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THIRTY-FIFTH MEETING

Tuesday, 23 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 30 (General rule regarding third States)

1. The CHAIRMAN invited the Committee to consider Part III, Section 4 of the International Law Commission's draft, beginning with article 30 and the amendments thereto.[1]

2. Mr. CARMONA (Venezuela), introducing his amendment to combine articles 30, 31, 32 and 33 into a single article (A/CONF.39/C.1/L.205/Rev.1), said that the amendment would simply clarify the wording and improve the application of the system embodied in the International Law Commission's four articles. The basic principle, the rule that treaties created neither rights nor obligations for third States except with their express consent, was set forth in clear terms in paragraph 1 of his amended text. That same paragraph embodied the substance of the present paragraph 2 of article 32 by means of the proviso " and under the conditions they establish." That formulation did away with the distinction which the Commission had endeavoured to draw between rights and obligations for third States in articles 31 and 32. That distinction derived from academic dissertations and it had no basis in reality. The position in State practice was simply that no State accepted either obligations or rights under a treaty to which it was not a party otherwise than through a clear and unambiguous expression of consent. The International Law Commission had stated that principle, as far as obligations were concerned, in its formulation of article 31; with respect to rights, however, provision had been made in paragraph 1 of article 32 for tacit consent, and even for a presumption of consent based on the conduct of the third State concerned. That system, which was not borne out by State practice, had been adopted by the Commission by a majority vote. There then remained only the problem of obligations imposed upon an aggressor State—a problem which was settled by the provisions of article 70.

3. With regard to the question of revocation or modification, paragraph 2 of his amended text (A/CONF.39/C.1/L.205/Rev.1) embodied in substance the provisions of the two paragraphs of the International Law Commission's article 33. However, the concluding proviso, which would now apply to both rights and obligations, had been amended to read " unless the treaty otherwise provides or it clearly otherwise appears from its nature and provisions ". That formulation would leave less margin for doubt.

4. Mr. MALITI (United Republic of Tanzania), introducing his delegation's amendment (A/CONF.39/C.1/L.221), to delete the words " without its consent " and add at the beginning of the article a reference to articles 31, 32 and 34, said that those were the articles which provided for the exceptions to the important principle *pacta tertiis nec nocent nec prosunt.*

5. His amendment would make the statement of the rule more vivid, while at the same time pointing out where the exceptions to the rule were to be found. The manner in which the International Law Commission had brought the element of third party consent into article 30 seemed to cast doubt on the effects of the rule by appearing to suggest that the third party had merely to consent for the treaty to affect it; that was not correct, since the provisions of articles 31 and 32 showed that the combined action of parties and non-parties was necessary in order to derogate from the principle involved.

6. Article 33 dealt with the principle from the point of view of the third State only, but the rule had to be looked at also from the point of view of the parties to the treaty. It could happen that a third State claimed a right but the parties objected on the ground that they had not consented to confer such a right upon a third State.

7. He could not support the Venezuelan amendment to combine articles 30, 31, 32 and 33 (A/CONF.39/C.1/L.205/Rev.1); the basic principle in the matter was sufficiently important to deserve an article on its own, separate from the exceptions. Moreover, the juridical differences between a provision imposing obligations and one conferring rights on third States, so well elaborated in the commentary, would be lost if the articles were combined.

8. Mr. KHASHBAT (Mongolia) said that the principle in article 30, that agreements imposed neither obligations nor rights upon third parties without their consent, was much more important in international law than in private law, because international law governed the relations between sovereign States. Article 30 would thus safeguard the sovereign rights of States.

9. The principle *pacta tertiis nec nocent nec prosunt* had in the past been accepted as an abstract formula but, in international relations, the rights of third States had been respected only when they were powerful enough to protect their own interests. Weak States had often been obliged to accept obligations imposed upon them under treaties to which they were not parties, and even to tolerate interference in their internal affairs by more powerful States. A glaring example of that type of violation of the vital interests of a third State had been the Munich agreement of September 1938 which had sealed the tragic fate of Czechoslovakia, a State which had not been a party to that agreement. The late Prime Minister Nehru, in a speech on 9 September 1954, had complained that the problems of Asian peace and security were being discussed by powers outside Asia, and that the treaties relating to Asia had been concluded mainly by non-Asian Powers. The same approach was to be found in legal literature, where claims had been made to a " right " to protect States without their consent, thus flouting their sovereign will. The socialist States had from the outset adopted a very different approach; respect for the sovereignty of third States had been at the very basis of their foreign policy.

[1] The following amendments had been submitted: Venezuela, A/CONF.39/C.1/L.205/Rev.1; United Republic of Tanzania, A/CONF.39/C.1/L.221.

10. The provisions which the International Law Commission had embodied in article 30 should be retained since they reflected existing international law and were in full conformity with the basic principle of the sovereign equality of States. There was no justification for changing the wording of article 30 or for merging it with other articles. He could not therefore support any amendments to that effect.

