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Summary record of the 732nd meeting

Topic:
Law of Treaties

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succession: indeed, he had deliberately framed it in the present tense with that consideration in mind. Some explanation on that point should be included in the commentary.

76. The Drafting Committee might consider whether reference to the temporal element should be made in the article itself.

77. As to the question of the exceptions, the wording used in sub-paragraphs (*a*) and (*b*) did appear in other articles already approved, but it might need general review during the second reading.

78. As to sub-paragraph (*c*), he agreed that it was unnecessary to refer to article 18-20: the provision could be re-drafted on more general lines.

79. With regard to Mr. Tunkin's last point, as the commentary showed, territorial application could be understood in different ways. It did not necessarily mean performance of treaty obligations in the territory. In the example given by Mr. Tunkin, the obligation to transmit the information to other Parties would remain by virtue of the fact that the information had been obtained by a national of the United Kingdom, a State all of whose territory was bound by the treaty. Article 58 was concerned with the general rule of the binding effect of a treaty in respect of all the territory of a State. Of course, there were many treaties which had a special importance for particular parts of a territory and there were others regarding which exceptions had to be made in respect of their territorial application, such as economic treaties which would not apply to free zones.

80. The CHAIRMAN suggested that article 58 be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

732nd MEETING

Wednesday, 27 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(A/CN.4/167)
(continued)

[Item 3 of the agenda]

ARTICLE 59 (Extension of a treaty to the territory of a State with its authorization) and

ARTICLE 60 (Application of a treaty concluded by one State on behalf of another)

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 59 and 60 in his third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 59 and 60 were, in a sense, linked, though they dealt with somewhat different principles. There might be some doubt as to whether article 59 should be retained at all, since it was concerned with a rather special case and would perhaps have little application outside the well-known example of the Treaty between Switzerland and Liechtenstein,[1] by virtue of which Switzerland was authorized to conclude commercial and customs treaties having territorial application to Liechtenstein, without there being any question of the latter becoming a party to those treaties.

3. As he had pointed out in paragraph (3) of the commentary, a similar situation might arise in the law of international organizations. For example, there was an article in the Treaty establishing the European Economic Community which provided for the conclusion of certain types of agreement by the Community that would be binding on Member States.[2] There, the question would arise whether the organization, in concluding such agreements, was acting in a representative capacity.

4. Article 60 dealt with the case in which, with the full knowledge of the other parties, on State concluded a treaty on behalf of another, which thereby became a party. If it were decided to retain the provision, the Commission might wish to include it among those relating to the effects of treaties on third States or, alternatively, to transfer it to Part I of the draft,[3] which dealt with the conclusion of treaties.

5. The CHAIRMAN, speaking as a member of the Commission, said he did not think the Commission need concern itself with the position of article 60 at that stage; it could settle that point after considering the article, if necessary even on the second reading.

6. With regard to article 59, which related to a very special case, he asked the Special Rapporteur whether, even in that special case, it was correct to say that it was the territory of the State that was bound rather than the State itself; if it was the State itself that was bound, the case could be treated in much the same way as that contemplated in article 60.

7. In the case of Liechtenstein and Switzerland, the wording of the treaty concluded in 1923 left room for doubt on that point, but his own opinion was that, since Liechtenstein was an autonomous subject of international law, it was the State of Liechtenstein that was bound by a treaty of that kind and not its territory.

8. Sir Humphrey WALDOCK, Special Rapporteur, said he would like further clarification of the Chairman's point. As he understood it, a State wishing to bring a complaint of violation of a treaty concluded by Switzerland and having territorial application to Liechtenstein, would not be able to bring that com-

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[1] League of Nations *Treaty Series*, Vol. XXI, p. 243.

[2] United Nations *Treaty Series*, Vol. 298, p. 90, article 228.

[3] *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 161 *et seq.*

plaint directly against Liechtenstein, but would have to lodge it through Switzerland.

9. The CHAIRMAN, speaking as a member of the Commission, said that although Switzerland was authorized to represent Liechtenstein in concluding a treaty, if Liechtenstein failed to observe the treaty, it was still Liechtenstien that was failing to meet its obligations; consequently, Liechtenstein as a State and as a subject of international law must be regarded as a party to the treaty.

