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Summary record of the 851st meeting

Topic:
Law of Treaties

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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 Aaland 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.*

well-founded and the Commission's draft should contain a provision covering cases of extra-territorial application, in the form of an additional paragraph in article 57. The Special Rapporteur's proposal (A/CN.4/186/Add.1) could serve as a basis for discussion, but he would prefer the provision to be based not on the competence of the State, which might be open to question, but on international law itself. He would suggest, therefore, that the words " in relation to matters which are within their competence with respect to those areas " be replaced by the words " if international law permits ".

6. He hoped the Commission would also make the change suggested indirectly by Mr. Reuter and bring the opening words of the English and French texts of the article into line with the Spanish text, in order to make it clear that the reference was to " territorial " application.

7. Mr. de LUNA said the Commission should not try to improve on the former text, which he was in favour of adopting as it stood.

8. Any discussion of the problem dealt with in article 57 —the territorial scope of a treaty—must start from the general principle of the unity and continuity of a State, which was reflected, so far as its territory was concerned, in the principle of the mobility of contractual frontiers which was stated by the Commission in that article. That was both the best and the most convenient general rule—the general presumption which it was sufficient to apply to the territorial unity of the State.

9. It was true that there were cases in which a treaty either did not extend to the entire territory of each of the parties or extended even beyond it. But those cases, which were the consequence of a general rule of international law, could be covered very concisely by the formulation used in article 57, since the final phrase, " unless the contrary appears from the treaty ", respected the free will of States, which were in a position to decide the scope to be given to a treaty in each specific case.

10. States which were not unitary in structure and comprised either autonomous territories or associated States could rely on the " federal " clause. For where a federal State was a party to a treaty, it alone, under international law, was entitled to the rights and bound by the obligations provided for in the treaty and was responsible for the performance or non-performance of the treaty. Naturally, that was sometimes rather inconvenient for a federal State if it wished to be a party to a treaty applicable to the entire territory of the parties; in that case, it either made a reservation to the territorial application or it undertook the necessary internal adjustments, so that when it bound itself on behalf of the entire national territory it could answer for the application of the treaty to its autonomous territories or component States. Another formulation, such as the one suggested by the Chairman, would also be acceptable, but it was not necessary.

11. He was also opposed to the proposal put forward by three governments—those of the Netherlands, the United States and Finland (A/CN.4/186/Add.1)—that a paragraph relating to cases of extra-territorial application should be added to the article. The paragraph suggested by the United States said the same thing as the text drawn up by the Commission. The text proposed by thc Netherlands, instead of admitting the exception to the general presumption resulting from the operation of the free will of the parties, established extra-territorial application as a general rule. The Netherlands was, of course, concerned to safeguard the huge natural gas resources under its continental shelf. He was convinced, however, that such practical problems could be solved by the exercise of free will, which the Commission had recognized in article 57.

12. Although there would be certain advantages in stating a second rule in another paragraph in order to take account of the cases referred to by governments, he thought they would be outweighed by the disadvantages, especially those relating to terminology. Whether the expression employed was " matters which are within their competence " or " jurisdiction of the State ", it was hard to avoid a taint of the so-called colonial clause, with its reference to " all the territory or territories for whose international relations the parties are responsible ". The suggested new paragraph was therefore superfluous and could even be dangerous.

13. Mr. TSURUOKA said he agreed with Mr. Rosenne and Mr. de Luna, and thought that the article should be retained as it stood.

14. He was rather surprised that, in part III of the draft, the Commission dealt only with application in point of time and space without mentioning application with reference to persons or things, for example; but he realized that detailed treatment would complicate the text, and that the work must be of practical value. From a practical point of view article 57 was necessary, since the territorial application of a treaty had sometimes been the cause of a dispute. He was not thinking of colonialism, as there would soon be no more colonies, but of the case of federal States—a subject of which he had had some experience in relations between his own country and the United States of America, particularly in connexion with the application of a treaty between them in all the constituent states of the Union. It was essential to include an article of that kind, but the Commission should not strive too much for perfection and try to cover all aspects of applicability.