11. Mrs. THAKORE (India) said that articles 30 to 34 of the International Law Commission's draft were as a whole acceptable to her delegation. It had at first had some reservations because the scheme of those articles relating to the effect of treaties on third States would appear to run counter to that embodied in the United Nations Charter. Obligations could only arise for a third State from its express acceptance; with regard to rights, however, it was sufficient under article 32 that the third State should exercise the right or not raise an objection.

12. Under the United Nations Charter, the scheme appeared to be just the reverse. By Article 2(6), the United Nations had been empowered to ensure that non-member States of the United Nations acted in accordance with the Principles of the Charter as far as might be " necessary for the maintenance of international peace and security ". That power and competence of the United Nations imposed corresponding obligations upon non-member States, in other words, on third States. There was nothing said about the express acceptance by the third States concerned. On the other hand, in article 35(2) of the Charter, a third State was given the right to " bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party ". In that case, however, the third State must accept " in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter ". The same appeared to apply for a third State when it became a party to the Statute of the International Court of Justice under Article 93(2) of the Charter. The distinction drawn between rights and obligations in the United Nations Charter was thus the very opposite of that embodied in the system proposed by the International Law Commission in its draft. On reflection, her delegation had decided to ignore that apparent contradiction on the ground that the special position of the United Nations with regard to the maintenance of peace and security would probably justify the imposition on a third State of obligations without its express consent.

13. The International Law Commission had compromised on the doctrinal dispute with regard to the question whether the rights of the third State were created by the treaty or by the express consent of that third State. She hoped that the compromise thus adopted would not create any difficulties. At one time, her delegation had been inclined to press for express consent for the exercise of rights by a third State, because a seeming benefit might prove to create obligations and liabilities for the third State without its express consent, under the guise of conditions for the exercise of rights as specified in paragraph 2 of article 32. But there again, her delegation had taken into account the fact that certain treaties creating objective régimes, rights valid *erga omnes*, should not require express acceptance by the beneficiary States. Article 32 had been designed to provide for that situation and should therefore be kept as it stood. The Commission itself had explained that it had not included in the draft any specific reference to treaties creating objective régimes on the understanding that the matter was covered by article 32, a point to which reference was made in paragraph (4) of the commentary to article 34. In view of that position, she also agreed to the manner in which paragraphs 1 and 2 of article 33 had been formulated. She also fully supported the retention of article 34 as it stood.

14. As a result of her delegation's position in favour of the retention of the present articles 30 to 34, it could not accept the Venezuelan proposal to combine articles 30 to 33 (A/CONF.39/C.1/L.205/Rev.1), the proposal by Finland to delete the second sentence of paragraph 1 of article 32 (A/CONF.39/C.1/L.141), or the proposals by Finland and by Venezuela to delete article 34 (A/CONF. 39/C.1/L.142 and L.223). She could accept, however, the amendment by Japan to article 32 (A/CONF.39/C.1/ L.218). The amendment by Syria to article 34 (A/CONF. 39/C.1/L.106) appeared to be of a drafting nature and could be referred to the Drafting Committee.

15. Mr. MOUDILENO (Congo, Brazzaville) said he supported the system adopted by the International Law Commission regarding the effect of treaties on third States, but suggested that the provisions of articles 30 and 31 and paragraph 1 of article 32 should be combined in a single new article 30.

16. The first paragraph of the new consolidated article would state the rule that a treaty could only have effects as between the States which had concluded it or had acceded to it. The second paragraph would specify that any special provision of a treaty which stipulated an obligation for a third State would only apply to that State with its consent. The third paragraph would state that any special provision of a treaty which stipulated rights in favour of a third State, a group of third States or all States would only apply to those States with their consent.

17. The provisions now embodied in paragraph 2 of article 32 should form a separate article, to be numbered 31. Those provisions laid down the very important rule that a State which accepted rights under a treaty to which it was not a party must comply with the conditions for the exercise of that right provided for in the treaty. The new article 31 might be worded to read, more or less: " A State which, under the provisions of article 30, accepts an obligation or a right stipulated in a treaty to which it is not a party shall, in the performance of that obligation or the exercise of that right, comply with the provisions of the treaty on the subject ".

18. That formulation would cover the case not only of the rights but also that of the imposing of obligations upon a third State. In both cases, provision should be made for compliance with the conditions laid down in the treaty.

19. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that he could not support the amendment by the United Republic of Tanzania (A/CONF.39/C.1/L.221), which gave to the provisions of articles 31 and 32 the appearance of exceptions to the general rule embodied in article 30. In fact, those provisions were simply applications of the

general rule in article 30 requiring the consent of the third State.

