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Summary record of the 734th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1964, **vol. I**

arose while the treaty was being framed. That was a different question and, for the sake of greater clarity, it would be better to delete the paragraph as Mr. Rosenne had suggested.

70. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that article 61 seemed generally acceptable and he would have no objection to its being re-drafted more or less on the lines suggested by Mr. Jiménez de Aréchaga.

71. The only divergence of opinion seemed to have arisen over the word "modify", and he agreed with Mr. de Luna that, even without the words "nor modify in any way their legal rights", sub-paragraphs (*a*) and (*b*) would be sufficient. He had incorporated that phrase in order to stress a particular element which had often come up in practice — in the *Island of Palmas* arbitration,[10] for example — but he had been conscious that it was, strictly speaking, superfluous. The words could be omitted without affecting the substance of the rule.

72. He had no strong feelings about paragraph 2, which could be dropped. Its purpose had been to serve as a reminder that States might, in a limited sense, acquire certain obligations, even before becoming parties to a treaty.

73. Mr. Elias's suggestion that the word "modify" should be replaced by the word "affect" was not acceptable, because that word was too loose. A treaty did in fact sometimes "affect" the rights of third parties, even when legally it did not "modify" them.

74. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the Latin maxim *pacta tertiis nec nocent nec prosunt* fully expressed all the elements of the rule, since it covered everything that might be to the advantage or disadvantage of third States. But if the intention was to define the scope of the rule by referring to obligations and rights, it would still have to be decided whether the restriction of a right was equivalent to the imposition of an obligation, which might not always be the case. No doubt the Drafting Committee would be able to find a solution.

75. Sir Humphrey WALDOCK, Special Rapporteur, said that if the maxim *pacta tertiis nec nocent nec prosunt* was to be mentioned in the title of the article it should be placed in brackets. Generally speaking, the Commission should exercise restraint in using Latin maxims borrowed from Civil Law.

76. The CHAIRMAN suggested that article 61 be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 12.50 p.m.

[10] *United Nations Reports of International Arbitral Awards*, Vol. II, p. 829.

734th MEETING

Friday, 29 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

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

[Item 3 of the agenda]

ARTICLE 62 (Treaties providing for obligations or rights of third States)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 62 in his third report (A/CN.4/167).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that during the discussion on article 61 it had been pointed out that that article and the two succeeding ones at some points touched on the topic of State succession; in that connexion he wished to draw attention to the statement in paragraph 6 of the introduction to his third report, that "to examine how far successor States may constitute exceptions to the *pacta tertiis nec nocent nec prosunt* rule would be to deal with a major point of principle which is of the very essence of the topic of State succession." It might be desirable to make some further allusion to that point in the commentary on article 61 or 62.

3. Sir Gerald Fitzmaurice, in his fifth report, had devoted twenty-one articles to rules concerning the legal effects of treaties on third States.[1] Some of those rules were covered in other parts of the draft articles adopted by the Commission, but the substance of the remainder had been put into articles 62-64 and he asked members to call attention to anything omitted which they considered it essential to include.

4. Perhaps, in the interests of orderly discussion, the Commission should first deal separately with paragraph 1 of article 62, discussing the question of obligations before tackling the question of rights.

5. As stated in paragraph 1, the principle was that a treaty did not create obligations for third States unless the parties intended it to provide a means of accepting such an obligation, which the third State must accept or tacitly assent to, thus creating a kind of collateral obligation between itself and the parties to the treaty. The language used in paragraph 1 had been carefully chosen so as to avoid any possible implication that there could be any imposition of an obligation. What was involved was an invitation to a third State or States to participate in a provision or set of provisions without becoming a party to the whole treaty.

6. One aspect of the *Free Zones* case[2] was an illustration of the principle stated in paragraph 1. Article

[1] *Yearbook of the International Law Commission, 1960*, Vol. II, pp. 75 *et seq.*

[2] *P.C.I.J.*, 1929, Series A, No. 22; *P.C.I.J.*, 1932, Series A/B, No. 46.

35, paragraph 2, of the Charter might be regarded as having relevance to the rule, but he would hesitate to accept the view put forward by Mr. Jiménez de Aréchaga at the previous meeting [3] that Article 2, paragraph 6, of the Charter was also an instance of its application. In his own opinion, Article 2, paragraph 6, was somewhat differently conceived and placed an obligation not on third States, but upon Members of the United Nations, requiring them to co-operate in ensuring that third States acted in a particular way. If the Charter obligations affected third States, it was because those obligations were an expression of general rules of international law.