10. Mr. CASTRÉN said that article 59 was closely connected with article 60, as was made clear by the Special Rapporteur's commentary on the two articles. In both cases a duly authorized State concluded a treaty on behalf of another State which, in consequence, was bound by the treaty and required to apply it in its territory. The difference which the Special Rapporteur had tried to establish between the two cases was apparently that, in the second case, the State which had authorized another State to act on its behalf became a party to the treaty on the same terms as the other States which had given their assent directly, whereas in the first case the State which had acted through another State in the conclusion of a treaty must continue to act in the same way with regard to all questions relating to the treaty's application.

11. His impression was that the Special Rapporteur had over-emphasized the territorial element in article 59. While it was possible to speak of the extension of a treaty to the territory of a State, as the Special Rapporteur had done in the title and in the opening words of the article, the expression "to bind its territory", and "to bind the territory of that State", used in sub-paragraphs (*a*) and (*c*), were somewhat equivocal. In reality, it was the State that was bound, the consequence of that juridical fact being that the treaty applied to its territory. Articles 7 and 8 of the treaty between Switzerland and Liechtenstein, quoted in paragraph (2) of the Special Rapporteur's commentary, stated that the commercial and Customs treaties concluded by Switzerland with third States would apply in the Principality, and that Liechtenstein authorized the Swiss Confederation to conclude such treaties and make them applicable to the Principality.

12. With regard to the form of article 59, he thought that in sub-paragraphs (*a*) and (*c*) all reference to territory should be deleted, and that only the authorization given by the State and the intention to bind it should be mentioned. Sub-paragraph (*c*) should follow immediately after sub-paragraph (*a*) and be supplemented by the words: "and intended to bind that State".

13. Perhaps it could also be provided that the other parties must give their consent to the extension of the treaty's application, though it could legitimately be assumed that they agreed to it implicitly if they entered no reservations on the subject.

14. With regard to article 60, he doubted whether the second sentence of paragraph 1 was necessary, since it stated an obvious corollary of the first.

15. Mr. TSURUOKA said that the case dealt with in article 59 was not very common and was unlikely to occur more frequently in the future. If the majority of the Commission wished to retain the article it should be drafted in terms that brought out the exceptional character of the situation more clearly. One way of doing so might perhaps be to invert the proposition and say, for example: "The application of a treaty does not extend to the territory of a State which is not itself a contracting party, unless...".

16. Articles 59 to 62 seemed to him to be closely interconnected, even though articles 59 and 60 related to the application of treaties and articles 61 and 62 to the rights and obligations created by treaties. That being so, it might be preferable first to discuss article 61, concerning the principle that treaties created neither obligations nor rights for third States; after disussing that article and reaching conclusions on it, the Commission would be in a better position to judge whether article 59 should or should not be deleted.

17. With regard to the point raised by the Chairman, he said that articles 59 and 60 dealt with two different kinds of treaty. Article 59 referred to the conclusion of an agreement, orally or in writing, between a State A and a State B, under which State B delegated in advance to State A general authority to conclude on its behalf treaties relating to specific matters (for instance finance and Customs), which would automatically apply to the territories of State B without that State's being a party to the treaty. In practice, if a dispute arose between State B and a State C, State B could not make representations concerning its settlement otherwise than through State A. In the case covered by article 60, on the other hand, the State did not itself participate in the conclusion of the treaty, and delegated to another State the authority to do so on its behalf; but it nevertheless became a party to the treaty. That, in his view, was the essential difference between the two articles, and it appeared to be confirmed by practice.

18. Mr. LACHS said that he would confine his remarks to article 59, which dealt with a very special case. He shared the Chairman's doubts about the wording of the article and believed that, even under the Treaty between Switzerland and Liechtenstein the binding effect extended beyond the territory of the latter, and involved its organs of State; that was particularly true of commercial treaties.

19. The extension of the application of treaties in the manner provided for in the article might also involve constitutional issues. One example was the occasion when the signature of the representative of Andorra to the Convention for the Protection of Cultural Property in the Event of Armed Conflict had been repudiated as void by the President of the French Republic on the ground that it had been appended without his consent.

20. To the general question of whether or not article 59 should be included, his answer was in the negative, because the practice it provided for was anomalous and caused the State to which the application of the treaty

was extended to lose its international identity, as it were. In the interests of the progressive development of international law it would be unwise for the Commission to sanction such an exceptional practice; it would suffice to mention the matter in the commentary.

