic of State succession. An illustration of that point was provided by the occasion in 1961 when the Nigerian Government had broken off diplomatic relations with France, after France had ignored representations against its nuclear tests in the Sahara. The Netherlands, which had acted as protecting Power, had brought to the attention of the Nigerian Government a treaty concluded between France and the United Kingdom in 1923, under which the United Kingdom had assumed certain obligations on behalf of itself and all its overseas dependencies, without specifying them by name. When it had prohibited French planes from landing on Nigerian territory or French ships from putting into Nigerian ports, the Nigerian Government had not considered itself bound by that treaty.

41. Sub-paragraph (*b*) seemed unnecessary since its substance was adequately covered by sub-paragraph (*c*).

42. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the rule in article 58 did not affect the fact that, on reaching independence, a territory would pass out of the system of treaty relations of the State formerly responsible for its international relations.

43. As the Commission had decided to appoint a Special Rapporteur on State succession, it should be mentioned in the commentary that the whole question of succession in the matter of treaties was being reserved.

44. Mr. BRIGGS said that he entirely agreed with the fundamental principle underlying article 58; the only problem was how to express the rule, based on State practice, that a treaty applied to the whole territory of a State apart from the exceptions provided for. As he read article 58, it had nothing to do with State succession or with participation in a treaty.

45. As far as the drafting of the article was concerned, he was in favour of dropping the reference to "territories for which the parties are internationally responsible".

46. The exceptions set out in sub-paragraphs (*a*) and (*b*) overlapped and sub-paragraph (*a*) could be eliminated. It would also be advisable to abandon the reference to "the statements of the parties", which might be a source of confusion and could be regarded as covered by the phrase "the circumstances of its conclusion" or by the provision in sub-paragraph (*c*), which itself could be simplified, as there was no need for a cross reference to all the complex provisions contained in articles 18-20.

47. The article and its title could accordingly be redrafted to read:

"*Territorial Scope of a Treaty in Relation to a Party*

"A treaty extends to all the territory of a party unless the contrary intention

"(*a*) appears from the terms of the treaty or the circumstances of its conclusion; or

"(*b*) is contained in a reservation accepted by other parties."

48. Mr. YASSEEN said that the unity of the territory of a State, considered as a subject of international law, was a recognized principle. Article 58 could be accepted in so far as it related to the territory of a State and made it possible to restrict the application of the treaty to part of that territory; but in so far as it mentioned the territories for which a State was internationally responsible or which were subject to its rule — without, of course, forming a legitimately integral part of that State — it was difficult to accept. Colonialism was at the root of such situations; but colonialism stood internationally condemned and was about to disappear. The Commission would therefore be well advised to leave that question aside; in drafting a general convention intended to apply to the future, it should be guided by the realities of international life.

49. With regard to the wording of the article, the reference in sub-paragraph (*b*) to the circumstances of the treaty's conclusion and the statements of the parties touched on the question of interpretation. The statements of the parties, even if they were perfectly clear and even if they agreed, could not restrict or enlarge the scope of the treaty if their substance was not incorporated in the treaty itself. Subsequent statements of intention could constitute an oral agreement which, in certain circumstances, might modify an existing treaty, but they could not be taken into account in interpreting the treaty unless they had a basis in its actual text. That seemed to have been the finding of the Permanent Court of International Justice, which had stated in its advisory opinion on the matter of *Access to, or anchorage in, the port of Danzig, of Polish war vessels*[16] that:

> "The Court is not prepared to adopt the view that the text of the Treaty of Versailles can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself."

50. Mr. AMADO said that previous speakers had already very well expressed what he might have wished to say on the article. True, it might be regretted that the proposed text did not sufficiently reflect the decolonization trend that was so characteristic of the present era; but could the Special Rapporteur have done otherwise? Fortunately, the detestable system of colonialism was disappearing, but it had left traces, residual effects, which could not be left unmentioned.

51. He supported the opinion that the application of a treaty should be restricted to the territory of States parties to the treaty, without any mention of dependent territories.

52. Furthermore, as the Commission had decided to devote a section of its draft to the interpretation of treaties, he was opposed to the tendency to include detailed references to problems of interpretation in many articles of the draft. Although it was essential

[16] P.C.I.J. (1931), Series A/B, No. 43, p. 144.

to provide for the exception indicated by the words " unless a contrary intention is expressed in the treaty ", what followed those words introduced explanations concerning interpretation which should not appear in the article. Once again the Special Rapporteur had tried to put everything into his draft, so that the Commission could prune it.