7. The CHAIRMAN suggested that the Commission should first consider the question of *pacta in odium*, dealt with in paragraph 1, and then that of *pacta in favorem*; that order of discussion should be entirely without prejudice to the final form of the article, for in the examples most frequently quoted, including some of those chosen by the Special Rapporteur himself, the acquiescence of the party concerned constituted consent to both rights and obligations.

8. Mr. PESSOU said he had been rather surprised that some speakers at the previous meeting had objected to references to Latin maxims. It seemed to him that that attitude was not scientific, for whether one liked it or not modern international law was the heir to Roman law. Even though most of the maxims formulated by the great Roman jurists applied in municipal law, the rules with which the Commission was trying to cover all the new situations had already been formulated by those Roman thinkers.

9. As to the problem raised in paragraph 1, the principle was, of course, contrary to that developed in the preceding articles. Nevertheless, the way in which the paragraph was drafted might suggest that it covered two different matters. There were several classes of treaty that created obligations for third States; for example, treaties on maritime and river communications or even treaties defining territorial status of frontiers. A second class comprised treaties whose effects were economic — Mr. Bartoš had given the example of the most-favoured-nation clause — or political, as in the case of the Principality of Liechtenstein. A third class binding on third States consisted of treaties which established an objective situation, such as those creating a political status, which could be asserted against States other than the parties to the treaty. He was accordingly rather concerned over the wording of paragraph 1, in which sub-paragraphs (*a*) and (*b*) covered two quite different matters.

10. The CHAIRMAN, speaking as a member of the Commission, said that he greatly appreciated Mr. Pessou's tribute to Roman law; the reason why some of the rules devised by Roman jurists were still valid and useful was mainly that, in formulating those rules, they had expressed not only their own thought, but also that of all the peoples with which they were in contact, both in the West and in the East.

11. Mr. BARTOŠ said that from the technical point of view he could only congratulate the Special Rapporteur on the conciseness with which he had presented certain principles and practices followed by the great Powers before the Second World War in concluding treaties creating obligations for third States. For his part, he was convinced that the *pacta tertiis* principle had become obsolete, not only in practice, but also in theory. He doubted whether the Commission should consider the case, even though from the practical point of view vestiges of that procedure for concluding treaties still subsisted.

12. In article 62 he saw a contradiction between the idea expressed in paragraph 1 (*b*) and the exception provided for in paragraph 3 (*a*). On the one hand it was laid down that a treaty provision created an obligation for a third State if that State had expressly or impliedly consented to the provision; on the other hand it was provided that the parties to the treaty were free to amend the provision at any time without the consent of the third State if they had not entered into a specific agreement with that State, which was a contradiction.

13. Another point was that even in the case contemplated in paragraph 3, an obligation might be involved, for an obligation could derive not only from a duty, but also from a right. In its judgment in the *Corfu Channel* case,[4] the International Court of Justice had laid down that a State was obliged to discharge the duties arising from the possession of its rights. From that point of view the provision in paragraph 3 was also a vestige of the past — of the time when the great Powers claimed the right to draw up treaties and later amend them, subjecting small States to the regime thus established. He was opposed to that system from both the legal and the political point of view, but technically he did not see any objection to the text proposed by the Special Rapporteur, which only reflected international practice up to the present, in particular the practice of the great Powers. He thought the Special Rapporteur had stated that practice in the form of a strict, but correct rule.

14. Mr. PAREDES said he would begin with an explanation he thought necessary, which he would give as briefly as possible. He might be mistaken, but he was firmly convinced that the United Nations guaranteed the members of the Commission full freedom of opinion and expression; such a guarantee was even provided by the Commission's own Statute, which called for representation of the different legal systems of the world, in which the elements of fact and law had distinguishing characteristics that created differences in the evaluation of human relations and slightly different legal and political approaches. The representatives of Africa, in the midst of the fight to consolidate their freedom, had special interests to protect; America, in the vigorous march of its civilization, was assailed by other cares; and Europe was nobly defending its glorious tradition. Consequently, each of them had its own particular variants in the legal order, which it wished

[3] Para. 62.

[4] *I.C.J. Reports*, 1949, p. 4.

to support. With regard to his own statements, however, in dealing with any problem in the Commission he had always adopted a purely theoretical approach without referring to concrete cases, so that no desire to criticize or censure certain actions should be ascribed to him. The views he had maintained might appear to show a critical attitude, but that was an inevitable consequence of contrary opinions.