21. Mr. BRIGGS said that he was in some perplexity over the concept of a territory being bound; in his opinion it was the State that was bound, even if it was not a party to the treaty in the strict sense of the term. As was clear from the provisions of the Treaty between Switzerland and Liechtenstein quoted in paragraph (2) of the commentary, the extension provided for would result in something wider than territorial application. Moreover, if the State was not bound by the treaty, in the event of non-performance of the treaty obligations, the question would arise which State could be held internationally responsible, the party to the treaty or the other State which had authorized it to enter into the treaty on its behalf.

22. He had tried to overcome some of the difficulties by recasting the article to read: "A State which is not itself a contracting party to a treaty becomes bound by that treaty when it has duly authorized another State to bind it by concluding the treaty". But on further reflection it seemed to him that the substance of such a provision was already covered by articles 60 and 62, which led him to the conclusion that perhaps article 59 was not necessary at all. At all events, the Commission needed more information on the scope and meaning of the Treaty between Switzerland and Liechtenstein.

23. Mr. ROSENNE said that he had some difficulty in accepting the assumption underlying article 59 that a State which was not a contracting party to a treaty, or its territory, could nevertheless be bound by it; he wondered whether, by authorizing another State to bind its territory by concluding the treaty, the first State did not thereby become a party in law. Indeed, it was not easy to see where the difference between articles 59 and 60 lay.

24. He was largely in agreement with the Chairman concerning the concept of consent to be bound by a treaty. In 1962, the Special Rapporteur had proposed a definition of a "party" as being a State or other subject of international law which had executed acts by which it had definitively given its consent to be bound by a treaty in force.[4] Although that definition had not been adopted by the Commission, it was reflected in the draft articles themselves and was referred to in paragraph 1 of the commentary on article 16.[5] Thus the concept of being bound by a treaty was an integral part of the concept of being a party to a treaty. Consequently, where treaties concluded by Switzerland had application to Liechtenstein, the latter should be regarded as a party in the sense that it enjoyed rights conferred by the treaties directly, and could be held internationally responsible for any breach of those instruments. It was, of course, important to make clear that the Commission was referring to those treaties only by way of illustration and had no wish to prejudice the position in fact which might exist between Switzerland, Liechtenstein and any other parties to the treaties between them.

25. Article 59 should not be kept as a separate article; its subject matter should be incorporated in article 60 for the reasons given in the last two sentences of paragraph (2) of the commentary on that article. Nor should the provision be restricted to treaties the parties to which were necessarily States: it could also apply to treaties to which international organizations were parties.

26. The Commission should be careful not to press too far any analogy with concepts of agency drawn from municipal law, because those concepts varied widely from one system to another. Footnote 59 to the commentary on article 60 was controversial and could be omitted.

27. It would be a progressive step to make it possible for one State to authorize another or, if it so desired, an international organization to conclude treaties on its behalf on the conditions specified in article 59. It was essential that those conditions should be fulfilled so that the other contracting parties should know with which State they were concluding the treaty. Such a provision would be an application of what Rousseau had called *une substitution préalable de compétence.* Sir Gerald Fitzmaurice, in his fifth report, had considered that States on behalf of which treaties had been concluded in that manner should be regarded as contracting parties,[6] and the Secretariat, in its Summary of the Practice of the Secretary-General as Depository of Multilateral Agreements, had given examples from the practice of governments of sovereign States, which it described as "representation".[7] Nor should a similar practice by international organizations be excluded, if their constitutions so permitted, and he wondered why article 60, paragraph 2, should be confined to treaties concluded between them and non-member States.

28. He had been interested to note from the report of the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space[8] that some proposals before it seemed to envisage something along the lines he had suggested, though in another realm of law.

29. Mr. ELIAS said he seriously doubted whether article 59 should be included at all, because its substance was already covered by articles 60 and 62; the special case of Liechtenstein could be mentioned in the commentary. One of the main difficulties was that of distinguishing between territorial application and participation through an agent, a point which the Special Rapporteur had brought out in paragraph (4) of the commentary. Ultimately, of course, subject to the

[4] *Yearbook of the International Law Commission, 1962,* Vol. II, p. 31.

[5] *Ibid.,* p. 175.

[6] *Yearbook of the International Law Commission, 1960,* Vol. II, p. 94, para. 56.

[7] ST/LEG/7, paras. 142-143.

[8] A/AC.105/9.

condition laid down in sub-paragraph (*b*), the State to whose territory application of the treaty was extended must be regarded as a party and hence as being internationally responsible for any breach.