20. Nor could he accept the Venezuelan amendment (A/CONF.39/C.1/L.205/Rev.1), which would apply exactly the same legal régime to both rights and obligations of third States. The International Law Commission had done well to make separate provision for rights and obligations and to require express consent only in respect of obligations. Where an obligation was concerned, it was clear that the third State had no interest in taking it up and its position should therefore be presumed to be negative. In order to safeguard the position of the third State, express consent had therefore been required. If the same system were now to be adopted with regard to rights, as was proposed in the Venezuelan amendment, the interests of third States would not be served. Moreover, it would represent a step backwards in relation to contemporary international law. The existing State practice was that, where a treaty stipulated benefits for a third State, its consent could well be tacit; in fact, consent could result from the mere conduct of the third State, or from the actual exercise of the right or benefit by that third State.

21. The Commission had decided not to include any provision on treaties creating so-called objective régimes. Such rights of third States as the freedom of navigation in certain rivers and canals, proclaimed for all States in certain multilateral or bilateral treaties, would therefore now be based on the provisions of article 32. If the express consent of those third States were required, the door would be open to the frustration of the rights of free navigation; a State wishing to hamper the exercise of such rights could claim that the third States concerned had not expressly accepted the rights. The position at present was that the mere exercise of the right of navigation by the captain of a ship flying the flag of a State was deemed sufficient to confer the right on that State.

22. There was no danger of obligations being imposed upon a third State under the guise of conditions for the exercise of rights. A third State could always refuse to exercise a right and would thereby be exempt from the conditions attached to its exercise. If, on the other hand, it wished to take up the right conferred upon it, it was only proper that it should comply with the conditions attached to the exercise of that right.

23. Mr. BADEN-SEMPER (Trinidad and Tobago) said that the amendment by the United Republic of Tanzania (A/CONF.39/C.1/L.221) should be considered by the Drafting Committee. He was in favour of dropping the words " without its consent " and also of excluding the proposed opening proviso in order to emphasize the categoric nature of the provision. If however it were decided to retain the opening proviso, it should refer to articles 31, 32 and 33 rather than to articles 31, 32 and 34.

24. Mr. ARIFF (Malaysia) said he also supported the amendment by the United Republic of Tanzania, the opening proviso of which established a useful link with the following articles. Without that link, the principle stated in article 30 would appear to stand alone without any qualification.

25. Mr. MALITI (United Republic of Tanzania) said he would ask that his amendment (A/CONF.39/C.1/L.221) should not be put to the vote but be referred to the Drafting Committee.

26. Mr. TAYLHARDAT (Venezuela) said that he did not wish his amendment (A/CONF.39/C.1/L.205/Rev.1) to be put to the vote and requested that it be referred to the Drafting Committee.

27. Mr. TABIBI (Afghanistan) said that article 30 laid down the correct rule in the matter. The agreement of States was the basis of all rules of international law, so that a State which was not a party to a treaty could have neither rights nor obligations under it without its consent.

28. He supported article 30 as it stood, as well as the following articles which set forth the exceptions to the general rule embodied in article 30. The provisions of all those articles were particularly important for small countries, on which, in the past, obligations had often been imposed without their consent. The text of the articles had been very carefully drafted by the International Law Commission and he would appeal to the Venezuelan delegation to withdraw its amendment to combine articles 30 to 33, since it would weaken the rule in article 30.

29. The CHAIRMAN said that the Venezuelan amendment (A/CONF.39/C.1/L.205/Rev.1) had in effect been withdrawn. The Tanzanian amendment (A/CONF.39/C.1/L.221) would be referred to the Drafting Committee. If there were no objection, he would take it that the Committee agreed to refer article 30 to the Drafting Committee on that basis.

It was so agreed.[2]

Article 31 (Treaties providing for obligations for third States) and *Article 32* (Treaties providing for rights for third States) [3]

30. Mr. KHASHBAT (Mongolia), introducing his delegation's amendment to articles 31 and 32 (A/CONF.39/C.1/L.168), said that it was merely of a drafting character. Its effect would be to transpose articles 31 and 32 so that the article concerning rights for third States came first. Since the purpose of the rule set forth in the two articles was to safeguard the sovereign equality of States, it seemed appropriate that the article on rights should precede the article on obligations.

31. As a consequential amendment, he proposed that the two paragraphs of articles 32 and 33 be transposed, so that the paragraph dealing with rights for third States came first in each case.

32. Mr. CASTRÉN (Finland) said that his delegation had introduced its amendment (A/CONF.39/C.1/L.141) proposing the deletion of the second sentence of paragraph 1 of article 32 because that sentence provided that a right might be created for a third State even without its consent, in the absence of a contrary indication. That derogation from the general rule in article 30 might be dangerous, since it introduced an element of uncertainty

[2] For resumption of discussion, see 74th meeting.

[3] The following amendments had been submitted: Finland, A/CONF.39/C.1/L.141; Mongolia, A/CONF.39/C.1/L.168; Japan, A/CONF.39/C.1/L.218; Netherlands. A/CONF.39/C.1/L.224. The amendment by Venezuela (A/CONF.39/C.1/L.205/Rev.1) to combine articles 30-33 in a single article had been withdrawn (see paragraph 29 above).

into the system of Section 4 of Part III of the draft. The third State might thus against its will become a so-called party to the treaty through pardonable negligence. States which had a small staff dealing with foreign affairs were often unable to follow and examine all the treaties concluded by other States.