53. He therefore agreed with the suggestion made by Mr. Elias and approved by Mr. Briggs, which in turn would entail adopting Mr. Pal's suggestion concerning the reference to reservations.

54. Mr. TSURUOKA said he approved of the principle stated in article 58 in so far as it meant that a treaty was applicable to the whole of the territory over which a party to the treaty effectively exercised its sovereignty, subject to certain exceptions provided for in sub-paragraphs (*a*), (*b*) and (*c*), which made sufficient allowance for the autonomy of the will of the parties.

55. Like other members of the Commission, he thought the words " or territories for which the parties are internationally responsible " should be omitted, for several reasons. First, since the Commission was to formulate general rules, it was entitled to anticipate the changes that might have occurred in the world in ten or more years' time, when the convention it was drafting would enter into force. Secondly, it appeared from the researches carried out by Rousseau, that the practice of some countries, such as France, was to regard treaties concluded by a colonial Power as not applicable to that Power's colonial territories unless the treaty expressly provided otherwise, although the case-law of the French courts was rather indecisive on that point. However, the question was controversial from the point of view of positive law, and it could be accepted that it was not necessary to state a rule applicable to situations of that kind, whether they were related to colonialism or not, since they were very rare.

56. It would be advisable to mention in the commentary the separability of the territorial application of treaties; that would make it easier to regulate certain situations, such as the application by a federated State of a convention signed by the federal government.

57. With regard to the reservation mentioned in sub-paragraph (*c*), in deciding on the admissibility of a reservation concerning the territorial application of a treaty, the object of the treaty must be taken into consideration. No such reservation could be accepted, for example, in the case of a humanitarian convention like the European Convention for the Protection of Human Rights.[17]

58. With regard to the question of State succession, it would be useful to mention the time factor in the text, in order to dispel certain doubts.

59. The CHAIRMAN, speaking as a member of the Commission, said he feared that intentions had sometimes been ascribed to the Special Rapporteur which were in no way reflected in the text he had proposed to the Commission.

60. First of all, article 58 should be regarded as dealing with the territorial scope of the application of a treaty, not with participation in a treaty. The question was whether a treaty concluded by a State was applicable to all its territories or whether, in some cases at least, it must be taken to apply to only part of those territories. It was a twofold problem, both aspects of which should be considered.

61. Some treaties were intended to be applicable to only part of a State's territory; for instance, the frontier treaties between Italy and Yugoslavia, which applied to certain areas with a mixed population and regulated such matters as the official use of two languages. Thus there were still cases in which treaties were concluded in respect of a specific part of a territory, and rules providing for such cases were given in sub-paragraphs (*a*), (*b*) and (*c*).

62. But the converse problem arose where the treaty was silent on the subject; it was essential to establish a rule applicable to such cases. However desirable it might be that colonialism should disappear completely as soon as possible, the fact remained that such a rule would be useful in cases which had no connexion with colonialism. There were many examples of territories which were not geographically part of the main territory of a State and enjoyed varying degrees of autonomy, such as the Faroe Islands and Eastern Greenland in relation to Denmark. Was it possible, for instance, for a State which had acceded to the European Convention for the Protection of Human Rights to claim that that Convention did not extend to such territories? That example showed how necessary it was to draft a provision clearly establishing that where a treaty did not specify the territories to which it applied, it must be presumed to apply to the whole territory of the State, and if there were more than one, to all its territories. Then a State would not be able to claim that a part of its territory was excluded from the application of the treaty because it was self-governing or separate from the main territory.

63. He did not think that the rule, as it stood, related to State succession which was a different matter and should clearly be dealt with separately. The only question to be settled was whether, in the absence of any reservation, explicit or implicit, a treaty applied to the whole of a State's territory or to only part of it.

64. Mr. BARTOŠ said he wished to associate himself with the comments made by Mr. Tunkin and Mr. El-Erian, among others, on the danger that the proposed text might be regarded as in some way sanctioning the colonial clause, which he had opposed ever since the United Nations had been established.