15. The four paragraphs of article 62 of the draft dealt with four exceptions to the rule stated in article 61, namely, that treaties applied only between the parties and did not affect third States. That principle was unanimously recognized as the basis of contractual relations. He proposed to consider the scope and effectiveness of the exceptions provided for in article 62.

16. The contracting parties could impose obligations on States that were not parties under the following conditions: (*a*) if they intended to do so and (*b*) if the third State expressly or impliedly consented to the provision in question. When the third State expressly consented, in the free exercise of its powers, there was no objection. But the consent should be express, precise and definite; he could not agree that mere implied consent was valid. It was a very general rule of law that exceptions could not be presumed, but must be expressly stated. It was even worse to use such a vague term as the Spanish word "*implícito*", which meant something that could be presumed to be included or could be deduced from the context or from an attitude.

17. The Commission had bravely defended the full knowledge and consent of the parties as a condition for the validity of an agreement; could it allow others to impose obligations on a State with full capacity, by virtue of a presumed acceptance? The powerful States, the great Powers, would always be able to presume consent, with true or false logic, in order to impose some conduct on the weak. Rather than facilitate such coercion, he was in favour of laying down stricter conditions for binding a third State.

18. The CHAIRMAN, speaking as a member of the Commission, said that the problem under discussion should not be confused with a political problem — that of the traditional struggle of the small States against the great Powers and the position which the great Powers adopted when they drew up a treaty to put an end to a conflict, for example. It was obvious that in such a case the will of the great Powers carried much more weight, both politically and materially, than that of the small States. But from the legal point of view, the small States which had acceded to the Treaty of Versailles, for example, had become parties to that Treaty in just the same way as the great Powers, and their accession had been voluntary; they had been free not to sign the Treaty of Versailles and to conclude a seperate treaty — as some of them had in fact done.

19. Article 62 dealt with quite a different problem; the question was whether a treaty concluded between two parties could create an obligation for a third State which would not become a party to the treaty. It seemed that the Special Rapporteur's proposal was in fact intended to respect the freedom of the third State as much as possible, for if the obligation established by the States parties to the treaty was to apply to the third State, it must be accepted by that State. The obligation existed only if there was agreement between the parties to the treaty and the third State. It would therefore be well to isolate that problem from any political considerations which might confuse the discussion.

20. Mr. BARTOŠ observed that the freedom of small States to give or withhold their consent to be bound by a provision of a treaty to which they were not parties was very often illusory in practice. Even if it was established by a theoretical rule that their consent was necessary, it could be obtained by direct or indirect constraint, in particular by economic pressure, and history offered many examples of such situations. Legal rules always had a political or economic basis, and it would be vain to formulate even rules of international law without taking account of their basis, in other words the historical and sociological facts underlying them.

21. The CHAIRMAN, speaking as a member of the Commission, explained that he had every sympathy with the view put forward by Mr. Bartoš concerning the position in which small States were placed. What he had meant was that the case referred to by Mr. Bartoš was different from that contemplated by the Special Rapporteur in article 62.

22. Sir Humphrey WALDOCK, Special Rapporteur, said that, as Mr. Jiménez de Aréchaga had pointed out at the previous meeting,[5] there were many safeguards in draft against the kind of practice described by Mr. Bartoš, where a State was compelled to do something under a treaty to which it was not a party. There were also cases of States being forced against their will to do something under treaties to which they had been compelled to be parties; and, of course, there were instances in which principles of law had been violated. But the Commission was concerned with the fundamental techniques of treaty-making and the consequences of the conclusion of treaties.

23. The rule he had attempted to set out in article 62 came closer to the provisions of Article 35, paragraph 2, of the Charter, which conferred a certain right on non-member States of the United Nations, but only on condition of their accepting in advance a very specific obligation — though that, perhaps, fell rather under paragraph 4 of article 62.

24. Paragraph 1 must be so drafted as to make it clear that there could be no question of imposing obligations on third States, but only of their freely consenting to accept them. It dealt with a very real problem, as there were many cases in which States had no particular desire to become parties to a treaty, but found some of its provisions of particular interest.

25. Mr. JIMÉNEZ de ARÉCHAGA said he fully approved of article 62 and admired the way in which the Special Rapporteur had managed to reduce to relatively simple terms a very complex element in the law of treaties.

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[5] Para. 5.