15. It would be better not to add anything to the article. The phrase " unless the contrary appears from the treaty" should be interpreted fairly broadly, in the positive as well as the negative sense, so that it was understood that the treaty—if its object so required or the intention was clear—was applicable outside the territory of the parties. If that idea was expressed in the commentary, there would be no problems of interpretation in treaty relations between States.

16. Mr. BARTOŠ, said that the Commission had tried to make the article simple so that its meaning would be clearer, but he concluded from the numerous objections raised by governments and the comments made during the discussion that simplicity was not always the best method. The objections were contradictory, but fundamentally most governments disliked the article's simplicity.

17. The Commission had considered at length the question whether it was better to speak of all the terri-

tories for which a State party was internationally responsible, or simply to speak of the entire territory of each of the parties. Both formulas could be defended, but in order to combat colonialism the Commission had chosen the second, fear of neo-colonialism and the vestiges of colonialism having led it to abandon the so-called colonial clause, which had formerly been preferred.

18. Other clauses had reappeared in the comments by governments, particularly the " federal " clause, about which he had misgivings. The expression " the entire territory " seemed to leave outside the scope of the treaty certain detached territories, which were not integral parts of the international community and had no international personality. Should those territories, whose connexion with the State party to the treaty was dubious, be excluded by a general rule, or should their case be dealt with in special clauses to be embodied in the treaty by an express provision? He himself preferred the second solution.

19. It might be asked, however, what the position would be in the case of multilateral conventions and law-making treaties. During a stay in Japan and when reading of events in Cuba, he had wondered what, from the point of view of the territorial application of treaties, would be the fate of territories which were certainly an integral part of the national territory of a sovereign State, but were in practice removed from its jurisdiction and classed as territories of another State : were the bases of Okinawa and Guantanamo part of " the entire territory " of the State to which they had been ceded? According to the Commission's view of the matter, they were not. On the other hand, those areas were excluded from the " entire territory " of the State to which they originally belonged. However that might be, the Commission need not concern itself with such cases, but the objections raised by governments would have opened its eyes to the fact that it had not taken them into consideration.

20. Several governments, including that of Yugoslavia, had raised another question : the application by national courts of rules stated in an international treaty and intended to apply outside the national territory. The questions involved related, of course, to the high seas, warships, outer space and international organizations; the Commission had deliberately omitted them.

21. Consequently, although the article was admittedly incomplete, everyone agreed that it was acceptable as a general principle, as was stated in the Netherlands Government's comment. With regard to the text proposed by the United States Government, although paragraph 1 was acceptable, paragraph 2 was very dangerous. It had not been the Commission's wish that a treaty should apply beyond the territory of each party, whenever such wider application was clearly intended. Nor could he endorse the objections made by the Greek delegation. The Special Rapporteur should give further study to the objections raised by governments and submit more precise conclusions to the Drafting Committee, so that the article could be made more complete, even though it might perhaps be more complicated.

22. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with those members who wished to keep article 57 in much the same form as it was at present, but the Commission would have to make its intention more explicit in order to prevent misinterpretation. The article had been intended to relate solely to treaties capable of being applied within the territory of a party. An additional paragraph to meet the point made by the Governments of Finland, the Netherlands, and the United States, stipulating that a treaty could also apply beyond the territory of any of the parties, did not belong in the present draft, but in a code on the law of treaties, because it was without normative substance.

23. The article as it stood constituted a rule of law, because it established a legal presumption that treaties capable of territorial application created an obligation which had to be performed in respect of the entire territory of a State and that any party wishing to restrict the territorial application of the treaty to only a part of its territory was bound to raise the question of such restriction at the time when the treaty was drawn up and to obtain the agreement of the other party or parties.

24. It was unnecessary to insert another paragraph, as proposed by the Netherlands Government, explicitly enunciating the right of a State composed of distinct autonomous parts to declare which of them the treaty applied to, since that right was already recognized by the final proviso for any State, whether federal or unitary, provided that the other parties to the treaty agreed to a territorial limitation.

