

Document:-
A/CN.4/SR.850

Summary record of the 850th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-

1966, vol. I(2)

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

it should ask itself the same question about paragraph 2, in which the problems were being dealt with for the second time.

88. Paragraph 1, which was in negative form, overlooked one problem: that of a previous situation which had not ceased to exist. The Commission had already discussed that problem in connexion with *jus cogens*, but had not dealt with it in any article. He did not wish to take a position on whether the Special Rapporteur had been right to leave it aside; he was willing to accept the text as it stood. But if the Special Rapporteur were to reconsider his views, he (Mr. Reuter) would support him.

89. With regard to paragraph 2, the Special Rapporteur had explained that he had wished to keep the question of the continued application of the provisions of a treaty, as such, quite separate from that of the legal consequences which might continue after the termination of the treaty. He (Mr. Reuter) was prepared to accept that rather subtle distinction, but would ask the Special Rapporteur whether it would not be better to replace the word "exists" by the words "is established" or "is created"; as it stood, paragraph 2 also ignored the question of the effects of a situation previously created under a given legal régime when a new régime subsequently came into force. It was true that the case of existing situations that were maintained was dealt with in article 53, but the amendment he had proposed would make article 56, paragraph 2, clearer.

90. Mr. de LUNA said that at that stage he would deal only with the Special Rapporteur's additional paragraph 3. The suggested text referred to only two possibilities: first, the case of a treaty which had entered into force provisionally but had never been brought into force definitively; secondly, the case of provisional entry into force followed by definitive entry into force. It did not deal with a third possibility—which was not a purely hypothetical one since he knew of a number of examples in practice—the case of a treaty which entered into force provisionally for a definite period, then ceased to be in force, and was subsequently brought into force definitively. In that case, there were two dates of entry into force and also an interval during which the treaty was not in force at all.

91. However, he saw no need for the additional paragraph. Article 56 referred simply to "entry into force" and made no distinction between provisional and definitive entry into force. The point raised by the Government of Israel could therefore be safely left to be dealt with by interpretation of the provisions of article 56 as it stood.

The meeting rose at 12.55 p.m.

850th MEETING

Thursday, 12 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de

Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(continued)

[Item 1 of the agenda]

ARTICLE 56 (Application of a treaty in point of time) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 56.
2. Mr. ROSENNE said he wished first of all to express his regret if the comment by the Government of Israel had caused any misunderstanding. The purpose of that comment had simply been to draw attention to the fact that, in principle, the scope of a treaty *ratione temporis* extended to the period during which it was in force provisionally in accordance with article 24. That point had not been mentioned in the 1964 commentary, though it had been dealt with in paragraphs (1) and (2) of the Special Rapporteur's commentary on article 57 in his third report.² The only purpose of the comment by the Government of Israel had been to call attention to that point, as had been done with regard to article 55.
3. He appreciated the efforts of the Special Rapporteur to deal with the matter in paragraph 2 of his observations (A/CN.4/186/Add.1). Personally, he thought that a specific provision was not necessary in the article and that, if the Special Rapporteur and the Commission were agreeable, the point could be covered adequately in the commentary.
4. Mr. CASTRÉN observed that most of the comments by governments or delegations related to the saving clauses at the end of each of the two paragraphs of article 56. Several governments thought that the same formula should be used in both paragraphs, though some preferred the wording used in paragraph 1, others that used in paragraph 2. For the reasons given by the Special Rapporteur, he considered that the difference between the two paragraphs should be maintained.
5. As to the additional paragraph which the Special Rapporteur had suggested to meet the comment by the Government of Israel, he thought it superfluous and liable to make the article unnecessarily complicated, as Mr. de Luna had pointed out at the previous meeting.³ The draft could not cover every detail. The rule stated in the new paragraph seemed self-evident; if the Commission thought fit, it could be mentioned in the commentary, as Mr. Rosenne had just suggested.
6. Unlike Mr. Reuter, he did not consider that paragraph 1 was incomplete because it failed to cover situations which had not ceased to exist when the

¹ See 849th meeting, preceding para. 79.

² *Yearbook of the International Law Commission, 1964*, vol. II, p. 10.

³ Para. 91.

treaty entered into force. If the situation came within the scope of the treaty, it must be, and probably would have been, taken into consideration in the treaty; if it did not, the treaty would be silent on the matter, and rightly so.

7. On the other hand, he thought there were sound reasons for Mr. Reuter's proposal that the words "situation which is established" should be substituted for the words "situation which exists" in paragraph 2; it was similar to the suggestion made by the Netherlands Government.

8. On the whole, he was prepared to accept the 1964 text as it stood, subject to drafting amendments.

9. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the Special Rapporteur that paragraphs 1 and 2 should be retained as they stood.

10. Paragraph 1 established the principle that treaties, in general, did not apply to past events or situations, unless the parties intended to give them retroactive effect. He favoured the present negative formulation, despite the implication that a treaty could apply to events which were taking place, or had not ceased to exist, at the time when the treaty entered into force. That would not constitute a retroactive application of the treaty.

11. He endorsed the Special Rapporteur's unwillingness to add a positive formulation on the subject of pending or continuing facts or situations, as suggested by the Greek delegation. Normally, the parties to a treaty would take such facts or situations into account, and there was little need in that case for a residuary rule of non-retroactivity, which was in fact what the provisions of article 56 constituted.

12. Since the parties could be presumed to have taken continuing facts or situations into account, the whole question became one of interpretation of their intention, and it was preferable not to interfere with that interpretation by laying down too rigid a rule. As the Permanent Court had stated in the *Phosphates in Morocco* case,⁴ "The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case,"—the expression used in the French text was *une question d'espèce*—and it had added that "in answering these questions it is necessary always to bear in mind the will of the State . . .".

