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Summary record of the 822nd meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE SECOND PART OF THE SEVENTEENTH SESSION

Held in Monaco from 3 to 28 January 1966

822nd MEETING

Monday, 3 January 1966, at 3.15 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. Pessou, Mr. Rosenne, Sir Humphrey Waldoock, Mr. Yasseen.

Address of Welcome by the Minister of State of the Principality of Monaco

1. The CHAIRMAN, after declaring open the second part of the Commission's seventeenth session, said he wished first, on behalf of the Commission, to express his thanks to the Government of the Principality of Monaco for its invitation to the Commission to meet in Monaco, for its hospitality, and for its warm welcome. He then invited H.E. Mr. Jean-Emile Reymond, Minister of State of the Principality of Monaco, to address the Commission.

2. Mr. REYMOND (Minister of State of the Principality of Monaco), welcoming the Commission on behalf of H.S.H. Prince Rainier III and the Government of Monaco, said that, as he was unable to mention all the eminent members of the Commission separately, he would pay a special tribute to its senior member, Mr. Amado, who brought so much lustre to its reputation.

3. It was the first time that the United Nations, represented by one of its most important organs, had held a meeting in Monaco, and he wished it every success in achieving its three aims of freedom, victory over hunger, and peace. It was also the first time that the International Law Commission was meeting elsewhere than at one of the main offices of the United Nations, and he was particularly happy that it had chosen Monaco.

4. The territory of the Principality might be small, but it lay wide open to the sea, the subject both of some of the Commission's major achievements — the Conventions on the High Seas, the Continental Shelf, the Territorial Sea and Fishing and Conservation of the Living Resources of the High Seas — and of the re-

searches of Albert I of Monaco, known as the Prince of the Oceans.

5. The Commission was about to continue its work on the law of treaties, a subject which it had been considering since 1949; its desire thereby to contribute to the establishment and maintenance of friendly relations between States was in happy accord with the age-old aspirations of the Principality.

6. The CHAIRMAN asked Mr. Ago to reply to Mr. Reymond on behalf of the Commission.

7. Mr. AGO said that he spoke on behalf of all the members of the Commission in expressing his warm thanks to the Minister of State for his good wishes and his gracious words. The contribution made by Monaco to international understanding was familiar the world over, and the interests of the Principality and those of the Commission had been particularly close at the time when the Commission had been engaged in its codification of the law of the sea.

8. The Commission was not one of the more spectacular organs of the United Nations; its labours did not produce immediate results and it did not seek to solve the world's most pressing problems. It was in the long term that its work was of importance to peace.

9. It was a source of pleasure to the Commission that Monaco had been chosen as the scene of its first winter session, and it wished to express its gratitude to the Principality for its hospitable welcome.

10. Mr. AMADO, after thanking the Minister of State for his more personal remarks, said it was a pleasure to work in the Principality. Whether it was reformulating existing rules of positive law or dealing with a subject like the continental shelf, on which neither State practice nor conventions had existed at the time, the Commission's overriding purpose was to reconcile the interests of States, for without agreement between States there could be no law.

11. Mr. BAGUINIAN, Secretary to the Commission, speaking on behalf of the Secretary-General of the United Nations, said he wished to express to H.S.H. Prince Rainier and the Government of the Principality of Monaco his gratitude for their generous invitation to the Commission, for the facilities placed at its disposal and for the co-operation the Secretariat had received from officials of the Government. In particular, he wished to thank H.E. Mr. Reymond, Minister of State, for having made the session possible and H.E. Mr. Crovetto,

Minister Plenipotentiary, who had first put forward the idea of a session of a United Nations organ at Monaco.

12. During the present year, in order to complete two important sets of draft articles before the expiry of the term of office of its present members, the Commission would meet for longer than in any year since it had been set up in 1949. If those tasks were successfully completed, it would be due in large measure to the contribution of the Government of Monaco.

13. The CHAIRMAN said that Monaco had always made an important contribution in the international sphere to humanitarian endeavours and to scientific work on the sea. In particular, its contribution had had a marked influence on the elaboration of modern international law. He wished to associate himself with previous speakers in expressing the Commission's thanks to the Principality.