25. If the majority were in favour of adding a paragraph to state the obvious fact that a treaty could apply beyond the territory of a party, questions of competence and jurisdiction would have to be left aside. States would regard as inconsistent with, if not the letter, at least the spirit of the Antarctic Treaty, anything in the Commission's draft that could be read as implying that certain States possessed jurisdiction in the Antarctic under international law—which would be the effect of the Netherlands proposal. The same objection applied to the Special Rapporteur's text, which might imply that they would possess competence in that area.

26. Any reference to international law in article 57 would only complicate matters and, in answer to Mr. Bartoš, he felt bound to emphasize that the Commission had never intended the article to cover, even by implication, the kind of serious political issues he had mentioned. Nor had any government understood the text in that sense. The Drafting Committee should adhere to a formula more or less on the lines of the one approved in 1964.

27. Mr. BRIGGS said he had no difficulty in accepting the principle stated in article 57, which was a statement of existing international law; he was opposed to the article's dealing with colonial or federal clauses. To judge from its comments, the United States Government seemed to be of the same opinion, since it regarded the definition as self-evident. That meant that a State with a federal form of government had no difficulty in accepting the principle that a treaty extended to its entire territory.

28. In the United States it was a rule of constitutional interpretation that a treaty was the supreme law of the land and was self-executing, and difficulties had some-

times arisen in certain states of the Union over the application of treaty provisions binding on the entire United States. However, that was a problem not of international, but of internal constitutional law, with which the United States had often been faced when concluding treaties, because it regarded them as applicable to the whole territory of the country.

29. The words " territorial scope " and " scope of application " used in the 1964 text had proved to be misleading and the Special Rapporteur, in paragraph 3 of his observations (A/CN.4/186/Add.1), had raised the question whether it was the Commission's intention to deal with the whole topic of the territorial scope of treaties or only with their application to the internal territory of a State. If the words " scope of application " were retained, an additional provision to meet the point raised by the three governments would be needed. The revision proposed by the Netherlands Government went too far, nor did he favour the phrase " with respect to those areas " in the Special Rapporteur's text. The United States text was preferable, but could be improved upon. The second paragraph might read : " A treaty may also extend to matters within the competence of a party outside its territory, unless the contrary appears from the treaty ". However, he questioned whether anything need be said on the scope of application. He had no strong views on the matter and believed that it would suffice to shorten the article to read :" A treaty extends to the entire territory of each party, unless the contrary appears from the treaty ".

30. Mr. AGO said that the principle underlying the article was simple, sound and obvious—so obvious that it might be questioned whether it need be stated. The intention was to say that, where a treaty was susceptible of territorial application and was intended to be applied in the territory of each party, it applied in principle to the whole of that territory, and if the parties wished it to be otherwise, they must say so in the treaty. If a State wished to exclude part of its territory from the application of a treaty, it could also say so in a declaration, as the United Kingdom had done in the case of the Channel Islands.

31. The only difficulty raised by article 57 was a small matter of drafting. He agreed with Mr. Jiménez de Aréchaga that it should be made clear that the article related only to certain treaties, namely, those capable of territorial application and which were intended to be applied in the territory of the parties. For there were treaties which had no territorial application and to which the rule could consequently not apply; there were also treaties which, though they had territorial application, were not intended to be applied in the territories of the States parties, for example treaties on the high seas, the Antarctic Treaty and, probably, some day, treaties relating to the moon.

32. In order to define the scope of the article quite clearly, he proposed that the words " intended to be applied in the territories of the parties " should be inserted after the words " The scope of application of a treaty ".

33. Mr. TUNKIN said that there was still some confusion about the purport of article 57, and the text approved at the sixteenth session could be construed in several ways. The most justifiable interpretation was that a treaty was binding upon a State which was a subject of international law as a territorial entity. If that was correct, the Commission's intention had not been clearly expressed and the Netherlands Government's proposed new paragraph, stipulating that a State could limit the application of a treaty to some of its constituent parts and that a declaration to that effect should not be regarded as a reservation, was due to a misunderstanding, since the point was covered by the proviso " unless the contrary appears from the treaty ". The parties were free to regulate matters concerning application before signing or ratifying, either in the treaty itself or by means of an additional agreement, a process of which he had had some personal experience during the negotiation of a treaty between the Soviet Union and Denmark.