33. Moreover, in many treaties rights were closely linked with obligations, as was apparent from paragraph 2 of article 32. If a third State reacted too late, the provisions of sub-paragraph (*b*) of article 42 might be invoked, and it might be presumed to have acquiesced in the application of the treaty in question. It might, of course, be argued, as the International Law Commission did in paragraph (7) of the commentary, that the provision gave the necessary flexibility to the operation of the rule in paragraph 1, and had the effect of further narrowing the gap between the two theories as to the source of the right arising from the treaty; but the Finnish delegation preferred precision and certainty to flexibility in the case at issue and considered that, by stating the presumption, the Commission had in fact taken a position in the doctrinal dispute, and had lent its support to the thesis that a right or obligation might arise for third States through the main treaty, without a subsidiary agreement with the third State. Accordingly, his delegation agreed with some of the Governments which had submitted comments on the provision, that it would be better to delete that controversial and equivocal sentence, which the Commission had added only at the end of its second reading of the draft.

34. Mr. FUJISAKI (Japan) said that his delegation had submitted its amendment to article 32 (A/CONF.39/C.1/L.218) to make it clear that the presumption in the second sentence of paragraph 1 was applicable only if the treaty was silent on the point. The amendment could be referred to the Drafting Committee.

35. Mr. RIPHAGEN (Netherlands) said that his delegation had submitted its amendment to article 32 (A/CONF.39/C.1/L.224) because it was not convinced that the system proposed by the International Law Commission in respect of the rights of third States under a treaty corresponded to actual State practice. If a treaty provided for a particular régime from which States which were not parties to the treaty might also benefit, it was not the assent of such third States, whether expressed or tacit, which created a relationship between the parties and those third States, but rather the fact that the third State had actually made use of that régime. For instance, it would be strange if a treaty according a right to all States should, through the presumed assent of those States, create a relationship with States which might not even know that the treaty existed at all, or with States which would never be in a position to make use of the régime instituted by the treaty. In the latter case, even the expressed assent of the third State should not be regarded as confirming the kind of inchoate title provided for in paragraph 2 of article 33. Indeed, there seemed to be no reason even to envisage the possibility of an irrevocable right being conferred on a State which had never made use of the provisions of a treaty to which it was not a party.

36. The Netherlands amendment to article 33 (A/CONF.39/C.1/L.225) was more a question of drafting. In proposing the deletion of the words " or modified " in paragraph 1 and the consequential changes in paragraph 2, his delegation based itself on the consideration that the modification of a right could have one of three meanings: first, an enlargement of the scope of the right, which would not require the consent of the third State; secondly, a diminution of the right, which amounted to complete or partial revocation and was therefore already covered by the article; or, thirdly, a change in the conditions under which the right was to be exercised, already covered by paragraph 2 of article 32. The words " or modified " were therefore superfluous and might create confusion. The amendment could be referred to the Drafting Committee.

37. Mr. MARESCA (Italy) said that his delegation fully supported the Finnish amendment (A/CONF.39/C.1/L.141). Since a treaty was an agreement between the parties to it, it constituted *res inter alios acta* for third States, and neither the rights nor the obligations deriving from that treaty could apply to them unless it was decided that it was indispensable for third States to enjoy certain rights conferred on them by the parties. In such cases, however, it was essential to obtain the consent of the third States, not only to obligations, but also to rights arising from the treaty. The presumption in the second sentence of paragraph 1 of article 32 was contrary to practice, to the general principles of treaty law and to the position of third States in respect of treaties.

38. Mr. BOYARSHINOV (Union of Soviet Socialist Republics) said that the legal position of third States had not only a theoretical, but a practical significance, for article 32 was concerned with the protection of the sovereign rights of States in respect of treaties conferring rights on third States. In practice there were several categories of such treaties: some, such as the 1948 Convention regarding the Regime of Navigation on the Danube,[4] conferred on all States freedom of navigation on a basis of absolute equality; other treaties, such as the United Nations Charter, conferred rights and obligations on a specific group of States, while yet others granted such rights to individual States.

39. The USSR delegation considered that the International Law Commission's text of article 32 was quite satisfactory, since it covered the requirements of all cases where the parties to a treaty might decide to confer certain rights on third States, and stressed the need for third States' consent to the acceptance of those rights. As the Uruguayan representative had pointed out, consent need not necessarily be express; it could be tacit.

40. His delegation could not support the Finnish proposal (A/CONF.39/C.1/L.141) to delete the last sentence of paragraph 1. It agreed with the arguments of the Mongolian representative in favour of changing the order of articles 31 and 32, so that the rights of third States should be stated before their obligations.