13. Furthermore, a distinction should be made between a merely passive continuation or prolongation of a situation, and the active continuation of a previous situation which found expression in recurring or fresh performance of a given conduct. There again, the Permanent Court had pointed to the existence of "subsequent factors which . . . are merely the confirmation or development of earlier situations . . .".⁵ That distinction had been established by the European Commission of Human Rights when it had decided that a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms committed before the entry into force of the Convention

did not fall within the Commission's jurisdiction even if the applicant was still serving a sentence, because the execution of a final sentence constituted a mere passive continuation of a past decision.⁶ The Commission had thus taken the same view as the Permanent Court on "subsequent factors which are merely the confirmation or development of earlier situations". On the other hand, in the *De Becker* case, the European Commission had considered that, although the initial violation of rights had been committed prior to the entry into force of the Convention, the jurisdiction of the Commission was established because there had been fresh proceedings or recurring applications of those acts after the Convention had come in force.⁷

14. An additional reason for not adopting the suggestion made by the Greek delegation was that the Commission had already considered and rejected it in 1964, because of the fear that it would go too far in excluding prior facts which might still be caught by the new treaty, particularly with regard to jurisdictional clauses.⁸

15. With regard to paragraph 2, he supported the Special Rapporteur's rejection of the Netherlands Government's suggestion that the words "any situation which exists" should be replaced by "any situation which comes into existence". For the reasons he had already given, a treaty that had been replaced could not apply to continuing situations—covered by the expression "situations which exist"—since those situations would as a rule be caught by the new treaty.

16. The additional paragraph suggested by the Special Rapporteur was unnecessary, because article 56 made no distinction between provisional and definitive entry into force, so that it covered both. That point would be explained in the commentary.

17. Mr. BRIGGS endorsed the view that the suggested additional paragraph was unnecessary; the point raised by the Government of Israel could perhaps be dealt with by using, in paragraph 1, the words "before the treaty became binding on that party" instead of the words "before the date of entry into force of the treaty with respect to that party".

18. The language of paragraph 1 was reminiscent of the United Kingdom contention in the *Ambatielos* Case, that "none of its [the treaty's] provisions are applicable to events which took place or acts which were committed before that date [July 1926]."⁹ In its judgment, the Court had not used that language, but had laid down that the treaty could not be deemed to have been in force prior to the exchange of ratifications and that, in the absence of "any special clause or any special object necessitating retroactive interpretation", it was "impossible to hold that any of its provisions must be deemed to have been in force earlier".¹⁰ In its 1964 report the Commission had reproduced the relevant

⁴ *Yearbook of the European Convention on Human Rights*, 1960, p. 284.

⁵ *Ibid.*, 1958–1959, pp. 230–235.

⁶ *Yearbook of the International Law Commission*, 1964, vol. I, pp. 33 et seq. vol. II, pp. 177 et seq.

⁷ *I.C.J. Reports* 1952, p. 40.

¹⁰ *Ibid.*

⁴ *P.C.I.J.* (1938) Series A/B No. 74, p. 24.

⁵ *Ibid.*

passages of that judgment¹¹ and he would urge that the wording of article 56 be modified to conform with it. That could be done by using a short formulation such as: "A treaty confers rights or creates obligations only during the period when it is in force".

19. After the entry into force of the treaty, its provisions would be applied in accordance with its terms; normally, the provisions of the treaty would apply to acts and situations contemporaneous with its existence in force. The question of its possible application to past facts was one of interpretation and, as Mr. Jiménez de Aréchaga had observed, it was undesirable to interfere with that interpretation by laying down unduly rigid rules in the matter. The presumption of non-applicability to past facts embodied in paragraph 1—except where the contrary appeared from the treaty itself—was too strong as a residuary rule. To say, as the International Court had said, that a treaty could not be in force retroactively was a different proposition from stating that the treaty provisions could not be given retrospective effects. Such retrospective effects could exist in certain cases, such as jurisdictional clauses which made no reservations regarding past events. On a previous occasion he had given as an example the case of an extradition treaty, which would apply to a person charged with murder before it entered into force. Great care should also be taken not to prejudice the position regarding peace treaties. If the language which he suggested for paragraph 1 were adopted, it would be possible to deal more adequately with the problems raised by paragraph 2.

20. He believed that the view taken by the Greek delegation regarding the saving clause "unless the treaty otherwise provides" was quite correct; a treaty was not terminated if some of its provisions continued to be applied. In paragraph 6 of his observations (A/CN.4/186/Add.1), the Special Rapporteur stated that the Commission had not overlooked the possibility of taking that view, but had rejected it. He (Mr. Briggs) had searched in vain through the records of the 1964 discussions for any indication that the Commission had considered the matter.

21. He recalled that article IV, paragraph 2 of the Antarctic Treaty, signed at Washington on 1 December 1959, provided that:

"No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."¹²

If that treaty were to cease to be in force, the question would arise whether a State could invoke, in support of a claim to sovereignty, an event which had occurred while it had been in force. The prohibition no longer applied, since the treaty had not forbidden the acts in question; it had merely denied to them certain effects while it was in force.

¹¹ *Yearbook of the International Law Commission, 1964*, vol. II, p. 178.

¹² United Nations, *Treaty Series*, vol. 402, p. 74.