34. The new wording for article 57 suggested by the United States Government was unacceptable because it was contrary to international law and might lead to the parties stipulating that a treaty applied to the territory of a third State. The Special Rapporteur's new paragraph, submitted to take account of the point made by the three governments, contained certain indispensable safeguards, but it might be even more widely misunderstood than the 1964 text, which could be regarded as stressing the element of the territorial integrity of a State as a subject of international law. The Special Rapporteur's text could be construed as meaning that, subject to the principles of international law in force, the scope of application of a treaty extended to the entire territory of a party; that hardly needed saying.

35. The proposed new paragraph would introduce the issue of application to certain territorial régimes and would alter the meaning of the article. Mr. Ago wished to restrict it to territorial application, but the 1964 text could be read as referring to any treaty.

36. It seemed unnecessary to provide for the possibility of a treaty being applicable to areas outside the territory of a State, because any such treaty would contain the requisite provisions, subject of course to their being in conformity with international law.

37. He supported the principle embodied in the 1964 text, that a State was bound as an entity, unless otherwise agreed, but the text itself needed to be made clearer.

38. Mr. AMADO said he found the 1964 text of article 57 satisfactory, but he understood the reasons for the addition proposed by Mr. Ago and could accept it. He would be in favour of dropping the article, but he recognized that it was sometimes necessary to state the obvious. However, he objected to the use of the expression " The scope of application ", which was unnecessarily complicated. It would be better to say " A treaty applies . . . ".

39. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Ago that article 57 raised no difficulty in regard to treaties which were territorial in scope, but intended to apply to only part of the territory. There were many treaties of that kind. The State was sovereign; it exercised authority over its territory and was free to conclude a treaty applicable to the whole or only to a part of that territory.

40. The problem became much more difficult when a treaty applied not in the territory of the States parties, but elsewhere. The draft articles would be incomplete if they did not deal with that question.

41. The solution suggested by the United States Government did not seem to him to be acceptable; he did not think it possible to base a rule concerning treaties to be applied outside the territory of the States parties solely on the intention of those parties. Some limitation was necessary. The Netherlands Government had suggested that it should be based on a State's jurisdiction under international law; the Special Rapporteur had proposed something rather similar. He (Mr. Yasseen) had suggested an objective criterion, namely, that a treaty intended to be applied outside the territory of the States parties must be in conformity with international law. For instance, two States could conclude a treaty applicable to the high seas to the extent that international law allowed it.

42. Mr. AGO said that in such cases reference must always be made to the treaty itself. Although it was possible to formulate a residuary rule for treaties that were territorial in scope and intended to be applied in the territory of the State— a rule by which, if the treaty was silent on the matter it would apply to the entire territory—it did not seem possible to draft a residuary rule for treaties relating to such diverse objects as the territory of another State, the high seas, Antarctica or the moon. Moreover, it was inconceivable that a treaty of that kind would not specify its own scope of application.

43. The criterion of conformity with international law was sound, but it was not only relevant to article 57, for the problem of the conformity of a treaty with international law could arise in all respects. Furthermore, if a treaty derogated from a general rule of international law, either that rule was not a peremptory norm and derogation was permissible, or it was a rule of *jus cogens* and derogation was prohibited by another article. Hence a reference to international law would be superfluous and he was still convinced that it would be better to retain the 1964 text.

44. The CHAIRMAN, speaking as a member of the Commission, said he saw no objection either to leaving the article as it stood, or to making the addition proposed by Mr. Ago and supported by Mr. Tunkin. But if it were so worded, article 57 would leave aside an important problem which had been raised by several governments and which ought to be dealt with.

45. It was true that there was a general requirement that all treaties must at least be in conformity with *jus cogens*. But as Mr. Tunkin had pointed out, the intention of the parties could not be taken as the sole basis for a rule on treaties applicable outside the territory of the parties. It was essential to stress that the intention of the parties was not sovereign for the purpose of determining such an extension of a treaty, and that the extension must be in conformity with international law. A reservation to that effect would be of value, even though, generally speaking, every treaty must be in conformity with *jus cogens*.