41. His delegation would vote for the International Law Commission's text of article 32, on the understanding that it did not affect the rights and privileges which might be derived from most-favoured-nation clauses. The practice of including such clauses in treaties was

[4] United Nations, *Treaty Series*, vol. 33, p. 197.

increasing: most-favoured-nation treatment was a keystone of the tariff and trade policies of a large number of States, with widely differing social and economic structures. The system was used not only with regard to tariffs and trade, but in many other agreements, such as the 1951 Convention relating to the Status of Refugees,[5] under which refugees enjoyed more favourable treatment, or at least no less favourable treatment, than other aliens. The International Law Commission had considered the question of most-favoured-nation treatment in connexion with Mr. Jiménez de Aréchaga's proposal to include a separate article on the rights of States arising from most-favoured-nation clauses, but had decided that it would be inexpedient, in view of the specific nature of the question. Nevertheless, the Commission had unanimously decided that the articles on the position of third States should not be interpreted as infringing those rights in any way.[6] The USSR delegation hoped that the Rapporteur would reflect the International Law Commission's position on the most-favoured-nation principle in his report.

42. Mr. MAKAREWICZ (Poland) said that his delegation was in favour of retaining the International Law Commission's wording of article 32, including the second sentence of paragraph 1. The Polish delegation saw no danger in the presumption of the State's assent, so long as the contrary was not indicated. Under article 32, paragraph 2, a third State exercising a right in accordance with paragraph 1 of that article had to comply with the conditions for its exercise provided for in the treaty, or established in conformity with the treaty: those conditions would in most cases also indicate the way in which a State's assent was to be expressed. The parties to a treaty intending to grant a right to a particular State or to a small group of States would no doubt lay down detailed conditions for the exercise of the right, and probably also explicit requirements as to the way in which the third State should express its assent.

43. Consequently, in practice, the presumption in the second sentence of paragraph 1 of article 32 would be applicable mainly to cases where the right was granted to a large number of States or to all the States, for instance, when right of passage was granted on a waterway which had previously not been open to general navigation. It would be quite superfluous to require third States to give their express assent in such cases, particularly since it might be difficult to decide to whom, how and when express assent was to be notified. The concept of presumed assent would facilitate the granting of rights to large numbers of States. The solution adopted by the International Law Commission corresponded to the requirements of international life, and should be approved by the Conference.

44. Mr. WERSHOF (Canada) said that, although his delegation respected the arguments in the commentary concerning the distinction between the requirement of express assent in article 31 and presumed assent in article 32, it considered it advisable to require express assent in both cases. It therefore supported the Finnish amendment (A/CONF.39/C.1/L.141) as a step in that direction. If the Finnish proposal were rejected the Canadian delegation would support the Japanese amendment (A/CONF.39/C.1/L.218). On the other hand, it could not support the Netherlands amendment (A/CONF.39/C.1/L.224) to article 32, which would have the effect of removing any requirement of assent on the part of the third State, even in a presumed form. The Canadian delegation considered that the Finnish and Netherlands amendments were substantive and hoped that a vote would be taken on them.

45. Mr. VEROSTA (Austria) said that his delegation would vote in favour of the Finnish amendment (A/CONF.39/C.1/L.141), in the belief that the last sentence of paragraph 1 of article 32 was superfluous and might give rise to difficulties by not fully stressing the necessity of obtaining the assent of the third State to the rights conferred on it. If the Finnish amendment were not approved, his delegation could support the Japanese amendment (A/CONF.39/C.1/L.218), but not the Netherlands amendment (A/CONF.39/C.1/L.224).

46. Mr. USTOR (Hungary) said that his delegation could support the texts of articles 31 and 32 as drafted by the International Law Commission, because they were in harmony with the basic principles of the sovereignty and independence of States. Articles 30 to 33 should be read together with article 70, which constituted an important general reservation to the whole draft, and especially to the articles on the relationship between treaties and third States. Another reservation to the articles in question appeared in paragraph 32 of the Commission's report on its eighteenth session,[7] where it was stated that the draft on the law of treaties did not deal with most-favoured-nation clauses and that those clauses were in no way touched by articles 30 to 33.

47. The Hungarian delegation could not support the Finnish proposal (A/CONF.39/C.1/L.141) to delete the second sentence of paragraph 1 of article 32. The Commission had considered it desirable to include that provision in order to give the necessary flexibility to the operation of the main rule of article 32 in cases where the right was expressed in favour of all States or of a large group of States. That presumption seemed to be useful and should be retained.

48. The effect of the Netherlands amendment (A/CONF.39/C.1/L.224) was very similar to that of the Finnish amendment, and the Hungarian delegation could not support it either. It did not believe that article 32 in its present form created a legal relationship between the parties to the treaty and the third State without the latter's consent, and therefore considered that it created no danger for the third State, which, as the Netherlands representative had pointed out, might not even know of the faculty opened to it. On the other hand, article 31 adequately protected the third State against the danger of undertaking any obligation which might be attached to the right offered to it.