65. With regard to the question of reservations, it was necessary to consider the provisions of territorial clauses dealing with practical matters; not clauses demarcating a frontier, for example, but those applicable to certain territories for practical reasons, such as the provisions of treaties on hydro-electric power, which dealt only with a particular river basin, or of treaties which settled certain frontier problems or

[17] United Nations *Treaty Series*, Vol. 213, p. 222.

questions relating to the territorial sea, which were normally applicable to only part of a State's territory. Even if they applied to only part of its territory, such treaties were in force in the whole territory of the State. In its desire to delete certain provisions reminiscent of the colonial clause, the Commission should therefore beware of omitting what was necessary for the normal application of treaties. He accordingly asked the Special Rapporteur to emphasize in his commentary that the proposed text in no way sanctioned the colonial clause.

66. There was also the problem of classifying treaties. Although it was true that certain treaties dealing with practical matters should not be regarded as applying to all the territories of a State, that was not true of treaties of general interest, such as those concerning humanitarian questions which, at the present stage of development of international law, necessarily applied to all parts of a territory. For instance, during the discussion of the Exploitation of the Prostitution of Others,[18] when France had objected that it could not enter into obligations on behalf of its North African protectorates because they enjoyed some degree of legislative autonomy, certain members of the Sixth Committee had protested against that attitude, arguing that the rules of the Convention should be applied first and foremost to the protectorates and afterwards to the metropolitan country.

67. Mr. JIMÉNEZ de ARÉCHAGA said that while the Commission realized that the Special Rapporteur had not intended to perpetuate the colonial clause in his draft of article 58, it was desirable to remove the possibility of any such misunderstanding by adopting the suggestions put forward by Mr. El-Erian and Mr. Rosenne. Accordingly, the words " or territories for which the parties are internationally responsible " should be dropped, and reference should be made to the time element in some such introductory wording as " While a territory is or remains within the jurisdiction of a State party to a treaty...". That would also eliminate any connexion with the question of State succession or succession to treaties.

68. Recast in that manner, article 58 would constitute a useful and indeed a necessary rule, particularly for certain types of treaty, where it was essential to establish precisely the part of its territory in respect of which a State assumed responsibility for compliance with the treaty provisions. That applied, for example, to extradition treaties, and to the Havana Convention[19] which bound States not to allow expeditions to leave their territory for that of other States for the purpose of fomenting civil war.

69. The rule was that, unless there was express provision to the contrary or the circumstances surrounding its conclusion indicated otherwise, a treaty applied to to the whole territory of the State. Any party wishing to restrict the territorial application of a treaty was bound to insert a proviso to that effect or to bear the onus of proving the existence of such an intention at the time when the treaty was drawn up. If that onus was to be placed on the State concerned, it was necessary to be liberal as to ways and means of proving the intention. The provision suggested in sub-paragraph (*b*) seemed sufficient for the purpose and in line with article 39 concerning the implied right of denunciation.

70. Sub-paragraph (*c*) was acceptable and he did not support the change proposed by Mr. Briggs, because it seemed unnecessary to stipulate that the reservation must be accepted by the other parties. If a statement by one of the Parties was enough in the case of intention to restrict the territorial application of a treaty, it should certainly be enough for a reservation.

71. Mr. TABIBI said that neither the article in its present form nor the commentary was likely to find favour with the General Assembly, where feeling against the colonial clause was very strong. Moreover, the article might be interpreted as prejudging the question whether there was a rule of succession to treaties. He suggested that the principle could be formulated quite briefly by saying that a treaty applied to the whole territory of a State unless a contrary intention was apparent.

72. Mr. TUNKIN said it should be made clear that not all the obligations deriving from a treaty had any direct connexion with the territory of a State; any formulation that might encourage a false presumption to the contrary should be avoided. For example, what would be the position under the Antarctic Treaty if, say, a United Kingdom national went to the antarctic to collect information and then stayed in some city outside his own country? Would the United Kingdom Government, as a party to the treaty, be responsible for ensuring that, in compliance with its provisions, the information obtained was passed on to the other parties?

73. Sir Humphrey WALDOCK, Special Rapporteur, said his commentary made it clear that he had in no way intended to ask the Commission to sanction the colonial clause in article 58; but the Commission would have found him less than candid if he had glossed over the matter altogether, particularly as the question of the territorial application of multilateral treaties had come up during international discussions in recent years.