46. Mr. CASTRÉN observed that only a few members of the Commission had supported the proposal made by three governments that cases of extra-territorial application should be provided for. The majority seemed to think it would be sufficient to state a general rule for normal cases which gave the parties the right and the freedom to extend or restrict the territorial scope by a special provision or some other specific statement in the treaty itself. He was not opposed to the latter solution.

47. The Netherlands Government's proposal to add a new paragraph relating to States consisting of autonomous regions each of which was free, under constitutional provisions, to decide whether or not to accept a treaty concluded with foreign States, had been criticized for different reasons by several members of the Commission and seemed to have no chance of being adopted. But that proposal had nothing to do with colonialism, which the Commission had discussed on several occasions, in particular, during the two readings of article 3.[3] On the contrary, the Netherlands proposal was designed to safeguard the independent status of states members of a federal State and that of autonomous territories, and at the same time to facilitate the conclusion and ratification of treaties by States having a special constitution. In such cases, if it were thought that the treaty should be applied to the entire territory, a provision to that effect could be inserted in the treaty itself; and that was the effect of the Netherlands proposal. The Special Rapporteur stated in his sixth report (A/CN.4/186/Add.1) that the matter raised by the Netherlands Government had been much discussed by the Commission. After re-reading the relevant summary records, he (Mr. Castrén) had come to the conclusion that the proposal was in fact a new one; but, if the Commission did not wish to adopt it, he would not press the point.

48. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission seemed to be assuming that there were two entirely separate categories of treaty; those capable of application within the territory of a State party and those capable of application outside that territory; but the reality was not so clear-cut. There could be, and were already in existence, international instruments in which both elements were present, such as the Conventions on the Law of the Sea[4] and the Antarctic Treaty.[5] Both contained provisions applicable within and without the territory of a State party, such as the provisions concerning the nationality of ships and the requirement to disseminate scientific information obtained in the Antarctic. The argument that article 57 was relevant to one category of treaties only could not stand, but Mr. Ago had offered a solution of the problem raised by the Chairman and Mr. Tunkin, and a way out of the difficulty would be for the article to refer to " treaties *capable* of being applied in the territory of a State ".

49. Mr. AMADO said he would once again plead the cause of States in the Commission. By the proviso " unless the contrary appears from the Treaty " article 57 left States completely free. But they were already re-

[3] *Yearbook of the International Law Commission*, 1965, vol. I, pp. 23 *et seq.* and 1962, vol. I, pp. 57 *et seq.*

[4] United Nations Conference on the Law of the Sea, 1958, *Official Records*, vol. II, pp. 132 *et seq.*

[5] United Nations, *Treaty Series*, vol. 402, p. 72.

sponsible for the expression of their intentions. To go on to say that a treaty must be in conformity with international law, as proposed by the Chairman, was surely superfluous.

50. Mr. BRIGGS said that Mr. Ago's solution appeared to be gaining support; he had only one doubt: that to keep the words " scope of application " might cause misunderstanding. He hoped Mr. Ago could agree to some such wording as " a treaty capable of being applied in the territory of each party extends to the entire territory ". A second paragraph would then be unnecessary.

51. Mr. de LUNA said he must first make it clear that he had had no intention of implying that some of the formulas which had been proposed were tinged with colonialism.

52. He was opposed to the insertion of an additional paragraph for the reasons given by Mr. Jiménez de Aréchaga and other speakers; but he could support either Mr. Ago's formula or the amendment suggested by Mr. Amado.

53. Mr. TUNKIN said that, since a treaty was binding on a State as a territorial entity, the question the Commission had to decide was what was the physical scope or " sphere " of its application? The Treaty concerning the Archipelago of Spitzbergen[6] provided an illuminating example, because it was concerned with only a part of Norwegian territory, but was binding upon Norway as a territorial entity. If Norway had been a federal State, no constituent part could have claimed that it was not bound by the treaty.