49. His delegation could support the Mongolian amendment (A/CONF.39/C.1/L.168), which could be referred to the Drafting Committee. If the Mongolian proposal were adopted, the order of the words "obligations" and "rights" should also be reversed in articles 30 and 33.

[5] United Nations, *Treaty Series*, vol. 189, p. 150.

[6] *Yearbook of the International Law Commission, 1964*, vol. II, p. 176, para. 21.

[7] *Yearbook of the International Law Commission, 1966*, vol. II, p. 177.

The Japanese amendment (A/CONF.39/C.1/L.218) could also be referred to the Drafting Committee.

50. Mr. ŽOUREK (Czechoslovakia) said that the International Law Commission's drafts of articles 31 and 32 were generally acceptable to his delegation, but it hoped that the Drafting Committee would take into account the Mongolian proposal (A/CONF.39/C.1/L.168) to reverse the order of the two articles. He had no specific remarks to make on article 31, except that, like all the other provisions of the draft, it should be read together with article 70, on the case of an aggressor State.

51. The main difficulty with regard to article 32 seemed to lie in the fact that it covered two categories of treaties, those having an analogy with private international law and those having an analogy with public international law. In the former case, the right must be accepted by the third State, but it was difficult to stipulate that requirement in respect of such normative treaties as those on freedom of navigation on international waterways and those containing most-favoured-nation clauses. In the case of such rights derived from international regulation, it was of course the sovereign right of every State to refuse the privilege conferred upon it.

52. It was very difficult to draw a distinction between the two categories of treaties in a convention on the law of treaties, but the International Law Commission had struck a well-balanced compromise between the two points of view concerning the need for the assent of third States to rights conferred upon them by international treaties. The Czechoslovak delegation therefore could not support any of the amendments to article 32.

53. Mr. BRODERICK (Liberia) said he supported the Finnish amendment (A/CONF.39/C.1/L.141).

54. Sir Humphrey WALDOCK (Expert Consultant) said that the Finnish representative had not been entirely correct about the position in the International Law Commission regarding article 32. There had been a division of opinion on a point of principle as to whether a treaty could of itself create rights without the consent of a third State. The Commission had had to seek common ground and at the same time to reflect the practice of States and take into account the needs of the international community.

55. Assent of the third State had been stipulated as necessary, but the Commission had recognized that it could take different forms. It had decided to include the presumption in the second sentence of paragraph 1 in order to protect the position of third States in respect of that important category of treaties which created rights in favour of all States or of wide categories of States. The Commission had attached special importance to the provision when it had decided not to include an article dealing with what were sometimes known as objective régimes. Articles 31, 32 and 33 must be read as a whole and article 32 assumed the simultaneous operation of article 31. In a case where a treaty provided for an obligation for a third State parallel to a right, that had equally to be accepted in addition to acceptance of the right. That situation was covered by articles 31 and 32, while paragraph 2 of the latter article dealt with the conditions of the exercise of the right. No State was bound to exercise the right. Moreover, article 33 provided for the revocation or modification of obligations, but made no similar provision for the renunciation of a right, since that went without saying.

56. Mr. MWENDWA (Kenya) said he supported the Finnish amendment.

57. Mr. RIPHAGEN (Netherlands) said he withdrew his delegation's amendments to articles 32 and 33 (A/CONF.39/C.1/L.224 and L.225).

58. Mr. CASTRÉN (Finland) said that his delegation had not proposed that consent to a right must be express; it could be tacit.

59. Mr. ARIFF (Malaysia) said he supported the Finnish amendment.

60. Mr. BISHOTA (United Republic of Tanzania) said he was not clear as to the reason for the difference in wording between articles 31 and 32 in respect of the category to which the third State must belong in order to be affected by the provision in the treaty imposing obligations or conferring rights. In particular, did article 31 imply that the third State in question should be specifically mentioned in the treaty?

61. Sir Humphrey WALDOCK (Expert Consultant) explained that in article 32 there was a particular need to provide for treaties that contemplated conferring a right on a group of States or on all States. That possibility would be unlikely to arise under article 31 in regard to obligations, but the language of that article was general so that the case was not excluded.

62. Mr. KRISPIS (Greece) said that there could be situations when rights conferred upon third States created a burden, for example, when dues were payable for navigation on an international waterway.

63. Sir Humphrey WALDOCK (Expert Consultant) said that the conditions for the exercise of a right were laid down in article 32, paragraph 2. The situation would be more difficult when parallel obligations and rights ensued from a treaty, both of which had to be accepted before the right became established. In such cases both articles 31 and 32 would apply.

64. The CHAIRMAN suggested that article 31 be approved and referred to the Drafting Committee.

It was so agreed.[8]

65. The CHAIRMAN put to the vote the amendment by Finland to article 32.

The amendment by Finland (A/CONF.39/C.1/L.141) was rejected by 46 votes to 25, with 17 abstentions.