Law of Treaties

(A/CN.4/177 and Add.1-2, A/CN.4/183 and Add.1-2)

[Item 2 of the agenda]

ORDER OF DISCUSSION OF THE DRAFT ARTICLES

14. The CHAIRMAN said that several members of the Commission, some of whom were also members of the Drafting Committee, had been detained by other duties but had informed him that they would be arriving shortly. The Drafting Committee could nevertheless begin its work, though the French and Spanish texts of the articles it would draft would have to be regarded as provisional until the members who had been given by the Commission the responsibility for drafting in those languages had arrived.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been asked by Mr. Ruda, whom he had seen in London, to convey to the Commission his regrets that, since Argentina was now a member of the Security Council, and he had been appointed to represent his country at the United Nations, it would not be possible for him to attend the earlier meetings of the present session.

16. The Commission had before it his fifth report on the law of treaties (A/CN.4/183 and Add. 1 and 2). Its first objective must be to complete its work on the articles in part II and to dispose of articles 8 and 9, on participation, and article 13 on accession, in part I (A/CN.4/177).

17. In his fifth report, he had followed the same general method as in the fourth (A/CN.4/177 and Add.1 and 2), giving for each article an analysis of the comments by governments together with his own suggestions in the light of those comments.

18. In paragraph 10, he had made certain proposals regarding the arrangement of the articles. The matter was of immediate importance because, in his fifth report, he had presented the various articles in the order indicated in paragraph 10, and he accordingly suggested that, at a very early stage in the present session, the Drafting Committee examine that question of arrangement and submit proposals to the Commission.

19. He had suggested re-arranging the articles, partly because he had noticed from their comments that governments had not always appreciated the impact of certain general provisions or realized the interdependence and inter-action of the various articles, and partly in order to allay in some measure the concern expressed by certain governments at the possible effect on the stability of treaties of the various provisions on essential validity and termination. If the provisions which indicated the limitations imposed on invoking grounds for invalidity and termination were placed at the beginning of part II, that part as a whole would be so presented as not to seem to encourage too easy a recourse to those grounds.

20. In his fifth report, he had made brief references to articles 30, 31 and 32 but the texts of those articles, his analysis of the government comments thereon and his own proposals for redrafts were to be found in his fourth report (A/CN.4/177/Add.2).

21. He proposed that the Commission start by examining the articles as set out in his fifth report and that the Drafting Committee be requested to consider the question of the arrangement of the articles in part II, so as to clarify that matter during the present winter session.

22. Mr. BRIGGS asked whether the Secretariat had received any further government comments on part II in addition to those already referred to in document A/CN.4/175 and the addenda thereto.

23. Mr. WATTLES (Secretariat) replied that the only additional ones were some short comments from the Government of Pakistan.

24. Sir Humphrey WALDOCK, Special Rapporteur, said that he had seen an advance copy of those comments and they did not appear to add very much to the statements made by the delegation of Pakistan in the Sixth Committee of the General Assembly, which were already analysed in document A/CN.4/175 and addenda.

25. Mr. BRIGGS said that in that case he could support both the proposals of the Special Rapporteur.

26. Mr. AGO said that he could accept the Special Rapporteur's first proposal regarding the Drafting Committee; he had considerable doubts, however, about the second proposal. Admittedly, comments by governments had, in general, to be taken into account, but he was less disposed to follow them where the arrangement of the Commission's draft was concerned, since questions of system were essentially a matter for the Commission itself. Pending the conclusions of the Drafting Committee, he would prefer that provisionally the Commission take as a basis the system it had adopted previously, which was a logical one, for normally the subject matter of articles 30-35 should be dealt with before that of the articles which the Special Rapporteur proposed to insert between articles 30 and 31.

27. Mr. ROSENNE said he would urge that articles 8, 9 and 13 be discussed by the Commission only when the maximum feasible attendance of members was present.

28. The CHAIRMAN said that the Sixth Committee of the twentieth General Assembly had adopted a resolution requesting the International Law Commission

to take the Committee's discussions on the drafts submitted to it by the Commission into account, and directing that the summary records of those discussions be communicated to the Commission.