54. States were free to conclude treaties covering a whole range of different subjects and there could be no question of a constituent part of a federation, say a republic of the Soviet Union, not being bound by the treaty as a whole or being able to plead reasons of internal constitutional law for not assuming the obligations imposed by the treaty.

55. He subscribed to Mr. Ago's views concerning the physical scope of application.

56. Mr. TSURUOKA said he had little to add to what Mr. Jiménez de Aréchaga and Mr. Tunkin had said. He was not sure that, in practice, the addition proposed by Mr. Ago would really clarify the idea the Commission wished to express. All treaties were, in a sense, intended to be performed in the territory of the parties. Even where a treaty related to the high seas or to outer space, the court called upon to adjudicate on a violation would have to base its judgment on the provisions of the treaty. If the relevant provisions applied to the high seas or to outer space, the treaty applied outside the territory of the State. He had confidence in the good sense of the Drafting Committee, but had wished to draw its attention to that point.

57. Mr. LACHS, amplifying the comments he had made at the previous meeting, said that the Commission was faced with an extremely interesting theoretical and practical issue raised by the problem of how treaties regulated events taking place outside the actual physical territory of a party. At the sixteenth session the Commission had been mainly concerned with how to define the area within which a treaty applied. There had been general agreement that there was no need to revert to the problem of the colonial clause.

58. There seemed to be no real doubt that the question of the federal clause could be left aside; when that point had arisen in the Sixth Committee in connexion with two international instruments, the consensus of opinion seemed to have been that the Commission's draft articles need contain no express provision on the matter.

59. Article 57 was drawing more attention to the problem of application to areas outside the territory of a State party, and when commenting on it at the previous meeting[7] he had had in mind, particularly, the need to ensure that the extension of treaties to such areas would not be left to the discretion of the State party concerned. The difficulty was how to draft such a provision. Clearly the land territory of a State must be taken as the point of departure, and the proviso at the end of the article should be retained. He was inclined to accept in principle Mr. Ago's suggestion, as amplified by Mr. Tunkin, but it would be necessary to explain as fully as possible in the commentary, what the Commission was trying to do. The aim must be not to hinder the development of a branch of international law in the making. He was particularly interested in matters pertaining to outer space, concerning which it was so vital for States to reach agreement.

60. Mr. EL ERIAN pointed out that the Special Rapporteur had not made an unqualified proposal for an additional paragraph, but had rather put forward a tentative text in case " the suggestion of the three governments that cases of extra-territorial application should be covered commends itself to the Commission " (A/CN.4/186/Add.1). In the 1964 discussion,[8] a number of suggestions had been made to the effect that article 57 (then article 58) should cover such cases, but the Commission had ultimately decided against it. In particular, it had decided not to include a provision on the application of treaties to territories for which a party was internationally responsible, in order to avoid the controversies that arose from the association of that formula with the " colonial " clause.

61. A number of important questions had been raised during the present discussion and the Drafting Committee would no doubt find suitable language to prevent any misconstruction being placed on the provisions of article 57. Personally, he agreed with Mr. Ago's suggestion, which would make it clear that the article dealt with territorial application and did not prejudice the application of a treaty outside the territory of the parties.

62. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had centred on two main questions: first, the possible insertion of an additional paragraph, and secondly, the more fundamental question of the terms of the provisions of the one paragraph which all members were agreed to retain.

63. On the first question, it was clear that a large majority of the members were not in favour of the insertion of an additional paragraph. He had not

[6] League of Nations, *Treaty Series*, vol. 2, p. 8.

[7] Paras. 97 *et seq.*

[8] *Yearbook of the International Law Commission, 1964*, vol. I, pp. 46 *et seq.* and pp. 167–169.

himself made a definite proposal on that point, and he did not wish to take the matter any further.

64. On the second question, it should be noted that the title of the article " The territorial scope of a treaty " gave the impression that its contents covered much more than they really did. Unless the contents of the article were broadened to cover the whole question of the territorial scope of treaties, that title would have to be reworded in narrower terms.