26. Paragraph 1 dealt with a genuinely live issue in the modern world, as there were a number of general multilateral treaties, such as the United Nations Charter and the Peace Treaties concluded after the Second World War, which contained provisions of concern to third States. Possibly paragraph 1, in view of its reference to consent by a third State, was not really an exception to article 61, and perhaps it did not go far enough in covering all the possibilities.

27. One omission from the article and the commentary which might cause surprise in some quarters was that of any reference to the principle laid down in Article 2, paragraph 6, of the United Nations Charter which had now become part of accepted legal doctrine and was regarded as imposing obligations on, or at least modifying the legal rights of, non-member States, in particular by requiring them to refrain from the threat or use of force. Kelsen had gone so far as to assert that all States had, as it were, become passive Members of the United Nations, even though only actual Members could exercise the rights conferred under the Charter.[6] Mr. Verdross in an important study had said that Article 2, paragraph 6, of the Charter was a revolutionary provision,[7] while the Danish jurist Ross had argued that the basis of the obligation for non-member States lay in the fact that the rules enunciated in the Charter represented the wish of the great majority of States; his actual words were "... there is nothing strange in the fact that his pretension is regarded as legitimate and is actually able to take binding form. What happens here is not different from what happens in the creation of all customary law. In both cases the legal attitude rests on the fundamental norm for international legislation, that the manifest legal conviction, which is held by the great majority of States, is also binding for the remaining minority".[8]

28. The documents of the San Francisco Conference and the text of the Charter itself substantiated the view that the legitimacy of imposing such an obligation, or of modifying the rights of non-member States, by prohibiting the use of force and creating a duty to settle all international disputes by peaceful means alone, was grounded on the will of the vast majority of the international community, speaking in the name of the principle of indivisibility of peace and thereby establishing a fundamental rule of law for all States. Such an important development could not be passed over in silence.

29. Mr. VERDROSS said that the principle stated in article 62 seemed to him to be correct; the only problem was whether there were any exceptions to it. The question of freedom of will went beyond article 62 and arose in all cases of consent by States; but the problem to be solved in connexion with article 62 was that of the possibility of implied consent. It was a difficult question, for the word "implied" might be used to cover acceptances which were not real acceptances. There was no denying that there were treaties whose purpose was to bind a third State; the two best known instances were the creation of the Free City of Danzig[9] and the creation of the Free Territory of Trieste.[10] In both cases the treaty had determined the basis of the constitution of the State. Consequently, it could hardly be said that the States concerned had impliedly accepted the obligation, for to do so they would have had to have a choice between consent and refusal. The Commission should not dwell too long on that point, however, for those were exceptional cases which had only been possible because the territories in which the new States were created had been under the jurisdiction of one of the contracting parties.

30. The point raised by Mr. Jiménez de Aréchaga concerning the United Nations Charter seemed more important. At first sight, it might be said that the obligations deriving from the principle prohibiting resort to force and the obligations to settle all disputes by peaceful means had already existed under the Briand-Kellogg Pact;[11] but that Pact prohibited only war, whereas the Charter condemned the use and even the threat of force in all cases except self-defence. In creating a world Organization the Charter had provided that those obligations should also bind non-member States. It was true that Article 2, paragraph 6, of the Charter only imposed direct obligations on Member States. But indirectly it also bound non-members. That was shown by Article 39 under which the Security Council could order measures of constraint against non-members if they violated the fundamental principles of the Charter.

31. Sir Humphrey WALDOCK, Special Rapporteur, said there had been general agreement at the previous session that certain provisions of the Charter were the latest and most authoritative exposition of general principles of international law that were applicable to all States. Nevertheless, he would hesitate to accept the interpretation placed on Article 2, paragraph 6, by Mr. Jiménez de Aréchaga, or to subscribe to the proposition that the Charter, as a treaty, was binding on third States.

32. Mr. YASSEEN said he largely agreed that the principles whose application the United Nations Charter appeared to extend to non-member States were fundamental principles of the international order, which had been embolied in the Charter or had become mandatory as international custom since the foundation of the United Nations.

33. Technically, he had no objection to the rule stated in article 62, paragraph 1. With regard to its drafting, however, he thought that sub-paragraph (*a*) did not make it sufficiently clear that the obligation only came into being through the consent of the third State and

[6] Kelsen, H., *The Law of the United Nations*, London, 1950, Stevens, pp. 106-110.

[7] Académie de droit international, *Recueil des Cours*, 1953, II, Vol. 83, p. 16.

[8] Ross, A., *Constitution of the United Nations*, Copenhagen, 1950, p. 32.