22. Another example was provided by the Convention on the Liability of Operators of Nuclear Ships, signed at Brussels on 25 May 1962. Article XIX of that Convention read:

"Notwithstanding the termination of this Convention or the termination of its application to any Contracting State pursuant to Article XXVII, the provisions of the Convention shall continue to apply with respect to any nuclear damage caused by a nuclear incident involving the nuclear fuel of, or radioactive products or waste produced in, a nuclear ship licensed or otherwise authorized for operation by any Contracting State prior to the date of such termination, provided the nuclear incident occurred prior to the date of such termination or, in the event of a nuclear incident occurring subsequent to the date of such termination, prior to the expiry of a period of twenty-five years after the date of such licensing or other authorization to operate such ship."¹³

Under that provision, the question would arise what was the legal basis of liability during the 25 years in question, at a time when the treaty was terminated. His own conclusion was that either the treaty was not in fact terminated, which was the thesis put forward by the Greek delegation at the General Assembly, or that the question was not a treaty question at all; it simply meant that certain matters of liability would survive the treaty.

23. For those reasons he considered that paragraph 2 was neither necessary nor desirable and that his own brief text would better serve the intended purposes of both paragraphs of article 56. It stated all that was required in the matter of the application of treaties in point of time. It was not the same provision as that contained in article 55, which referred to the binding character of treaties and not to the application of treaties for the duration of the period when they were in force.

24. The CHAIRMAN, speaking as a member of the Commission, said he had no comments to make on paragraph 1, which, in his opinion, could be retained as it stood.

25. With regard to paragraph 2, he agreed with Mr. Reuter and to some extent with the Netherlands Government. He had not been convinced by the Special Rapporteur's explanations. Situations created before the treaty entered into force or while the treaty was in force were covered implicitly or explicitly by paragraph 1. Paragraph 2 could refer only to situations which arose after the treaty had ceased to have binding force. The expression "situation which is established" would therefore be preferable to "situation which exists".

26. He agreed with Mr. Briggs and with the Greek delegation that paragraph 2 stated not an exception, but a general rule relating to the case of a treaty which, although it had terminated, was maintained in force at least in part. That would apply, for example, to the Convention on the Liability of Operators of Nuclear Ships, article XIX of which provided that "the provisions

¹³ *Le Droit maritime français*, 1962, tome XIV, p. 596.

of the Convention shall continue to apply" even after the Convention had terminated. Mr. Briggs had clearly established the distinction between the fact of a treaty being in force and the applicability of its provisions; a treaty might well come into force at a certain date and apply to facts or acts prior to that date. Consequently, paragraph 2 should specify that a treaty could not apply to facts, acts or situations which arose after the treaty had ceased to be in force; that was a general rule, not an exception.

27. Mr. ROSENNE said that article 56 did not deal either with entry into force or with termination, but with the period during which the parties were legally bound to apply the terms of the treaty. From the doctrinal point of view, if a treaty contained provisions on its continued application after its termination, it could be said that technically the treaty was still in force, at least in part.

28. Although the example was not directly relevant—in view of the provisions of article 3 (*bis*)—he would cite the constitution of UNESCO, because it provided a clear illustration of the problem. That instrument specified that the withdrawal of a Member State became effective on 31 December of the year following the one in which notice of withdrawal had been given. The effect of that provision was that the instrument remained in force, at least in part, with regard to the withdrawing country until that date had passed.

29. Though there might be differences in doctrinal approach, he did not believe there was any fundamental cleavage within the Commission regarding the rule to be embodied in article 56, namely, that the obligation to perform the treaty was incumbent on every party thereto for the period between the entry into force and the lawful termination of the treaty for the party concerned.

30. It appeared to be generally accepted that, under the *pacta sunt servanda* rule, a treaty might have retroactive effects or prospective application if the parties so agreed; such agreement could either be expressed in the treaty itself or take some other form; it could, for example, follow from the nature of the treaty.

31. The difficulties that had arisen were essentially questions of drafting; the Drafting Committee should be able to state the rule clearly and avoid any complications due to confusion between the concept of lawful termination and that of the application of treaties.

32. With regard to the concluding words of paragraph 1, he agreed with the remarks contained in paragraph 4 of the Special Rapporteur's observations, especially the passage reading: "quite often the very nature of a treaty indicates that it is intended to have certain retroactive effects without specifically so providing (see paragraph (5) of the commentary)" (A/CN.186/Add.1). That same thought was reflected elsewhere in the Commission's draft, for example, in article 39 as adopted at the previous session, and he assumed that the matter would be further clarified after the Commission had re-examined the articles on interpretation.

33. The provisions of paragraph 2 really dealt with the consequences of lawful termination and perhaps the Drafting Committee should consider combining them

with those of article 53; that would avoid the inelegance of having two separate provisions on the consequences of lawful termination, drafted from slightly different angles, on the basis of what was admittedly a valid, but also an extremely fine, distinction.

34. In law, there could be no further application of a treaty after its lawful termination and he could therefore not accept all the contents of paragraph 7 of the Special Rapporteur's observations.

35. In 1964, article 56 (then article 57) as first submitted by the Drafting Committee had consisted of only one paragraph; but as a result of the discussion paragraph 2 had been added at the 759th meeting.¹⁴ He now urged that its contents be transferred to article 53.

36. Mr. LACHS said that the Special Rapporteur's approach to the problem of provisional entry into force was correct; however, as had already been pointed out, since article 56 made no distinction between provisional and definitive entry into force, there was no need to insert an additional paragraph on the subject. It would be sufficient to deal with the matter in the commentary.

37. Paragraph 1 should be retained as it stood.

38. With regard to paragraph 2, he shared the Special Rapporteur's views on the proposals for its amendment. In particular, he endorsed his rejection of the Netherlands Government's suggestion that the words "which exists" should be replaced by the words "which comes into existence". It was essential to draw a distinction between a situation which existed and one which came into existence; the former expression covered a situation which arose during the currency of the treaty and continued to exist after its termination.