30. As there seemed to be fairly general agreement that article 59 could be dropped, perhaps the Commission could now pass on to article 60.

31. Mr. PAREDES said that when the text of article 59 was examined in isolation, it gave the impression that the case contemplated was that of one State delegating authority to another to represent it in a particular transaction. Accordingly, the agent acted on behalf of the principal, establishing rights and obligations for it and representing its interests. In the case contemplated in the article, the negotiator combined two capacities: the personality of his own State and that of the State which had entrusted him with the negotiations. That being so, both States must be regarded as parties to the transaction. But the Special Rapporteur observed in his commentary that that would be going too far, and that it was rather a kind of indirect participation whereby the third State obtained certain advantages and assumed certain obligations, but did so through the signatory to the treaty, which alone could demand fulfilment.

32. That was really a situation of dependence prejudicial to the freedom of the State and incompatible with the concept of its full capacity, which was assumed by the Commission in its work on the law of treaties. He could not accept such dependence, which would impair the autonomy of countries and threaten them with a kind of continuous subordination. It would be a disguised resurgence of colonialism which had been so vehemently condemned by the speakers at the previous meeting.

33. A provision on the lines of article 59 might be included in the draft if the Commission were obliged to make a detailed compilation of the older principles of international law, however inadequate they might be under modern conditions; but not when the Commission was required not only to codify, but also to take account of the progressive development of law. The inclusion of such a provision in the draft might cause misunderstanding, owing to the reference to conditions of dependence. In contemporary international society, it was unthinkable that one independent State should be under the tutelage of another; every country must accept its own responsibilities and make its own mistakes. The conquest of the freedom of nations must be based on their own experience, even at the risk of errors they committed themselves, but not of the errors of others.

34. The CHAIRMAN, speaking as a member of the Commission, warned the Commission against the danger of confusing the issue. Articles 59 and 60 had nothing to do with cases of colonialism, or even with cases on which the Commission should express a favourable or unfavourable opinion. It really dealt with the case in which one of two States, such as Switzerland and Liechtenstein, or Belgium and Luxembourg, saw fit to empower the other to represent it and to conclude treaties on its behalf. It was on that basis that the commercial and customs treaties concluded by Belgium automatically applied to Luxembourg as well. There was no question of colonialism, or protectorates, or generally speaking of any system which must be regarded as obsolete and incompatible with the independence of States. It was not a question of encouraging certain forms of relationship but, as several speakers had clearly seen, of determining whether there was really any difference between the case dealt with in article 59 and that dealt with in article 60.

35. His own view was that there was no difference. By article 8 of the Treaty between Switzerland and Liechtenstein, for example, Liechtenstein empowered Switzerland to represent it, which meant that Liechtenstein continued to be a sovereign State having rights and obligations; consequently the rights and obligations deriving from a treaty concluded by Switzerland also became rights and obligations of Liechtenstein. As to which party the rights and obligations deriving from the treaty were vested in, it was Liechtenstein as much as Switzerland; consequently, it was Liechtenstein as a State that was bound, and not its territory. Thus the case dealt with in article 59 was similar to that dealt with in article 60, and could be considered with that article.

36. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with those members who had suggested the deletion of article 59; its contents should be transferred to the commentary on article 60.

37. The 1923 Treaty between Switzerland and Liechtenstein, which was mentioned in the commentary as an example of the situation covered by article 59, seemed to constitute a case of agency, in which one State entrusted another with the power to represent it not only for the purpose of concluding certain treaties, but also for the purpose of claiming rights under those treaties. Thus the matter clearly came within the scope of article 60.

38. The three conditions laid down in article 59 were not sufficient. In particular, in sub-paragraph (*b*) it was not enough to say that the other parties to the treaty must be aware of the authorization; it was also necessary for the other parties to agree to have the treaty extended to a State which had not signed it.

39. Mr. de LUNA said he was convinced that article 59 should be dropped, on the principle that a treaty did not apply to third parties. A territory could not be bound if the State had not bound itself. A State could bind itself either directly, as normally occurred, or by authorizing as its representative another State, which then acted on its behalf. The example given in the Special Rapporteur's commentary was rather misleading, because article 8 of the 1923 Treaty created a mere agency: it authorized Switzerland to negotiate on behalf of Liechtenstein.