[9] Treaty of Versailles, Part III, Section XI.

[10] United Nations *Treaty Series*, Vol. 235, p. 100.

[11] League of Nations *Treaty Series*, Vol. XCIV, p. 57.

only from the moment when that consent was given. The parties to a treaty could not create an obligation which was legally binding on a third State; they could only propose an obligation. Moreover, in order to avoid difficulties and misunderstandings, it would be preferable to require express consent in sub-paragraph (*b*).

34. Mr. AMADO commended the Special Rapporteur for saying in this commentary that the Commission should take State practice as a basis for dealing with the subject, rather than Roman law or analogies with national systems of law. The Commission's task was to codify rules of customary law or rules which were already recognized by the conscience of the nations and were worthy of being codified in order to produce their effects as rules of international law; and it was true that the rule stated in article 61 was one of the bulwarks of the independence and equality of States, as was stated in paragraph (3) of the commentary.

35. However, although article 62 was perfectly clear about the creation of rights for third States, it was much less clear about the creation of obligations which could be asserted against them. The entire article was overshadowed by the ghostly presence of that agreement which the Special Rapporteur called "collateral", whereby quasi-parties to a treaty accepted the obligations which the real parties had written into it. Moreover, as Mr. Yasseen had rightly said, such obligations could only be proposed to the third States. It was noteworthy that in his commentary the Special Rapporteur did not give any example of a treaty which had created obligations for third States; the examples given related only to the creation of rights. Consequently, he found it difficult to accept the provision as drafted.

36. Article 62 was certainly necessary. The will of a State might be manifest, but it might also be veiled or even entirely mute, as was suggested by the word "impliedly". The article could be improved by some amendments and redrafting in more concise terms. On the other hand, the Commission should indicate what kind of treaty could create obligations for third States, and it should make some reference to the United Nations Charter.

37. Mr. de LUNA said that he would go even further than Mr. Amado; the reason why the Special Rapporteur had not given any example of a *pactum in obligandum tertii* was that there were no treaties of that kind. He did not know of any treaty which had created real obligations for a third State without its will being taken into account. Even the Treaty of Versailles was not really a treaty of that kind, for although the Central Powers had been bound to comply with certain of its provisions, it was not by virtue of the Treaty itself, but by virtue of the peace treaties which they had signed subsequently and individually. No doubt there were treaties whose effects were harmful to third States, but it could not be said that they created obligations for third States. Treaties which created obligations for the nationals of third States, such as extradition treaties, were a different matter.

38. The Special Rapporteur emphasized in paragraph (3) of his commentary that the consent of the third State was always necessary if it was to be bound by a provision in a treaty to which it was not a party; that condition was laid down in paragraph 1 (*b*) of the article. But then, if the third State consented, it either had acceded to the treaty or a new treaty had been concluded, and it was to that new treaty that the Special Rapporteur was alluding when he spoke of a "collateral agreement". That was the heart of the matter. If the third State consented, it ceased to be a third State, and the real basis of its obligation was not the first treaty, but its subsequent consent. Consequently, the penultimate sentence in paragraph (3) of the commentary was open to question.

39. There was another important problem to which Mr. Bartoš had referred: that of revocability, which arose in regard to obligations as well as to rights. If he was right in thinking that the obligation of a third State derived not from the initial treaty, but from the "collateral agreement", then the obligation was not revocable; the question of revocability arose in connexion with the rules concerning the termination of treaties and was linked with the rule on the unilateral denunciation of an agreement or treaty.

40. He did not think the Commission need concern itself with Article 2, paragraph 6, of the Charter in connexion with article 62 of its draft. The Charter was an exceptional case, and the provision in question was not really related to article 62.

41. The substance of paragraph 1 was correct. It would be better to delete the words "or impliedly", however, since the consent must be express. Moreover, that provision should not appear under the title given to article 62, for it did not really deal with treaties "creating" obligations for third States.

42. Sir Humphrey WALDOCK, Special Rapporteur, said that the title of article 62 in the French text — "Traités *créant* des obligations, etc." — might give rise to misunderstanding, because it did not faithfully render the meaning of the phrase "treaties *providing for* obligations". It had never been his intention to suggest that a treaty in itself might *create* obligations for third States.

43. Mr. LACHS said he had been glad to read the Special Rapporteur's statement in the commentary that while pertinent analogies undoubtedly existed in national systems of contract law, the Commission should base its conclusions on State practice and the jurisprudence of international tribunals. Personally, he would go even further and say that the subject of article 62 constituted a special phenomenon of international relations.