65. He wished to emphasize that the concluding proviso, " unless the contrary appears from the treaty ", did not cover by implication the question of extra-territorial application. To read such an implication into it would be contrary to the natural meaning of the words. If the Commission desired to cover the question of extra-territorial application it should do so explicitly; otherwise it should admit that the question was not dealt with in article 57.

66. In the additional paragraph which he had tentatively put forward, he had used the expression " within their competence " for the purpose of placing a limitation on the idea that the mere agreement of the parties could enable them to extend the application of a treaty outside their respective territories. It was for that reason that he had been unable to accept the United States proposal, which could lend itself to possible misinterpretation on that point.

67. It was essential to draw a clear distinction between three separate questions. The first was the capacity of a State to act for itself, for its federated component units in the case of a federal State, and for its dependent territories. The second was the principle that when a State concluded a treaty it bound itself in respect of the whole of its territory and not merely part of it. The third was the actual territorial application of the treaty, and since there appeared to be a general desire in the Commission to cover that question alone, it would be necessary to amend the wording of article 57 on the lines suggested by Mr. Ago.

68. The question would then arise whether the Commission should adopt a provision stating the proposition that when a State entered into a treaty it bound the whole of its territory. As he saw it, that proposition was covered by the general concept of what constituted a State; the expressions " State " and " party " as used in the draft articles could only be taken as referring to the whole entity which constituted the State in international law. If the Commission were agreed on that point, the contents of article 57 could be safely confined to the question of territorial application, especially in the particular context of part III of the draft articles.

69. The Drafting Committee would, of course, have to consider the possibility of replacing the term " application " by a less ambiguous one, so as to make it clear that article 57 was intended to refer to territorial application and not to the proposition that a treaty entered into by a State bound the whole of its territory.

70. He was in entire agreement with Mr. Jiménez de Aréchaga as to the need to avoid giving the impression that a clear-cut distinction could always be made between two types of treaty: those which had a territorial application and those which had not. The example of the exchange of information called for under the Antarctic Treaty showed that a treaty of the first type could involve more than mere territorial application.

71. In the light of that observation, it would perhaps be desirable to replace the reference to the " scope of application of a treaty " by a reference to the " scope of application of the provisions of a treaty ". Such a formulation might help to avoid the misunderstandings which had prompted the suggestion by the three governments discussed in his observations.

72. He accordingly proposed that article 57 be referred to the Drafting Committee, with instructions to prepare a provision based on the 1964 text, amended on the lines suggested by Mr. Ago.

73. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 57 to the Drafting Committee, as proposed by the Special Rapporteur.

It was so agreed[9]

ARTICLE 58 (General rule limiting the effects of treaties to the parties) [30]

[30]

Article 58

General rule limiting the effects of treaties to the parties

A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon a State not party to it without its consent.

74. The CHAIRMAN invited the Commission to consider article 58, for which the Special Rapporteur had proposed a new title reading:

" *General rule limiting to the parties the obligations and rights arising under a treaty* "

Although, in accordance with its usual practice, the Commission would deal separately and successively with each of the articles 58 to 62, he wished to draw attention to paragraph 1 of the Special Rapporteur's observations on article 58, which read: " This and the next four articles form a group covering the topic of the effect of treaties in creating obligations or rights for third States. Accordingly, in considering each of these articles it is necessary to keep in mind the contents of the five articles as a whole " (A/CN.4/186/Add.2).

75. Sir Humphrey WALDOCK, Special Rapporteur, after thanking the Chairman for underlining the interconnexion of articles 58-62, which was particularly close in the case of the first three of those articles, said that in 1964, there had been a considerable division of opinion between members of the Commission, particularly on the question of rights created in favour of third parties. As a result of the discussion, the Commission had adopted as the first article of the group the one which now appeared in the draft as article 58, and which was intended to state in very general terms the principle in the matter. The rather neutral formulation of article 58 was designed to take account of the views of some members on the provisions embodied in article 60.