66. The CHAIRMAN suggested that article 32 be referred to the Drafting Committee together with the amendments by Japan (A/CONF.39/C.1/L.218) and Mongolia (A/CONF.39/C.1/L.168).

It was so agreed.[9]

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[8] For resumption of discussion, see 74th meeting.

[9] For resumption of discussion, see 74th meeting.

Article 33 (Revocation or modification of obligations or rights of third States) [10]

67. Mr. ESPEJO (Philippines), introducing his delegation's amendment (A/CONF.39/C.1/L.211), said that its aim was to make the language of article 33 more forceful. As the changes were of a drafting character it could be referred to the Drafting Committee.

68. The CHAIRMAN suggested that article 33 be referred to the Drafting Committee with the Philippine amendment.

It was so agreed.[11]

Article 34 (Rules in a treaty becoming binding through international custom) [12]

69. Mr. NACHABE (Syria) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.106) was to state clearly that, for a rule to become binding upon a third State, that State must recognize it as a customary rule of international law. The International Law Commission had underlined that fact in the first two sentences of paragraph (2) of its commentary. More and more new States were joining the international community as subjects of international law with the same sovereign rights as other States and there was no question of imposing upon them customary rules in the formulation of which they had not taken part, particularly since some of the rules originated in treaties that were aimed at safeguarding the individual interests of particular States.

70. For such rules to become binding on third States, particularly new States, their obligatory character must be recognized by the States in question. Article 38 of the Statute of the International Court of Justice referred to " international custom, as evidence of a general practice accepted as law " and " the general principles of law recognized by civilized nations ". During the discussion on article 34 in the Commission, some members had been concerned about the drafting of the article and had even questioned whether it had a place in a draft on the law of treaties.

71. He asked that his amendment be referred to the Drafting Committee.

72. Mr. CASTRÉN (Finland) said his delegation had proposed the deletion of article 34 (A/CONF.39/C.1/L.142) for formal reasons. It had been inserted by the Commission out of considerations of caution, but in his opinion it had no place in a convention exclusively concerned with the law of treaties. It would not be possible to contest the independent validity of the customary rules of international law, the other principal source of international law, and to deduce from the deletion of article 34 that the proposed convention would exempt States from obligations incumbent on them by virtue of the rules of customary law.

73. Mr. CARMONA (Venezuela) said that article 34 dealt with an extremely delicate matter which was of particular complexity, inasmuch as it touched the sovereignty of third States. In its present form the rule was not a progressive one. Great caution had been exercised in the matter by the International Court of Justice in the *Asylum* case.[13] The application and practice of article 34 might involve the imposition on third parties of obligations to which they had not consented, and he could only accept such a provision in cases of *jus cogens*. He therefore opposed article 34, the maintenance of which might deter States from ratifying the convention.

74. Mr. SEPULVEDA AMOR (Mexico) said the purpose of his delegation's amendment (A/CONF.39/C.1/L.226) was to make the text more forceful. Certain treaties could enunciate general principles of law, the Convention on the Prevention and Punishment of the Crime of Genocide,[14] for example. Article 34 was important and should be retained.

75. Mr. SECARIN (Romania) said that the draft articles should mention exceptions to the rules laid down in articles 31-33 which established the conditions when treaties could create rights and obligations for third States. The application of a treaty could be extended beyond the contracting parties by collateral links which third States accepted either expressly or tacitly, but only when the rules were rules of customary international law. The process was a characteristic of modern times. Rules accepted by some States were subsequently applied by third States, by virtue of having become rules of customary law. That was particularly true of codifying treaties. The International Law Commission had been careful to remove any misunderstandings and had embodied a reservation in article 34, the value of which was to set out the legal basis for obligations and rights that could be invoked *erga omnes*.

76. Article 34 should be maintained because it represented a realistic solution and would make for the progressive development of law. Relations between States were based on the free expression of their will, which was the material source of the law of nations. It was in the tacit agreement of States, which consented to observe certain norms as customary rules in their practice, that the compulsory force of those norms resided.

77. He therefore supported the Syrian amendment (A/CONF.39/C.1/L.106).

78. Mr. MAKAREWICZ (Poland) said that article 34 was useful and enunciated a generally recognized principle. The real source of the obligation for the third State was recognized international custom, not the treaty. The practical importance of the article lay in the fact that it could provide an effective safeguard against the temptation for a State to invoke its non-participation in a treaty in order to evade rules which were binding on it under another heading. Rules contained in the Vienna Regulation of 1815 had become in course of time generally accepted as rules of customary law and had been applied by non-parties to the Regulation. The Laws and Customs of War on Land codified in the

[10] An amendement to article 33 had been submitted by the Philippines (A/CONF.39/C.1/L.211. Amendments submitted by Venezuela (A/CONF.39/C.1/L.205/Rev.1) and the Netherlands (A/CONF.39/C.1/L.225) had been withdrawn (see paragraphs 29 and 57 above).

[11] For resumption of discussion, see 74th meeting.