40. Article 59 really dealt with a case of quasi-servitude, in which one State had acquired the right to act in lieu of another. For instance, a State which became a party to the General Agreement on Tariffs and Trade (GATT) had to give particulars of all its customs

territories; that was not a case of agency, but of a right acquired by virtue of a prior treaty and the State which had acquired the right exercised it. It remained to be decided whether the Commission should devote an article to such a special and infrequent case; he thought it should not.

41. Mr. BARTOŠ said that in article 59 the Special Rapporteur had adopted too narrow an approach, for the problem was not confined to very small States. At one time France had contested the right of some of its former colonies in Africa, which had become independent, to enter into treaties with other countries on certain matters covered by a monetary union agreement with France. Some had gone so far as to consider that monetary union a form of neo-colonialism. Consequently, if the Commission drafted an article on the matter, it should be worded in such a way that it not only applied to the cases covered by the present article, but also established a general rule. It was therefore necessary to consider how far a treaty which gave a power of agency to a third State was compatible with the principle of independence stated in the United Nations Charter.

42. True, it was quite normal for a State to be represented by another State, and the Vienna Convention on Diplomatic Relations made provision for missions common to several States. Nothing in such an arrangement was contrary to the principle of independence, provided that the representation was *ad hoc*, or in the case of a continuing agency, that it was always revocable. But in the case of representation for a fixed period there was always an element of abdication by the State represented, which created a condition of dependence, even if it was accepted voluntarily. So if the principle of the independence of States was held to be rule of *jus cogens*, it seemed that the conclusion of agreements of that sort was not admissible.

43. With regard to the application of treaties concluded through a third State, to which the State represented became a party, complex problems arose in regard to breach of the treaty by the representing State and to claims brought by the represented State concerning the application of the treaty. Could it be said that the represented State would be deprived of freedom to assert its rights *ex contractu* against the contracting parties and could that State itself appeal to the International Court of Justice? Furthermore, in the practice of the United Nations, some States could sign certain treaties on behalf of other States, but for ratification, the commitment had to be entered into by each State individually.

44. He therefore considered that certain factors for which the Special Rapporteur had made no provision should be taken into account in the article. If a treaty containing an agency clause specified that the agency was revocable at any time, the clause did not infringe the principle of independence of States; but if the agency was a lasting one he thought it jeopardized the principle of independence, and he would have to make reservations on that point.

45. The CHAIRMAN, speaking as a member of the Commission, agreed that article 59 could apply to countries other than very small ones, but as the agency relationship was freely established between two States, the Commission should not express a favourable or an unfavourable opinion on that practice. Such relationships could be formed between any countries, not only in Europe, for reasons of mutual assistance. They might even be the adumbration of a federal system.

46. Mr. YASSEEN said it was the State as a subject of international law that would be bound by a treaty, not its territory, which was only one of the constituent elements of the State. The reason why article 59 gave the impression that the territory of the State was to be bound was that it was possible to envisage a legal situation in which a certain State was authorized not only to conclude a treaty on behalf of another State, but also to perform all the acts relating to the application of a treaty on behalf of that State. In so far as independent States were concerned, article 59 dealt only with a question of representation, or more precisely, with the scope of that representation. Thus understood, article 59 seemed to him to be one of the applications of article 60.

47. With regard to the underlying principle of article 60, the first question was whether it was possible for a State to delegate authority for the conclusion of a treaty or for all purposes concerning its application, and the second was whether provisions on that point should be included in the draft. It was, in principle, legally possible for a State to authorize another State to act on its behalf in such matters, unless the practice went so far as to deprive the State of its international personality. Hence that form of agency should only be provided for in respect of acts concerned with making a State a party to a treaty. Such provisions would meet a practical need where the agency was *ad hoc*, individual and revocable. Since it should be made easier for States to become parties to international treaties, a rule of that kind might be in the interest of the international order, especially where codifying treaties or general treaties were concerned. But it did not seem necessary to provide for agency in respect of the application of treaties; the duration of such an agency and the nature of the acts performed by virtue of it might impair at least the configuration of a State's sovereignty. A State might freely consent to such an arrangement, but the case should not be expressly provided for in the draft.

48. Mr. PESSOU thought that perhaps Mr. Lachs had best defined the problems raised by article 59. The Special Rapporteur never failed to call attention to every possible case, even if that made it harder for him to formulate a rule. Article 59 was based on an existing situation: the special case of Liechtenstein. But was it really appropriate to devote an article to such a case? He was inclined to think it might perhaps be better to drop the article altogether, or to transfer its substance either to the commentary or to some other article dealing with a situation of the same kind.