76. There had been few government comments on article 58. The Governments of Cyprus and Algeria

[9] For resumption of discussion, see 867th meeting, paras. 11-13.

had drawn attention to the connexion between its provisions and those of article 36. Article 58 made provision for a treaty being used as a means of binding a third party with the consent of that party; if that consent was obtained by coercion, it was clearly invalid under article 36. That question had been raised when article 36 had been discussed at the previous session,[10] and the general feeling had been that, although the Commission might consider introducing a provision to deal with it into article 58, it was perhaps already covered by the general language of article 36 as adopted at that session.

77. He had proposed a change in the title of the article in order to meet the point raised by the Netherlands Government, as explained in paragraph 2 of his observations.

78. Mr. ROSENNE said that he was in general agreement with the conclusions reached by the Special Rapporteur.

79. With regard to the connexion between article 58 and article 36, he recalled that at the previous session he had accepted the general view on article 36 largely because of the stress laid by Mr. Ago on the need for a lapidary text. He had done so, however, subject to the question being dealt with in the commentary and his position was the same with regard to article 58 and its commentary. The question was one to which governments would have to give some attention at the conference of plenipotentiaries.

80. The Drafting Committee would have to examine the wording of article 58 carefully; in its terms, it applied only to the question of imposing obligations or conferring rights upon States not parties to a treaty. Paragraph (2) of the commentary adopted in 1964,[11] however, introduced another element, which was not covered by the text of article 58 itself; the question of the modification of legal rights and obligations, and perhaps even of their extinction. From the legal point of view, the modification of rights was not the same as the imposition of obligations. Article 61 dealt with the revocation or amendment of provisions regarding obligations or rights of third States, and the question arose whether article 58 was fully consistent with the remainder of the group of five articles.

81. Moreover, for the same reasons, he had some doubts about the Special Rapporteur's proposed new title for article 58.

82. Mr. BARTOŠ said he was quite convinced that articles 58 to 62 were inseparable as to substance. Nevertheless, in his capacity as a member of the Commission, he did not agree with the view expressed by the Yugoslav Government that the first three of those five articles could be combined in one article; he was more inclined to take the Czechoslovak Government's view that article 58 stated a general principle which should be stressed as such. Moreover, the Yugoslav Government was not at all opposed to that principle.

83. With regard to the comment by the Netherlands Government, he did not agree that the transfer of a piece of territory constituted an exception to the principle stated in article 58. In his opinion, the transfer of a piece of territory did not entail the transfer of the contractual situation resulting from prior treaties, for in that case the frontiers represented legal facts the contractual nature of which had already been consummated. The State to which the territory was transferred was not obliged to accept that territory, but if it did so it could not accept more than was transferred to it.

84. There was no reason to make any change in the rule stated in article 58, as formulated in 1964. The rule was a simple one, as the Greek delegation had observed, but it was of great importance and almost a part of the international public order. The Commission should therefore bear it in mind in reviewing the articles that followed.

85. Mr. AGO said that the more he thought about it, the more convinced he became that article 58 should be left as it stood. The comments which had been made about the title seemed to him to have little legal justification. In that context, the term " effects " could only denote legal effects, not factual consequences. Although he was not absolutely opposed to changing the title, he thought, like Mr. Rosenne, that it would be preferable not to do so.

86. If reference were made to article 36, it would also have to be made to all the other articles concerning invalidation of consent, such as those on error and fraud, for there was no justification for restricting the reference to invalidation by the threat or use of force. Consent to be bound by obligations or to acquire rights under article 58 created an agreement and therefore came within the scope of the rules relating to treaties. The Commission could mention in the commentary that the rules relating to invalidation of consent must be taken into account in applying article 58, but it would be dangerous to mention only one ground for invalidation.

The meeting rose at 12.55 p.m.

852nd MEETING

Monday, 16 May 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: 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, Mr. Verdross, 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 58 (General rule limiting the effects of treaties to the parties, *(continued)*[1]

[10] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 826th-827th meetings and 840th meeting, paras. 84 *et seq.*

[11] *Yearbook of the International Law Commission, 1964*, vol. II, p. 180.

[1] See 851st meeting, preceding para. 74.