39. The example of the Antarctic Treaty given by Mr. Briggs did not seem convincing; the purpose of that Treaty was to freeze all claims while it was in force. The prohibition of claims based on events which occurred while the Treaty was in force resulted from the operation of its own clauses.

40. The fact of the matter was that even if a treaty ceased to exist, it could not be erased altogether; it ceased to operate, but it became a part of history. As indicated by the concluding words of paragraph 2, "unless the treaty otherwise provides", problems of that kind should be decided in accordance with the terms of the treaty itself. The concluding passage of paragraph 2 should, however, be brought into harmony with the changes which had been suggested for article 53. The reference to article 53 contained in paragraph 2 should be retained so as to stress the clear link between the two sets of provisions.

41. Mr. de LUNA said that, although he was generally in favour of simplification, he could not support the short text proposed by Mr. Briggs; it was an oversimplification of the whole matter and did not really cover all the questions with which the Commission was attempting to deal in article 56. In fact, it was little more than a paraphrase of the *pacta sunt servanda* rule embodied in article 55.

¹⁴ Yearbook of the International Law Commission, 1964, vol. I, p. 165, para. 16 and p. 232, para. 8.

42. He agreed with those speakers who had stressed that when a treaty was completely terminated, it ceased to be in force and could not be a source of rights or obligations. The example of the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships was not conclusive. The case envisaged by Mr. Briggs was that of the Convention ceasing to be in force in respect of one of the parties, but remaining in force for the others. That situation was a fairly common one in international law; for example, the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 specified, in article 65, paragraph 2, that denunciation of the Convention by a party did not release that party from its obligations in respect of any act constituting a violation performed by it before the date on which the denunciation became effective.¹⁶ A further example was to be found in the customary clause in the constitutions of international organizations to the effect that certain obligations remained due by a former member of the organization for a certain period after its withdrawal.

43. Paragraph 2 dealt with different matters from those covered by provisions such as article 65, paragraph 2, of the Human Rights Convention. It related to events which had occurred while the treaty was in force. It was important to remember the difference between acquired or vested rights and mere expectations. A right could have its source in a treaty, but once it was vested in its beneficiary it had a life of its own. A vested right would survive the withdrawal of the party concerned from the treaty, but a mere expectation would not.

44. He agreed with those who had pointed out that, if a treaty could be applied to a situation arising after its termination, the treaty—or the relevant part of it—was still in force.

45. Mr. EL-ERIAN said he agreed with the Special Rapporteur's conclusions on paragraph 1 of article 56 and with the distinction so clearly made between the consequences of the termination of a treaty and the continued application of certain provisions of a treaty after it had ceased to be in force. He therefore fully supported the Special Rapporteur's idea of keeping the contents of article 56 separate from those of article 53.

46. Paragraph 2 did not appear to touch the question of acquired rights, but related only to the further application of a treaty's provisions after its termination.

47. The suggested paragraph 3 was unnecessary because article 56 was drafted in general terms, so that it covered both entry into force under article 23 and provisional entry into force under article 24. The matter could be explained in the commentary.

48. There seemed to be a lack of clarity in the comments of the Greek delegation. A distinction should be made between the effects of the future convention on the law of treaties and the effects of the individual treaties that would be governed by its provisions. Article 56 did not deal with the general effects of the future convention on the law of treaties: it enunciated principles which still contained some elements of declaratory law because in 1959 the Commission had considered casting the draft articles in the form of a code. Personally, he had

no doubt that the rules embodied in article 56 gave expression to general norms of international law.

49. In 1964, in answer to a question by Mr. Ago regarding treaties providing for the pacific settlement of disputes, the Special Rapporteur had said that "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".¹⁸ As Mr. Ago had pointed out "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 . . . that the procedure applied to all disputes, even those arising out of prior facts".¹⁷

50. Article 56 did not prejudice the application in point of time of the future convention on the law of treaties.

51. Mr. AGO said he first wished to make it clear that he shared the view of those who did not consider it necessary to add to article 56 a paragraph on provisional entry into force. A treaty either entered into force or it did not; if it did so even provisionally it nevertheless entered into force. It was therefore pointless to complicate an already difficult article by adding a provision of the kind proposed.

52. One point which should be emphasized was that the rule stated in article 56 was a residuary rule. The essential factor was what the will of the parties had been, and that will might diverge from the course outlined by the Commission. Consequently, there might perhaps be some advantage in placing the proviso concerning what appeared from the treaty, or what it provided, at the beginning of the paragraphs rather than at the end.

53. The Drafting Committee would have to give careful consideration to the question raised by Mr. Rosenne regarding the relationship between paragraph 2 of article 56 and article 53; in the present text, the phrase "Subject to article 53" certainly seemed obscure.

54. However, the most difficult and important problem raised by the article, which was full of pitfalls, was that of "situations". Where the reference was to facts or acts which supervened or took place at a given moment, the problem was relatively easy to solve; it would even be rather strange for a treaty to provide that it did not apply to facts or acts which supervened or took place while it was in force. But a "situation" began at a certain moment and then continued. As drafted, paragraph 1 meant that the treaty did not apply to a situation which had begun before, and ceased to exist before, the treaty entered into force, but that the contrary might appear from the treaty; in other words, the treaty might provide that it applied to a previous situation which had ceased to exist by the date of entry into force. But by its silence, paragraph 1 implied that the treaty always applied to a previous situation which had not yet ceased to exist when the treaty entered

¹⁶ *Yearbook of the International Law Commission, 1964*, vol. I, p. 41, para. 14.