49. Replying to Mr. Bartoš, he said that some French-speaking African States had indeed concluded a monetary and financial convention with France. Any con-

vention or treaty entailed compliance with certain rules and a balance between the rights and duties of the parties. Any sacrifice made must have its compensation. In the case of Dahomey, the convention did not involve any contradiction and was not in any way a form of neo-colonialism. The Dahomey franc was equivalent to two French francs, and that brought Dahomey great advantages. The rules of a convention were made to be respected, even if their application involved certain difficulties; for example, if one of the parties wished to go beyond the limitations imposed by a treaty with one State in order to conclude other treaties with other States. When two parties were bound by a convention, it was not possible for one of them to fulfil its obligations, while the other evaded them. The difficulties to which Mr. Bartoš had referred were solely due to the fact that the parties were bound to fulfil the obligations laid down in a convention.

50. Mr. TUNKIN said that, like a number of other articles drafted by the Special Rapporteur, articles 59 and 60 had been submitted for the purpose of putting to the Commission problems which merited discussion. He understood that the Special Rapporteur was prepared to drop article 59 and thought that he would not press very strongly for the retention of article 60 either. In that article, all reference to international organizations should be omitted, since the Commission had already decided not to deal with them in its study of the law of treaties.

51. Articles 59 and 60 dealt with situations in which one State was subordinated to another. Quite apart from any doubts he might have about the application of a treaty being extended to the territory of a State which was not a party to it, article 59 obviously contemplated such a position of subordination — the case in which a State concluded a treaty that would automatically apply to the territory of another State. The same applied to article 60, which dealt with the case in which one State concluded a treaty on behalf of another, with its authorization; the latter State would thereby disappear from the international arena and the former would, in effect, take its place as a subject of international law.

52. The Commission should bear in mind certain basic principles of contemporary international law. In view of resolution 1505 (XV) on future work on the codification and progressive development of international law, adopted by the General Assembly in 1960, the Commission should approach its task in the light of the new trends in international relations which had an impact on the development of international law; it should take into account recent changes in international law and the new rules that were being developed. The well-established principles of contemporary international law included that of the equality of States, by virtue of which all States were equal as sovereign entities and subjects of international law, and that of respect for the sovereignty of States. An examination of the rules stated in articles 59 and 60 showed that they were incompatible with those two basic principles of international law.

53. In order to understand a legal rule properly, it was necessary to consider its social content. The rules stated in articles 59 and 60 had in fact been used mainly in colonial practice, in connexion with protectorates. Outside colonial practice, cases covered by those rules were extremely rare.

54. It was also important not to confuse the cases dealt with in articles 59 and 60 with certain other situations, which were completely different. One example was the signing of a treaty by the diplomatic representatives of one State on behalf of another State. In 1963, the Moscow Treaty banning nuclear weapon tests [9] had been signed by the Ambassador of Brazil on behalf not only of Brazil, but also of certain other countries; in signing for those other countries, however, he had been acting not for Brazil, but for the countries concerned.

55. Another example was provided by the 1961 Vienna Convention on Diplomatic Relations, article 6 of which read: "Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.[10] If, therefore, States A and B appointed the same person as ambassador to receiving State C, and the ambassador called at the Foreign Ministry of State C to deal with a matter relating to State A, it would be State A that would be acting through him. If the ambassador called on behalf of State B, then it would be State B that would be acting through him. Both States, A and B, were on the same level internationally; there was no question of either of them replacing the other in the international sphere.

56. Several speakers had pointed out, and the Special Rapporteur himself had recognized, that cases covered by article 59 were extremely rare. As to article 60, the Special Rapporteur had stated in paragraph (2) of his commentary that "the expanding diplomatic activity of States and the variety of their associations with one another may lead more frequently to cases where one State acts for another in the conclusion of a treaty". Personally, he very much doubted that. In fact, the tendency was precisely the opposite: every State tended to act for itself and none was prepared to allow another State to represent it.

57. With very few exceptions, the cases coming within the scope of the articles under discussion were a heritage of colonialism; the few exceptions should not be generalized. Or course, nothing in the draft articles prohibited such exceptions.