74. The article stated the general rule that a treaty applied to all the territory of a State unless otherwise provided. He was willing to abandon the phrase " or territories for which the parties are internationally responsible ", despite the fact that it was frequently used by opponents of colonialism, on the understanding that the words " all the territory " meant the whole area subject to the jurisdiction of the State, including any territory that might be geographically separate. There were many cases of geographically separate territories: for example, Spitsbergen, the Channel Islands and the Isle of Man, and territories such as Indonesia.

75. He agreed with the Chairman that the article should not be concerned with the problem of State

[18] United Nations *Treaty Series*, Vol. 96, p. 272.

[19] League of Nations *Treaty Series*, Vol. CXXXIV, p. 47.

succession: indeed, he had deliberately framed it in the present tense with that consideration in mind. Some explanation on that point should be included in the commentary.

76. The Drafting Committee might consider whether reference to the temporal element should be made in the article itself.

77. As to the question of the exceptions, the wording used in sub-paragraphs (*a*) and (*b*) did appear in other articles already approved, but it might need general review during the second reading.

78. As to sub-paragraph (*c*), he agreed that it was unnecessary to refer to article 18-20: the provision could be re-drafted on more general lines.

79. With regard to Mr. Tunkin's last point, as the commentary showed, territorial application could be understood in different ways. It did not necessarily mean performance of treaty obligations in the territory. In the example given by Mr. Tunkin, the obligation to transmit the information to other Parties would remain by virtue of the fact that the information had been obtained by a national of the United Kingdom, a State all of whose territory was bound by the treaty. Article 58 was concerned with the general rule of the binding effect of a treaty in respect of all the territory of a State. Of course, there were many treaties which had a special importance for particular parts of a territory and there were others regarding which exceptions had to be made in respect of their territorial application, such as economic treaties which would not apply to free zones.

80. The CHAIRMAN suggested that article 58 be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

732nd MEETING

Wednesday, 27 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

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

[Item 3 of the agenda]

ARTICLE 59 (Extension of a treaty to the territory of a State with its authorization) and

ARTICLE 60 (Application of a treaty concluded by one State on behalf of another)

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 59 and 60 in his third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 59 and 60 were, in a sense, linked, though they dealt with somewhat different principles. There might be some doubt as to whether article 59 should be retained at all, since it was concerned with a rather special case and would perhaps have little application outside the well-known example of the Treaty between Switzerland and Liechtenstein,[1] by virtue of which Switzerland was authorized to conclude commercial and customs treaties having territorial application to Liechtenstein, without there being any question of the latter becoming a party to those treaties.

3. As he had pointed out in paragraph (3) of the commentary, a similar situation might arise in the law of international organizations. For example, there was an article in the Treaty establishing the European Economic Community which provided for the conclusion of certain types of agreement by the Community that would be binding on Member States.[2] There, the question would arise whether the organization, in concluding such agreements, was acting in a representative capacity.

4. Article 60 dealt with the case in which, with the full knowledge of the other parties, on State concluded a treaty on behalf of another, which thereby became a party. If it were decided to retain the provision, the Commission might wish to include it among those relating to the effects of treaties on third States or, alternatively, to transfer it to Part I of the draft,[3] which dealt with the conclusion of treaties.

5. The CHAIRMAN, speaking as a member of the Commission, said he did not think the Commission need concern itself with the position of article 60 at that stage; it could settle that point after considering the article, if necessary even on the second reading.

6. With regard to article 59, which related to a very special case, he asked the Special Rapporteur whether, even in that special case, it was correct to say that it was the territory of the State that was bound rather than the State itself; if it was the State itself that was bound, the case could be treated in much the same way as that contemplated in article 60.

7. In the case of Liechtenstein and Switzerland, the wording of the treaty concluded in 1923 left room for doubt on that point, but his own opinion was that, since Liechtenstein was an autonomous subject of international law, it was the State of Liechtenstein that was bound by a treaty of that kind and not its territory.

8. Sir Humphrey WALDOCK, Special Rapporteur, said he would like further clarification of the Chairman's point. As he understood it, a State wishing to bring a complaint of violation of a treaty concluded by Switzerland and having territorial application to Liechtenstein, would not be able to bring that com-

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[1] League of Nations *Treaty Series*, Vol. XXI, p. 243.

[2] United Nations *Treaty Series*, Vol. 298, p. 90, article 228.

[3] *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 161 *et seq.*