¹⁷ *Ibid.*, para. 11.

into force; curiously enough, it even gave the impression that the treaty itself could not exclude from its scope a situation which had begun before its entry into force and had continued to exist while it was in force. It was obvious, however, that certain treaties, such as jurisdictional treaties, could exclude situations of that kind. Consequently, the Commission ought to clarify that point.

55. At first glance, paragraph 2 appeared to state the obvious, but that was better than saying something incorrect. On that point he shared the view of the Chairman: a "situation which exists after the treaty has ceased to be in force" could have begun to exist before that date. Any international court examining such a situation would have to consider whether the treaty had been in force at the time when the situation had begun and, if so, to judge the situation according to the treaty. It would be absurd to exclude a situation from the scope of a treaty because that situation had continued to exist after the treaty had ceased to be in force. The Commission would therefore do well to follow the suggestion of the Netherlands Government that the words "situation which exists" be replaced by the words "situation which comes into existence".

56. He had no specific proposals to make, but would urge the Drafting Committee to review article 56 with the utmost care.

57. Mr. TUNKIN said that both paragraphs of article 56, but in particular paragraph 2, raised some awkward theoretical problems. On the question raised by the Greek delegation, for example, it was clear that, if certain clauses of a treaty were applied, they could only be regarded as being still in force.

58. Although the wording of the article could be affected by whatever view was adopted on the various theoretical issues, taking a practical approach, both paragraphs of article 56 could be accepted as a reflection of existing practice, and in his view they were acceptable as rules of law, regardless of theoretical controversies.

59. He had himself been one of the negotiators of the Antarctic Treaty of 1959 and he well remembered the difficult negotiations over article IV, which had the effect of freezing territorial claims in Antarctica. The hypothetical example based on that article given by Mr. Briggs was not convincing. If the Antarctic Treaty were to terminate, any acts performed while it had been in force would of course be governed by its provisions and could not be invoked in support of any new territorial claim, or any rebuttal of a claim made before 1959. Such an application of the Antarctic Treaty to all the events which occurred during the period of its operation would be consistent with the general tenor of article 56.

60. The problems raised by Mr. Ago should receive careful consideration by the Drafting Committee, although the difficulties involved had been somewhat exaggerated.

61. As to the suggested paragraph 3, he agreed that it was unnecessary.

62. Lastly, he was unable to support the suggestion by Mr. Ago that both in paragraph 1 and in paragraph 2, the concluding proviso should be moved to the

beginning of the paragraph. He was in favour of placing the proviso after the statement of the rule, as in other instances.

63. Mr. BARTOŠ said it had been maintained that the rule stated in paragraph 1 was a residuary rule—a general rule applicable in the absence of special arrangements by the parties. That was very true. But the use of the expression "unless the contrary appears from the treaty" added to the general rule and to the parties' special rule a third kind of rule—an additional derogation resulting from the interpretation of the treaty. That involved an element of uncertainty which sound juridical technique should try to remove.

64. With regard to the question of provisional entry into force, Mr. Ago had asked that an already difficult rule should not be further complicated. Mr. Tunkin, on the other hand, thought that the question should be dealt with; he was thinking in particular of provisional entry into force as provided for in the final clauses of a treaty. Not infrequently, however, a treaty was applied provisionally irrespective of its final clauses, because during the negotiations, the parties had agreed on a transitional arrangement by which the treaty would be applied provisionally pending its entry into force. In that case, there was no "provisional entry into force" in the strict sense of the term, but the treaty was applied by virtue of an agreement independent of its provisions; that was an expedient by which certain relations could be established between the parties even if the political climate, for example, made it impossible for the treaty to enter into force. Though he did not ask that that question should be dealt with explicitly in article 56 itself, he thought it should at least be mentioned in the commentary.

65. Mr. AMADO said that article 56 was difficult enough in any case, but it was made even more unattractive by the abundance of the possibilities involved. For all their enlightenment, their profound theoretical knowledge and their wide practical experience, the members of the Commission had not found their way easily through the difficulties. The whole statement of that so-called rule of law was qualified by the phrase "unless the contrary appears from the treaty" or "unless the treaty otherwise provides". In other words, an extraordinary effort was made to state a rule, and then the parties were left to embark on the hazardous enterprise of interpreting the treaty. It was therefore to be hoped that the Drafting Committee would not only reject the new paragraph proposed by the Special Rapporteur, but would even consider deleting article 56 altogether.

66. Mr. JIMÉNEZ de ARÉCHAGA said he felt bound to comment on paragraph 2, because of the doubts to which the discussion had given rise. The examples given of treaties to which the proviso at the end of the paragraph would apply, had shown that they were terminated by express provision in the treaty itself, and the Commission, in its draft articles, could not seek to impugn the intention of the parties or the expression of that intention. However, certain effects of those treaties arising from acts performed while they were in force might continue, and that continuation was reinforced by other rules of international law.

67. To take the example of the Antarctic Treaty, by virtue of the inter-temporal rule acts performed while the treaty was in force could not provide a ground for occupation, because that would be unlawful under international law, being forbidden by the treaty. The position under the Convention on the Liability of Operators of Nuclear Ships was even clearer. A State remained responsible for having licensed a nuclear ship while a party to the treaty and for having created a potential risk, but the licensing would have to take place while the treaty was in force.

68. With regard to the other problem raised in paragraph 2, as a result of the Netherlands suggestion, which had been supported by some members, he was concerned lest the adoption of a formula using some such wording as "any situation which comes into existence" might create a contradiction between paragraphs 1 and 2. Three kinds of situation had to be taken into account—extinct, continuing and future—and it must also be borne in mind that while paragraph 1 was concerned with a new treaty, paragraph 2 was concerned with an old treaty. If the Commission endorsed the Netherlands Government's assertion that the old treaty did not apply to situations that had come into existence after its termination, that would be correct, but obvious. However, that formula was also open to the interpretation, *a contrario*, that the old treaty applied not only to situations which had ceased to exist, which was correct, but also to continuing situations, which was the exact opposite of what had been implicit in paragraph 1.