58. Article 59 should be dropped altogether and he doubted whether article 60 should be retained in any form.

59. Mr. AMADO said that once again, the Special Rapporteur, in his concern for accuracy, had tried to omit nothing. Article 59 was based on a fact, namely that, when any State negotiated with Switzerland on matters affecting Liechtenstein, it negotiated with Switzerland alone. Liechtenstein existed as a State, but it

[9] ENDC/100/Rev.1.

[10] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, Vol. II, p. 83.

had delegated all its sovereign power of negotiation to Switzerland. The special relations between Switzerland and Liechtenstein constituted the only instance of such fusion of one State with another. The relationship between Belgium and Luxembourg was entirely different.

60. He did not agree at all with the view that article 59 was a residue of colonialism; it deal only with the case of Liechtenstein and Switzerland, in other words, with the authority conferred on Switzerland by Liechtenstein to represent it. The delegation of authority was clearly established by article 8 of the 1923 Treaty. The Commission should obviously not base an article on that particular case, and he was therefore opposed to article 59.

61. Mr. REUTER said he was in favour of deleting article 59, but retaining article 60.

62. The difficulty experienced by members of the Commission in reaching agreement on purely technical points was partly due to differences in legal terminology and training. For jurists from Continental Europe, the whole problem of article 59 was illustrated by the terms "*représentation*" and "*personnalité juridique*". He did not claim that those expressions were satisfactory but he noted that for anglo-saxon jurists the first did not seem to have the same meaning or the same use, while the second was regarded as too abstract. The Commission's work would certainly be much easier if it could get over difficulties of that kind.

63. He could not help being surprised at the strongly anti-federal views he had heard expressed. The number of States in the international community was not fixed by any rule of international law, by any new principle, or by any article of the Charter. A State was in no way prohibited from permanently surrendering its independence by merging with a larger unit of its own free will.

64. The Commission should, of course, avoid any suggestion of endorsing colonialism, or even of not condemning it explicitly enough. What differentiated the federal system from the colonial system was equality, and Mr. Tunkin had rightly stressed that the basic problem was not strictly legal, but sociological. There was some reason to fear that colonialism was not just a thing of the past, but still had some future before it. Its manifestations were mainly economic; the only true equality, which was social equality, was not easy to attain. It was true that some structures, though federal in form, were in fact colonial; but conversely, some structures which were colonial in appearance were federal in reality. In European communities the voting rights of certain States were in many cases reduced to nothing, but it could not be said that that was colonialism. Other systems, under which States retained formal equality without being able to make any effective use of it, were really closer to colonialism. To distinguish between what was federal and what was colonial involved a political judgment. He did not think the Commission was required to assume responsibility for such a judgment, and he would therefore prefer article 60 to stand; but it should be in general terms and be accompanied by a cautious commentary omitting any examples which might give the impression that the Commission was looking to the past for guidance.

65. Mr. de LUNA agreed with Mr. Reuter that article 60 should be retained. A distinction should be drawn between two cases: that in which a State was represented by an organ of another State acting in a dual capacity, as was permitted by the Vienna Convention on Diplomatic Relations, and that in which one State negotiated on behalf of another.

66. But there was another problem. As the Commission had not dealt with the question of agency in Part I of the draft, it might seem strange that it should do so only in the part dealing with the application of treaties. Although the representation of one State by an organ of another raised no particular problems, the other kind of representation to which he had referred ought to be studied; but the substance of article 60 should be transferred to Part I, section II of the draft.

67. The CHAIRMAN, speaking as a member of the Commission, pointed out that Liechtenstein was only represented by Switzerland in the negotiation and conclusion of customs and commercial treaties; other treaties were concluded by Liechtenstein independently.

68. At first sight he agreed with Mr. Tunkin that it would be possible to drop paragraph 2 of article 60, since it dealt with a problem relating to international organizations and such problems had so far been left aside.

69. But he could not agree with Mr. Tunkin on paragraph 1; the Commission's draft would be incomplete if the idea expressed in that paragraph was omitted. It would seem strange if the Commission decided to rule out the possibility of concluding a treaty by agency. Agency could be a stable and permanent arrangement, as in the case of the Belgium-Luxembourg Economic Union; indeed, that was an example that could well be followed as an intermediate solution between independence and federation. Agency could also be occasional, and that was the case contemplated in paragraph 1 of article 60. Agency of that kind had always existed and had always been regarded as legitimate; the Commission could not overlook it.