29. Personally, he did not agree with those delegations which had said that, since Foreign Ministries had not had time to submit their comments in writing, the views expressed by government representatives during the Assembly's session should be accepted in lieu of the comments of governments. But the Commission had to respect the wishes of the Sixth Committee, and so must take those views into account. He asked whether the Special Rapporteur had taken those views into consideration.

30. Sir Humphrey WALDOCK, Special Rapporteur, said that, in preparing his fifth report, he had so far as possible taken into account the views expressed in the General Assembly. Inevitably, however, the necessity to submit his report to enable it to be translated in time into the other languages for the winter session had meant that only a part of those comments had been taken into consideration.

31. Mr. WATTLES (Secretariat) said that the Secretariat regularly prepared a digest of the views expressed in the Sixth Committee, but since the summary records on which it was based were as yet only provisional, it could not be available to the Commission until the summer session.

32. The CHAIRMAN said that, in requesting the Commission to take note of the Sixth Committee's summary records, the Committee had not specified any time limit; it would certainly be sufficient if the Commission consulted the final summary records during its summer session.

33. Mr. ELIAS said it would be best to defer consideration of the controversial articles 8, 9 and 13 until the eighteenth session, when there was a greater likelihood of nearly all the members of the Commission being present.

34. As far as the order of discussion was concerned, he was in favour of taking up the articles in the order in which they appeared in document A/CN.4/L.107 and of considering their final arrangement later, a matter which would probably have to be dealt with towards the end of the eighteenth session.

35. Mr. PESSOU, supporting Mr. Ago's proposal, said it was a functional proposal which presupposed a methodical approach. Each article had a clearly defined juridical function and produced a specific effect. If the Commission discussed the articles piecemeal, co-ordination would become impossible. It was for the Commission to decide on a systematic approach. It had a technical task which was entirely divorced from political matters.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that he was not altogether clear as to what considerations had prompted Mr. Ago's proposals.

37. The first question that the Commission had to consider was the arrangement of the content of part II of the draft. It would have to decide how to deal with a number of general provisions, such as those concerning

preclusion and separability which related to the essential validity of treaties and their termination, and whether or not it was desirable to stress the grounds which might prevent a treaty from being applied.

38. In his fifth report, he had made some changes of order for reasons of more systematic presentation, and also in an attempt to meet the strong objections by certain governments that some of the provisions might threaten the security and stability of treaties. He had transferred the provisions which had the effect of restricting the right to invoke invalidity to the beginning of part II, to follow article 30. In its previous draft the Commission had repeated in a number of articles some of the provisions concerning separability, but had not done so with the provisions on preclusion.

39. In the interests of clearer presentation, it might be wiser to indicate which general provisions affected all the articles, apart from certain specified exceptions, and that was a matter that could be considered by the Drafting Committee.

40. Mr. ROSENNE said that in some respects the order adopted at the fifteenth session had been accidental and that the provisions concerning separability, which had proved particularly troublesome, had been as it were tacked on at the end of part II. Perhaps in the interest of orderly discussion the wisest course would be to take up the articles in the order adopted at the fifteenth session, and then to consider whether any rearrangement was required in the light of the discussion both in the Commission and in the Drafting Committee. Though of considerable importance, the order was a technical matter.

41. He agreed with what had been said by Mr. Elias concerning articles 8, 9 and 13, particularly in view of the statement by the Secretariat.

42. Mr. BRIGGS said he agreed with the Special Rapporteur's suggestion, which would not entail the Commission's having to make a final decision as to the order of the articles.

43. He also supported Mr. Elias's proposal to postpone consideration of articles 8, 9 and 13 until the eighteenth session.

44. Mr. AGO said that he would have preferred that the Special Rapporteur should indicate whether it was for practical reasons that he thought certain articles should be dealt with before others. In his (Mr. Ago's) opinion, the fact that certain articles preceded others would hardly reassure States which were concerned over the stability of treaties; that reassurance would be given by the text as a whole.

45. Since cross-references to earlier or later articles were inevitable, the lesser evil should be chosen; for example, it seemed neither logical nor elegant to mention the loss of the right to invoke reasons for invalidity before the conditions for the validity of treaties had been dealt with. The Commission should therefore adhere to the order it had chosen, subject to a final review of the order of the articles by the Drafting Committee.