69. Thus, if the changes proposed were introduced in paragraph 2, the inference that the Commission wished to be drawn from paragraph 1 would be in danger; hence it was preferable to keep the text as it stood, in order to avoid the implication that the old treaty might apply to existing situations or to situations subsisting after its termination.

70. Mr. AGO said that the Commission should give a good deal of thought to the wording of the article, in order to make sure that it covered all the cases as well as possible. But he had no doubt that it would be possible to find satisfactory wording, and he was not in favour of the desperate course advocated by Mr. Amado, who would like the Commission to drop the article altogether because of the difficulties it involved. There were indeed real difficulties; but they were due solely to the existence of continuing situations, whose existence in time did not coincide with that of the treaty. That was the point to be settled.

71. The problems to be solved were not theoretical problems at all. To a very large extent they could be solved either by the treaty, which would itself in many cases give the necessary particulars, or by interpretation of the treaty, though it would be wrong to think that everything could be settled by interpretation.

72. The first case he had pleaded before the International Court of Justice had been one between France and Italy concerning a situation that had arisen before the entry into force of a jurisdictional clause and had continued to exist after its entry into force. The clause simply stated that the jurisdiction of the Court did not extend to earlier situations. But what was meant by "earlier situations"? Were they situations which had

begun and ceased to exist before the jurisdictional clause had come into force, or were they situations which had begun before, but might continue to exist even after it had come into force? The Court had settled the question in a certain way, but in a later case it seemed to have taken a different position. That showed how necessary it was for the Commission to draw up a residuary rule on the subject, which was by no means hypothetical.

73. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that as he had indicated at the outset, article 56 was a difficult one and not easy to draft in any of the working languages. It would certainly need further consideration by the Drafting Committee, but the Commission must decide what the article should contain. As it stood, the text did not provide a positive rule and the title was a misnomer, because the article in fact set out the conditions when a treaty did *not* apply in point of time; it dealt with the temporal limits of application and not with the general principle of application in point of time. That fact provided his answer to Mr. Ago's criticism of paragraph 1, that it failed to indicate what happened when the situation had begun to exist before the treaty came into force and continued after the treaty came into force. If paragraphs 1 and 2 were retained in their present form, the title would have to be changed to correspond to their content.

74. Paragraph 1 was essential, for precisely the reasons just given by Mr. Ago. Although the examples cited in learned works might not be numerous, there had been a number of cases, particularly in respect of jurisdictional clauses, in which the principle of non-retroactivity had been very important. In his opinion, there was a fundamental rule that a treaty did not have retroactive effects unless the intention of the parties had clearly been to the contrary or such an intention could be deduced from the general provisions of the treaty; that rule needed to be stated. It could be left to the Drafting Committee to consider whether the rule should be expressed in terms of non-retroactivity, with the intention of the parties as a qualification, or the other way round.

75. At that juncture the Commission was unlikely to make much more progress in solving the central problem posed by the temporal aspect of acts or facts, which was inherent in the nature of things. He was not sanguine about the chances of resolving the difficulty simply by better drafting.

76. He would not conceal his uneasiness about paragraph 2 and the over-subtlety of the distinctions to be drawn between it and article 53. The explanation in his sixth report (A/CN.4/186/Add.1) of the difficulties involved was, he thought, correct and the discussion had not dispelled any of his anxieties. The Drafting Committee would need to examine carefully the exact relevance of those two provisions to the whole draft.

77. The substantive discussion on paragraph 2 had centred on the clause "unless the treaty otherwise provides" and he remained unconvinced by the argument developed by the Chairman and by Mr. Briggs. There was a doctrinal issue involved, but the apparent cleavage of opinion was not perhaps very wide. However, he thought it would be difficult to argue that, when the

parties had contemplated and provided for termination or for withdrawal by one party, a particular clause in the treaty remained legally in force for that party. He had dealt with that point in paragraph 7 of his observations.

78. The difficulty was the familiar one of an executed treaty giving rise to vested rights and obligations, and those rights continuing to have effects and possessing an independent legal existence by virtue of having arisen out of the treaty. An example of the difficulty could be drawn from the Convention on the Liability of Operators of Nuclear Ships under which, by reason of licensing a nuclear ship during the existence of the instrument, a party incurred a liability that might survive for twenty-five years, whether or not it remained a party. That Convention contained an express provision clearly contemplating that a State might cease to be a party, but certain effects would nevertheless continue during the existence of the treaty. Admittedly the case was the special one of an obligation arising out of something that had occurred during the treaty's existence and continuing as an independent legal obligation after the party concerned had withdrawn.

79. The Convention for the Protection of Human Rights and Fundamental Freedoms was another example, because it provided that a State denouncing the Convention would remain liable for violations of human rights occurring before the denunciation took effect. It was the existence of that type of provision that had prompted the Commission to add the proviso "unless the treaty otherwise provides", and if paragraph 2 were retained, it would probably have to remain more or less in its present form. The point was a substantive one, but the Drafting Committee could discuss it.

80. Of course, the real issue before the Commission was whether paragraph 2 should be retained at all, and if so, how it should be related to article 53. On that issue the discussion had not thrown much light, so he reserved his own position until the Drafting Committee had had an opportunity of examining the article.

81. It was unnecessary to complicate the task of formulating article 56 by referring to final clauses, the problem of which he had brought up on various occasions, hoping to obtain from the Commission an answer to the question what legal force they possessed. The Commission seemed to regard them as some kind of esoteric mystery: it agreed that they had some force, but no one seemed to be clear as to its source.

