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Summary record of the 867th meeting

Topic:
Law of Treaties

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with general matters concerning the rules applicable to the modification of multilateral treaties.

67. As far as sub-paragraph (c) was concerned, he was firmly of the opinion that it ought to be dropped. Whatever the Commission decided to do in regard to the relationship between customary and treaty law, it was certainly inappropriate to deal with it in the somewhat perfunctory manner adopted in sub-paragraph (c). At the sixteenth session the Commission had scratched the surface of the subject without really coming to grips with it, and the general view had been that it would be wiser not to embark upon a general examination of the relationship between different sources of international law, although specific aspects of the question might have to be taken into account in certain articles of the draft.

68. A number of members would prefer to leave aside the whole question of the bearing of the inter-temporal law on article 68 until the Commission had examined the section on interpretation. He could endorse that standpoint but, owing to the divergence of opinion in the Commission itself and among governments and delegations, his final conclusion in respect of article 69 was that the issue should be left aside. The choice lay between a fairly comprehensive provision or a general formula that would not take the matter very far. Further consideration of sub-paragraph (c) could be deferred until the Commission had discussed the section on interpretation and the Drafting Committee had received clearer instructions.

69. Subject to those considerations article 68 could now be referred to the Drafting Committee.

70. The CHAIRMAN suggested that article 68 be referred to the Drafting Committee as proposed by the Special Rapporteur.

*It was so agreed.*⁶

The meeting rose at 1 p.m.

⁶ For resumption of discussion, see 876th meeting, paras. 11-64.

867th MEETING

Friday, 10 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Tabibi, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to consider the texts of articles submitted by the Drafting Committee.

ARTICLE 55 (*Pacta sunt servanda*) [23]¹

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the only change the Drafting Committee wished to propose in article 55 was to the opening words in the English text where the words "A treaty" had been amended to read "Every treaty". No change was needed in the French or Spanish versions. The English text would thus read:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

3. The CHAIRMAN put to the vote article 55 with the amendment to the English text proposed by the Drafting Committee.

Article 55 was adopted by 14 votes to none.

ARTICLE 56 (Non-retroactivity of treaties) [24]²

4. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new title and new text for article 56, reading:

"Non-retroactivity of treaties"

"Unless it otherwise appears from the treaty, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

5. The article had now been reduced to a single paragraph and the provision contained in paragraph 2 of the 1964 text (A/CN.4/L.107) concerning the binding force of a treaty that had ceased to exist, had been dropped.

6. Sir Humphrey WALDOCK, Special Rapporteur, added that during the discussion of article 56 at the present session, the view had been expressed that paragraph 2 of the 1964 text was closely linked with article 53, on the legal consequences of the termination of a treaty. The Drafting Committee, after examining the relationship between the two provisions, had concluded that paragraph 2 of article 56 was unnecessary and might be misunderstood.

7. The CHAIRMAN, speaking as a member of the Commission, said he had no objection to the article so far as its substance was concerned, but the English and French texts were not fully concordant.

8. Mr. AGO said that what had happened was that, in the second line of the French text, the word "*antérieur*" had been omitted after the word "*fait*".

9. The CHAIRMAN put to the vote the Drafting Committee's text for article 56, subject to correction of the French version.

Article 56 was adopted by 12 votes to none, with 1 abstention.

10. Mr. BRIGGS, speaking as a member of the Commission, said that he had been forced to abstain on article 56, which went too far in excluding past acts, facts or situations. He had in mind particularly treaties

¹ For earlier discussion, see 849th meeting, paras. 2-78.

² For earlier discussion, see 849th meeting, paras. 79-91, and 850th meeting, paras. 1-84.

with jurisdictional clauses about which he had commented on previous occasions as well as at the 850th meeting.³

ARTICLE 57 (Application of treaties to territory) [25]⁴

11. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new title and text for article 57, reading:

"Application of treaties to territory"

"The application of a treaty extends to the entire territory of each party unless it otherwise appears from the treaty."

12. Comparing that text with the 1964 version, he said that the words "scope of" had been omitted because they were open to misconstruction and the proviso had been amended by the substitution of the words "it otherwise" for the words "the contrary".

13. The CHAIRMAN put to the vote the Drafting Committee's text for article 57.

Article 57 was adopted by 13 votes to none.

ARTICLE 1 (Use of terms): additional definition [2]

14. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a definition of a third State, for inclusion in article 1, reading:

"Third State means a State not a party to the treaty."

15. The proposed definition was put forward at that juncture because the examination of other provisions dealing with the rights and obligations of non-parties had revealed that one was needed.

16. Mr. de LUNA said that in his view it would be preferable for the Commission to postpone consideration of that definition until it took up article 1 again, because the definition of "third State" entailed a reference to another notion, that of "party", which had not yet been defined.

17. Mr. EL-ERIAN said that the Commission could take a provisional decision that, in principle, a definition of a third State should be inserted in article 1. The precise wording could be considered at a later stage.

18. Sir Humphrey WALDOCK, Special Rapporteur, said that a provisional decision on the definition would have to be taken because the expression "third State" or "third States" was used in the titles and texts of articles 58 and 59 that the Drafting Committee would be proposing. The expression had been used in the titles of certain articles approved at the sixteenth session without any indication of what was meant.

19. The CHAIRMAN suggested that the Drafting Committee's definition be provisionally approved, subject to further examination in connexion with article 1.

It was so agreed.