70. With regard to the position of the provision in the draft, he agreed with Mr. de Luna; but the Special Rapporteur had said at the beginning of the discussion that that secondary question could be settled later.

71. Mr. YASSEEN said that in view of the Chairman's opinion he had not intended to speak about the placing of article 60, but he thought that if it was to be confined to agency in the conclusion of treaties, it should be in some other part of the draft.

72. Mr. EL-ERIAN said he shared the general feeling that article 59 should be dropped because it dealt with a particular case that did not justify special treatment. He would revert to article 60 at the next meeting and for the time being would confiine himself to general comments.

73. The Commission had agreed that its work on the law of treaties should take the form of a draft convention, not of a code. Certain situations in international relations, which were not contrary to international law, but were nevertheless of a particular character, should not be generalized in a draft convention on the law of treaties.

74. He appreciated the efforts of the Special Rapporteur to submit draft articles that were as complete as possible to the Commission, so that it could decide which provisions should be retained for the purposes of a draft convention; he had, for example, done well to provide the Commission with an opportunity of discussing the question of the colonial clause in connexion with article 58. But the special situations dealt with in articles 59 and 60 belonged rather to the commentary than to the text of the articles. The Commission should avoid any suggestion that it approved of situations which were not consistent with contemporary international law, and should not derive general rules from special situations. His position was rather similar to that taken by the Commission on article 3, concerning the capacity to conclude treaties; for although there were exceptional cases, such as neutrality, in which the capacity of a State to conclude certain treaties was restricted, the Commission, as stated in paragraph (1) of its commentary on article 3 [11] had held that it would not be appropriate to enter into all the detailed problems of capacity which might arise and had decided to set out, in that article, broad provisions concerning capacity to conclude treaties.

The meeting rose at 1 p.m.

733rd MEETING

Thursday, 28 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(A/CN.4/167)
(continued)

[Item 3 of the agenda]

ARTICLE 59 (Extension of a treaty to the territory of a State with its authorization) and

ARTICLE 60 (Application of a treaty concluded by one State on behalf of another) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 59 and 60, in the Special Rapporteur's third report (A/CN.4/167).

2. Mr. TSURUOKA said that he considered article 60 useful, if not absolutely essential. The substance of it might perhaps be included in the commentary on the part of the draft concerning the conclusion of treaties, or it might be made into a separate article for inclusion in that part. With the development of international relations, the method described in the article was likely to be used more often; besides, its use might mitigate the inconveniences caused by the rupture of diplomatic relations between two States.

3. With regard to the substance of the article, it would be well to stress in the commentary that the consent of the party with which the agent State concluded the treaty was indispensable. In the interests of the stability of international relations, the Commission might also mention the question of the evidence of authority. That was an important point where a relationship between two independent States was concerned.

4. Mr. JIMÉNEZ de ARÉCHAGA suggested that the idea, if not the actual wording, of paragraph 1 of article 60 should be retained, namely, that a State could confer upon another State authority to represent it in concluding a treaty, as Luxembourg had done with Belgium, and in demanding compliance with its terms, as Liechtenstein had done with Switzerland. He agreed with the Special Rapporteur that that kind of situation might well occur more frequently in the future. It was significant that both the cases quoted were cases of small countries having a customs or other economic union with a larger neighbouring country. In view of the new widespread tendency to organize economic associations, such as the Free Trade Association being formed in Latin America, with the aim of broadening production areas and markets, the Commission should not ignore, much less condemn, a practice whereby a small economically developing State could secure a better bargaining position by allowing another State to act on its behalf. Another possibility was that a State which was protecting the interests of another State following its severance of diplomatic relations with a third State, might quite legitimately have occasion to conclude a treaty on its behalf.

5. The Commission should not adopt a negative attitude to the legitimate institution of agency merely because it might have been used in the past to set up protectorates. Many other legitimate institutions had been used for objectionable purposes, but the Commission had not decided that it should not deal with them. It should be remembered that representation by the operation of law did not exist in international law; the only form of representation was by virtue of a treaty. Any agency relationship which might be established would therefore be subject to the rules in Parts I and II of the draft articles. Such rules as those relating to free consent, nullity on grounds of coercion, *jus cogens*, the power of denunciation in certain circumstances, and determination for change of circumstances would apply in all cases. There would thus be ample safeguards to ensure that no State would in future, as had happened in the past, use the method of agency by treaty to set up a protectorate regime against the free will of the State represented.

[11] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 164.