82. Generally speaking, he still held to the conclusions he had expressed in his sixth report. He would do his best to help the Drafting Committee overcome the difficulties created by the excessively fine distinctions drawn between article 56 and article 53.

83. The new paragraph he had suggested for inclusion in the article need not stand, as everyone seemed to agree that it was superfluous.

84. The CHAIRMAN suggested that article 56 be referred to the Drafting Committee in the light of the discussion.

It was so agreed.¹⁸

¹⁸ For resumption of discussion, see 867th meeting, paras. 4-10.

ARTICLE 57 (The territorial scope of a treaty) [25]

[25]

Article 57

The territorial scope of a treaty

The scope of application of a treaty extends to the entire territory of each party, unless the contrary appears from the treaty.

85. The CHAIRMAN invited the Commission to consider article 57, for which the Special Rapporteur had proposed an additional paragraph reading:

"A treaty may apply also in areas outside the territories of any of the parties in relation to matters which are within their competence with respect to those areas if it appears from the treaty that such application is intended."

86. Sir Humphrey WALDOCK, Special Rapporteur, said that article 57 had given rise to much discussion at the sixteenth session and the Commission had decided not to cover in the article (then article 58) a number of issues which he had presented in his third report,¹⁹ with the result that the text had been pared down to something almost lapidary. After examining the comments by governments and delegations, he had come to the conclusion that most of their suggestions should for one reason or another be rejected.

87. The Greek delegation to the Sixth Committee had questioned the need for the article, on the ground that it merely created a refutable legal presumption. In a sense that was true, as it was true of many other articles in the draft which in some measure had to be subject to the will of the parties; but that did not mean that the Commission should refrain from stating residuary rules, if it seemed necessary, as it had decided to do in article 57.

88. The most extensive change proposed was the addition, advocated by the Netherlands Government, of a second paragraph expressly enunciating the right of States composed of distinct autonomous parts to declare to which constituent element a treaty applied. That would bring the Commission back to the issues examined, but set aside, at the sixteenth session. Though he sympathized with the Netherlands proposal—and it would be remembered that in his original draft he had put forward certain provisions regarding capacity in an attempt to elucidate some of the difficult problems involved—he had accepted the Commission's view that the article should be restricted in the manner decided on in 1964. The text which had emerged from that discussion was not so rigid as to exclude legitimate possibilities of the kind contemplated in the Netherlands proposal, which therefore did not call for changes in the text.

89. The Governments of Finland, the Netherlands and the United States had raised a point that deserved attention, namely, the extra-territorial application of treaties, arguing that, although that had not been the Commission's intention, the text might be read as excluding such application, for example, in respect

¹⁹ Yearbook of the International Law Commission, 1964, vol. II, p. 12.

of ships and aircraft on the high seas, the continental shelf, etc. Of course, the Commission had not overlooked treaties concerned with such matters, but had regarded article 57 as being primarily concerned with the application of treaties to the territory of the parties. Perhaps it was desirable, given the nature of the article, to try to cover the point, though the drafting would not be easy. His own proposal for a new paragraph had been read out by the Chairman. The text proposed by the United States Government on that point differed slightly from the Netherlands Government's proposal for the revision of the article as a whole. The new texts proposed by the two governments would be found in paragraph 4 of his observations (A/CN.4/186/Add.1).

90. Mr. PAREDES said that the territory of States differed in nature: it was not always uniform and continuous. Some States had both continental and island territories, others had dependent territories. Those differences gave rise to a wide variety of legal, economic, geographical, political and administrative situations, and the problems relating to the different parts of the territory of a State were rarely the same. In his view, therefore, it was normal for treaties to relate to a specific part of the territory; in other words, the principle to be deduced was exactly the opposite of that which the Commission was upholding in article 57. The treaty applied to the territory to which the object or purpose of the treaty specifically related. If the treaty was silent on the matter, the intention would have to be examined to determine whether it applied to all the territories, with differing status, of the States which had concluded it, or only to some part of those territories. In short, far from solving the problems, article 57 in its existing form complicated them enormously, and it would be better to delete it.

91. In case the Commission nevertheless decided to retain the article, he would point out that in the new paragraph proposed by the Special Rapporteur, the phrase "areas outside the territories of any of the parties" seemed to be so general that it could even mean that the treaty could be imposed on countries which had nothing to do with it and which would thus be subjected to a sort of colonization.

92. The Special Rapporteur had probably not intended the phrase in question to have that meaning, and had no doubt been thinking only of parts of the territory which were not contiguous or which had a special legal status, such as maritime zones, warships, air space or dependent territories of the States which had concluded the treaty. But it was essential to clarify the text by specifying that it referred exclusively to territories subject to the jurisdiction of the States parties to the treaty and that, as required by the principle of the independence and equality of States, a country could not have a particular course of action imposed on it by countries of which it was not a dependency.

93. Mr. REUTER said he believed that the Commission could concur in the Special Rapporteur's observations and retain the text it had adopted in 1964. Subject to what the Commission might subsequently decide about such expressions as "appear from the treaty", the text must certainly have some flexibility, but it was in fact already fairly flexible.

94. He thought the proposal made by the Governments of the Netherlands, the United States and Finland might possibly be the result of a misunderstanding, or rather of the fact that, of the three versions of the article, only the Spanish was entirely correct, in that the opening words of the article were exactly the same as the title, namely, "*El ámbito de aplicación territorial*", whereas the word "territorial" had vanished from the English and French texts, though it was obvious that the article related only to territorial application. The question whether there was a field of application that was not territorial was entirely foreign to the Commission's intentions. He was therefore in favour of rejecting the proposal by the three governments and mentioning in the commentary that the Commission had not wished to settle that question.