[12] The following amendments had been submitted: Syria, A/CONF.39/C.1/L.106; Finland, A/CONF.39/C.1/L.142; Venezuela, A/CONF.39/C.1/L.223; Mexico, A/CONF.39/C.1/L.226.

[13] *I.C.J. Reports, 1950* p. 266.

[14] United Nations, *Treaty Series*, vol. 78, p. 277.

Hague Convention of 1907 had come to be generally accepted as norms of international customary law and as a consequence, even those States which were not parties to the Convention were under an obligation to respect the rules, and that principle had been confirmed by the Nuremberg Military Tribunal. For those reasons the Polish delegation was opposed to the deletion of article 34.

79. The Syrian and Mexican amendments deserved careful consideration by the Drafting Committee.

80. Mr. TABIBI (Afghanistan) said he supported the proposals by Venezuela and Finland to delete the article, which added nothing to the draft. If it were retained, he would vote in favour of the Mexican and Syrian amendments.

81. Mr. MARESCA (Italy) said that article 34 was so important that it might have been inserted at the beginning of the draft; it was certainly essential in an instrument of codification. New rules of customary international law were continually being created and that practice ought to be reflected in the draft. The article should be maintained in its present form. The Mexican amendment would make its meaning clearer.

82. Mr. DE BRESSON (France) said that he was far from convinced that article 34 was either necessary or desirable. The conditions in which customary rules were imposed on States derived from custom and not from the treaty itself. He therefore feared that the article, instead of making the situation clearer, might raise doubts and cause confusion, and was inclined to agree with the views expressed by the Finnish and Venezuelan representatives.

83. Mr. SUY (Belgium) said that he too supported the views put forward by Finland and Venezuela, not because he contested the principle stated in the article, which had been recognized by the Nuremberg Military Tribunal, but because it had no place in a convention on the law of treaties; it related to the process of the formation of customary law. If the article were retained, he would support the Mexican amendment.

The meeting rose at 5.55 p.m.

THIRTY-SIXTH MEETING

Wednesday, 24 April 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 34 (Rules in a treaty becoming binding through international custom) [1] *(continued)*

1. Mr. MIRAS (Turkey) said that his delegation fully shared the concern expressed at the previous meeting by several delegations in connexion with article 34. That article considerably weakened the scope of the rule of relativity—based on sovereignty—which was set forth in articles 30 to 33: that was one of the essential rules of the law of treaties.

2. Article 34 did not raise the question of traditional custom, but that of the formation of custom through treaties. The object of the convention was to codify the law of treaties or more precisely a part only of that law. Accordingly, there was no need to include any reference to the transformation of treaties into customary rules. That was a difficult question and should be treated separately. Article 34 would be more appropriate in a separate work of codification relating to the notion of custom. Retention of the article might make it very difficult for certain States to accept the future convention. Efforts could of course be made to improve the drafting of the article and that was the purpose of the Syrian amendment (A/CONF.39/C.1/L.106). If the article was to be retained, it would be preferable to include a reference to Article 38 of the Statute of the International Court of Justice, which defined international custom as evidence of a general practice accepted as law.

3. The Mexican amendment (A/CONF.39/C.1/L.226) proposed to extend the scope of article 34 by the addition of the words " or as a general principle of law ". But he thought that in order to obviate the difficulties to which article 34 might give rise, the best solution would be to delete it.

4. For those reasons, he supported the amendments of Finland (A/CONF.39/C.1/L.142) and Venezuela (A/CONF.39/C.1/L.223).

5. Mr. KRISPIS (Greece) pointed out that according to prevailing opinion, both as regards practice and doctrine, the general principles of law recognized by civilized nations constituted a source of international law, in the same way as treaties and custom. In the case of a conflict between a general rule of law and a customary or treaty rule, the latter prevailed, since it was normally *jus specialis*. However, that fact did not affect the equality of the three sources of international law, namely treaties, customs and the general rules of law.

6. If article 34 was adopted in its present wording, it might provide arguments for the opponents of the theory according to which the general rules of law were equal as sources of international law to treaties and customs. Moreover, on the basis of the precedent created by Article 38 of the Statute of the International Court of Justice, which placed the three sources on the same footing, article 34 might be considered a step backwards.

7. For those reasons, his delegation would vote in favour of the Mexican amendment (A/CONF.39/C.1/L.226), but proposed to add at the end the words " recognized by civilized nations ". If the Mexican amendment was rejected, his delegation would vote for the deletion of article 34.

8. He was in favour of the Syrian amendment (A/CONF. 39/C.1/L.106), which would improve the text of article 34.

9. Mr. ŽOUREK (Czechoslovakia) pointed out that his Government's proposal to delete article 34, which had been submitted in its written observations (A/CONF. 39/5), was not motivated by a negative attitude towards the idea on which that article was based. On the contrary, the principle set forth in article 34 seemed to be irrefutable.

[1] For the list of the amendments submitted, see 35th meeting, footnote 12.