46. Mr. CASTRÉN said that, while not perhaps agreeing with the Special Rapporteur in every respect so far as the new order was concerned, the redraft was

an improvement as to form. He accordingly thought that the order proposed by the Special Rapporteur should be followed. The Special Rapporteur had prepared the redraft in the light of that order and would find it difficult to rearrange the text if the Commission reverted to the former order.

47. Sir Humphrey WALDOCK, Special Rapporteur, said he hoped that the new version of article 47, paragraph 1, would satisfy Mr. Ago and meet his criticism that it would be inelegant to refer to the loss of a right to allege the nullity of a treaty before laying down the conditions of validity.

48. Mr. AGO said it was evident from Mr. Castrén's and the Special Rapporteur's remarks that the order of the articles must inevitably affect the substance of the articles. The text would vary with the Commission's decision regarding the placing of any one article. He therefore maintained his proposal that, for the time being, the Commission retain the earlier order.

49. Mr. YASSEEN said that the Commission customarily took the Special Rapporteur's draft as the basis for its discussion. In his latest report, however, the Special Rapporteur had changed the order, and the change in the order of the articles reflected a change in approach which to some extent affected the scope of certain rules. If the Commission took the Special Rapporteur's report as the basis for its discussion, it should follow the order suggested by the Special Rapporteur, but that course would not necessarily imply its acceptance of the order.

50. In his opinion, the Commission should, for the sake of convenience, follow the order proposed by the Special Rapporteur, without prejudice to its future attitude regarding the substance, and subject to the proviso that it was at liberty to revert to the original order.

51. Mr. AMADO said that the order of the articles should be dealt with later and that, instead of looking at the outside, the Commission should look at the intrinsic foundations of the structure of its draft. What he personally was interested in was the content of the one or other article, in order that he could make up his mind whether the article deserved his approval.

52. Mr. CADIEUX said that the discussion should proceed on the basis of the Special Rapporteur's proposals. The Commission was clearly caught in a vicious circle because the placing of an article would influence its drafting. The Commission should, however, tackle the problem without prejudice to its future decision regarding the order of the articles. The Special Rapporteur's proposals made it possible to deal with the question in the light of new factors and to make progress.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the decision as to the order in which the articles were to be discussed was perhaps not of such fundamental importance as some members thought. He had tried in his new text not to alter the substance of the articles previously approved, except where that was called for by well-founded observations from governments or where some variation of nuance was needed. The advantage of transferring general provisions to the

beginning of part II was a technical one and could appropriately be discussed by the Drafting Committee. He would have thought it might be convenient to follow the order he had chosen in his fifth report primarily for scientific reasons, though he had no wish to impose his views on the Commission.

54. The CHAIRMAN said that opinion was divided and that, since at present the Commission only had a quorum for discussion, not for voting, it could not settle the matter by a vote. He suggested that the discussion be continued the next day, by which time more members would have arrived.

55. Mr. AGO said he supported the Chairman's suggestion.

56. Mr. BRIGGS said he presumed that the Commission would start by discussing article 30 and that he hoped agreement would soon be reached on which articles it would take after that, so as to give members due warning as to which articles they should study first.

57. The CHAIRMAN said that, at the next meeting, the Commission would first consider article 30, and would then decide whether to go on to article 31 or whether to take article 49.

The meeting rose at 5.20 p.m.

823rd MEETING

Tuesday, 4 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/177 and Add.1-2, A/CN.4/183 and Add. 1-2, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 30 Presumption as to the validity, continuance in Force and operation of a treaty)

Article 30

Presumption as to the validity, continuance in force and operation of a treaty

Every treaty concluded and brought into force in accordance with the provisions of part I shall be considered as being in force and in operation with regard to any State that has become a party to the treaty, unless the nullity, termination or suspension of the operation of the treaty or the withdrawal of the particular party from the treaty results from the application of the present articles. (A/CN.4/L.107, p. 31)

1. The CHAIRMAN welcomed Mr. Caicedo-Castilla, the observer for the Inter-American Juridical Committee, who had arrived to attend the Commission's proceedings.