ARTICLE 58 (General rule regarding third States) [30]⁵

20. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new title and text for article 58, reading:

"General rule regarding third States"

"A treaty does not create either obligations or rights for a third State without its consent."

21. The main change, which the Drafting Committee did not consider affected the essential meaning of the 1964 text, was the omission of the words "applies only between the parties". It was proposed in order to avoid the theoretical controversy that had arisen over the article.

22. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's proposals took account of the objections to the wording he had previously submitted to that Committee, "binds only the parties", on the ground that it might be misinterpreted as proclaiming that a treaty could not be binding on individuals but only on the States parties to it. The reference to "the parties", both in the title and in the text of the 1964 version, was unnecessary in a statement of the rule and was better omitted.

23. The CHAIRMAN put to the vote the Drafting Committee's text for article 58.

Article 58 was adopted by 12 votes to none, with 1 abstention.

ARTICLE 59 (Treaties providing for obligations for third States) [31]⁶

24. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new text for article 59, reading:

"An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be a means of establishing the obligation and the third State has expressly accepted that obligation."

25. That text did not vary in principle from the one adopted by the Commission in 1964; only a few minor drafting changes had been introduced.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that, in its previous discussions on article 59, the Commission had considered the problem of the relationship of the provisions of that article with the case of an aggressor State on which certain obligations had been imposed. A number of governments, including those of the United States and the USSR, had suggested in their comments that article 59 should cover that point.

27. Some members had supported that suggestion but others had felt that the matter was already sufficiently covered by article 36, which stated that a treaty was void if its conclusion had been procured by the threat or use of force "in violation of the principles of the Charter of the United Nations", since a treaty imposed on an aggressor would not constitute a violation of the Charter. The Drafting Committee had examined the question and had decided not to include any provision on the matter in article 59 but to prepare, for

⁶ For earlier discussion, see 853rd meeting, paras. 3-88, and 854th meeting, paras. 1-23.

³ Paras. 17-23.

⁴ For earlier discussion, see 850th meeting, paras. 85-101, and 851st meeting, paras. 1-73.

⁵ For earlier discussion, see 851st meeting, paras. 74-86, and 852nd meeting, paras. 1-52.

submission to the Commission, the text of a possible general article to deal separately with the problem of a treaty imposed on an aggressor State. That text would be submitted to the Commission shortly.⁷

28. The CHAIRMAN put to the vote the Drafting Committee's text for article 59.

Article 59 was adopted by 13 votes to none.

The meeting rose at 11.45 a.m.

⁷ See 869th meeting, para. 3.

868th MEETING

Monday, 13 June 1966, at 3 p.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. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to consider the text of articles submitted by the Drafting Committee.

ARTICLE 60 (Treaties providing for rights for third States) [32]¹

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new text for article 60 reading:

“1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and the State assents thereto. Unless after becoming aware of the provision it indicates the contrary, its assent shall be presumed.

“2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.”

3. The first sentence in paragraph 1 more or less followed the 1964 text (A/CN.4/L.107) except for some

¹ For earlier discussion, see 854th meeting, paras. 24-103, and 855th meeting, paras. 1-30.

changes of punctuation in the interests of clarity. The second sentence was new and replaced the former sub-paragraph (b) that dealt with express or implied assent; it had been revised by the Drafting Committee in the light of Mr. Ago's suggestion at the 855th meeting.² No change was proposed in paragraph 2.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's suggestion had been designed to bridge the division of opinion in the Commission and had been welcomed by some members.

5. The CHAIRMAN, speaking as a member of the Commission, said that he was not entirely satisfied with the second sentence of paragraph 1, whereby a third State was obliged to take immediate action as soon as it had become aware of the provision under which it was offered a right; no allowance was made for a reasonable interval. An obligation of that kind should not be imposed on third States and the sentence should therefore be recast.

6. Mr. PAREDES said that he agreed with Mr. Yasseen. The sentence should be drafted in the contrary sense. If a State which had been offered a right remained silent on the subject of that right, it should be assumed that it did not accept the right. At all events, a reasonable interval should be allowed for it to say whether it accepted or rejected it. He did not see how a right could be imposed on a State without its full knowledge and consent. It seemed to him essential that there should be an explicit statement regarding the right by the State to which it was offered, before the right could be regarded as having been acquired by that State and incorporated in its law.

7. Mr. JIMÉNEZ de ARÉCHAGA said that the second sentence in paragraph 1 was an improvement on the 1964 text and would not entail the dangers which the Chairman apprehended. It had been framed in the form of a presumption, and it would always be open to the third State not to exercise the right conferred upon it or expressly to refuse to accept it; it would in fact protect the position of a third State in cases when it might not wish to manifest its will in a formal way. The text could surely not be interpreted as imposing a right.

8. Mr. BARTOŠ said that he took the same view as Mr. Yasseen and Mr. Paredes. The new wording was an improvement on the old, but the second sentence of paragraph 1 was unsound, since it provided that, as soon as a State had become aware of the provision offering it a right, it was assumed that it had formally assented to it.

9. What in fact was the process by which a State became aware of a provision in a treaty and expressed its assent? In the ordinary course of events, those operations were performed by diplomatic agents of that State who might or might not be qualified to express the formal consent of the State to accept, not merely a right but an obligation arising under it. It was therefore very difficult to argue that, as soon as a State had knowledge of a communication indicating to it that there was a treaty under which it had acquired a right, it was presumed to have given its assent to accepting that

² Para. 20.