95. If the Commission nevertheless wished to add a paragraph on that question to the article—and in doing so it would be venturing on difficult ground—he would prefer the text proposed by the United States to that of the Netherlands Government or even that of the Special Rapporteur, for he doubted whether the words "area" in English and "zone" in French, used by the Special Rapporteur, were wholly satisfactory in the context. There might be cases of extra-territorial application in which it would be inelegant to use those words, for example, when referring to ships or to space. In that respect, the text proposed by the United States had the advantage of not containing any word likely to be controversial.

96. The defect of the text proposed by the Netherlands Government was that it raised a serious question of substance; for it introduced the idea that, when a treaty was applied in a non-territorial field, a burden of proof was imposed on the party intending to apply the treaty, which had to prove that it was entitled under international law to apply the treaty outside its territory. He hoped the Commission would not raise that question unintentionally.

97. Mr. LACHS said that article 57 needed careful re-examination. In principle, most treaties applied to the territory of the parties, but there were a number which applied exclusively to areas outside the territory, for example, outer space. That point ought to be reflected in the article, because the scope of application of such treaties was not ancillary, but an essential element of the instrument. The Commission must strike some kind of balance and not overlook existing and possible future treaties of that kind.

98. The Netherlands Government had re-opened issues that had already been discussed at length by the Commission and there was no need to recapitulate the reasons for the Commission's decision that the article should not deal with territorial limitation resulting from colonial clauses and the like. He agreed with the comments made by the Czechoslovak Government. The institutions of trust territories and dependent territories mentioned by the Netherlands Government were disappearing and the Commission need not legislate for their perpetuation. Recent treaties of a humanitarian nature concluded under United Nations auspices took account of that fact, as was clear from article 23 of the Convention for the Suppression of the Traffic in Persons and

of the Exploitation of the Prostitution of Others,²⁰ and article 12 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery.²¹ By virtue of those provisions, the two instruments applied to the whole territory of a State party, irrespective of the legal status of any particular part of the territory within its jurisdiction. There was no need to amplify article 57; the problem of the application of treaties to what were known as colonial territories or to the component parts of a federation should not be dealt with in the draft articles.

99. He agreed with Mr. Reuter that the formula suggested by the Netherlands Government to cover extra-territorial application might cause difficulties and would have to be carefully examined if the Commission decided to add a provision on that point. The wording suggested by the Special Rapporteur would lead to complications, especially the phrase "within their competence".

100. Mr. CASTRÉN said he supported the suggestion by three Governments—the Netherlands, the United States and Finland—that a paragraph be added to article 57 to provide for cases of extra-territorial application of treaties; as drafted in 1964, the article had not been complete. He was also prepared to accept, in the main, the wording submitted by the Special Rapporteur for the new provision; but he proposed that the words "under international law", taken from the text suggested by the Netherlands Government, be inserted after the word "competence". The title of the article might also have to be changed to cover such cases.

101. He also approved of the Netherlands Government's proposal that a further provision be added to article 57 to take account of special factors such as the federal structure of a State or the position of dependent territories; he hoped the Commission would examine that proposal with all the care it deserved. The Special Rapporteur himself had said in his observations that he was in sympathy with much that was said in the comments of the Netherlands Government, but believed that the rule adopted by the Commission in 1964 was flexible enough not to give rise to difficulties in practice of the kind envisaged by that Government. He (Mr. Castrén) feared that the doubts of the Netherlands Government might be justified. Finland, for example, had on several occasions experienced difficulties with regard to its autonomous territory of the Åland Islands, where the treaties entered into by Finland could not be applied without the assent of the local *Landsting*. The provision proposed by the Netherlands Government seemed useful, as it provided a practical solution for those complex problems.

The meeting rose at 1 p.m.

²⁰ United Nations, *Treaty Series*, vol. 96, p. 284.

²¹ *Op. cit.* vol. 266, p. 40.

851st MEETING

Friday, 13 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(continued)

[Item 1 of the agenda]

ARTICLE 57 (The territorial scope of a treaty) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 57.
2. Mr. ROSENNE said he agreed with much of what had been said about article 57 at the previous meeting, except that he had the same slight doubts about the phrase "entire territory" as he had expressed at the sixteenth session.²
3. The article should be retained as it stood at present. The point intended to be covered by the additional paragraph tentatively suggested by the Special Rapporteur was met by the proviso "unless the contrary appears from the treaty"; that proviso could either limit or extend the general rule set out in the article, which was rightly made subject to the intention of the parties, however that might be ascertained. If extra-territorial application needed to be dealt with at all, it should be done in the commentary.
4. The CHAIRMAN, speaking as a member of the Commission, observed that the 1964 discussion had changed the fate of article 57, which had originally been intended to extend the application of treaties beyond frontiers. As a result of that discussion, the Commission had confined itself to stating that a treaty applied to the entire territory of each party "unless the contrary appears from the treaty"—a proviso intended to permit restriction of the scope of application to a part of the territory. At least that was how he had understood the article in the final version submitted by the Drafting Committee.
5. A few of the comments by governments—which added nothing new, since the Commission had already considered the points they contained in 1964—stressed that some treaties were intended to be applied outside the territory of the State, without there being a colonialist régime or any extension of the competence of the State to the detriment of the freedom of other peoples; examples of such treaties were those intended to apply to the high seas or outer space. Those comments were

¹ See 850th meeting, preceding para. 85.

² *Yearbook of the International Law Commission, 1964*, vol. I, p. 48, paras. 23 et seq.