44. The Commission should clearly state the principle that international conferences and negotiations leading up to the preparation of international instruments should include all States interested or concerned. If that principle were fully implemented, the need for stipulations in favour of third parties would be avoided. Under present conditions, however, for purely subjective reasons based on the will of the negotiating parties, an interested party might not be invited to attend the discussions leading up to a treaty, even if the treaty

actually concerned it. Instances could be given from recent history, of negotiating States wishing to confront an interested State with a *fait accompli* and to impose the provisions of a treaty upon it. It would therefore be a progressive development of international law, to which reference should be made in the commentary, to require that the State or States concerned should be consulted prior to the formulation of any provision which would place an obligation upon them. Should consent be given by the State or States concerned, the obligation thus accepted would not rest on a "collateral agreement", but on the original instrument.

45. The provisions of paragraph 1 made it clear that the third State must give its consent. But the use of the term "impliedly" in sub-paragraph (*a*) raised the question whether silence could be construed as consent. In the light of the award by Judge Huber in the *Island of Palmas* case,[12] the answer to that question must be in the negative. In support of that view, he could quote from Polish practice the case of *Feldman* v. *the Polish Treasury*, of 1921, relating to the Berne Convention of 1890, and the ruling by the Permanent Court of International Justice on the applicability of the Barcelona Convention of 20 April 1921 relating to the Regime of Navigable Waterways of International Concern,[13] to which Poland was not a party.

46. The cases envisaged in paragraph 1 constituted an exception to a general rule. But that exception was itself subject to exceptions. In the first place, objective conditions and circumstances could create a situation in which the consent of the State concerned could not, and even need not, be sought. The interests of international peace and security could require certain measures against an aggressor State in order to prevent aggression or the violation of vital rights of peace-loving States. That result could be achieved by imposing certain obligations upon a State guilty of aggressive war and by drawing up principles to safeguard peace in the future. At the end of the Second World War, for instance, certain measures had been imposed upon the aggressor States and their consent had not been required.

47. Another example was provided by certain provisions of the United Nations Charter, in particular, Article 2, paragraph 6, and Article 35, paragraph 2. There was, however, a difference between those two provisions: Article 2, paragraph 6, dealt with a substantive matter and related to the principles of the Charter, which should be regarded as reflecting international law binding all States, whereas Article 35, paragraph 2, dealt with the machinery of the Charter, that was to say procedural matters. That was why Article 35 gave non-Member States a choice: if they did not agree to be bound by the obligations specified, they could not have access to the Security Council. The provisions of Article 2, paragraph 6, on the other hand, gave non-Member States no choice, and it would be appropriate to mention that the case contemplated in that paragraph was an exception to the provisions of Article 62.

48. He suggested that the reference to implied consent should be deleted from paragraph 1; that provision should be made for exceptional cases in which the consent of the third State could be dispensed with; and that the commentary should mention the desirability of all States concerned participating in the negotiation of a treaty.

49. Mr. CASTRÉN, referring to paragraph 1, said it was difficult to presume that a State could be bound by a provision of a treaty made by other States, and it would therefore be wiser to require the third State's express consent. If the Commission considered that implied consent was sufficient, it should emphasize, at least in the commentary, that the consent must be so clearly implied that there could be no doubt as to the State's intention.

50. Mr. TUNKIN said he doubted whether the case envisaged in article 62, paragraph 1, really constituted an exception to the rule *pacta tertiis nec nocent nec prosunt*. It was a case of extending the sphere of application of a treaty to a State which was not a party.

51. The basis of all rules of international law — whether conventional or customary — was the agreement of States. Hence it was not strictly correct to say that obligations of a State could have their origin in a treaty to which it was not a party. A treaty as such was never a source of obligations for a third party; the agreement of that party was essential.

52. The problem which arose was that of determining, in each particular case, whether the agreement of the third party existed. The Special Rapporteur had very properly specified the two essential conditions: first, that there should be an offer to the third State to accept the obligations, and second, that the third State should give its consent. That consent could be given by means of a more or less formal agreement, and on that point, he shared the misgivings of previous speakers with regard to the term "impliedly". He suggested the words "expressly or impliedly" should be deleted; the question whether consent had been given would then be a matter of interpretation in each particular case.

53. He agreed with Mr. Lachs that certain treaties could be binding upon third States. For instance, the agreements regarding Germany made by the Allied Powers at the end of the Second World War were undoubtedly binding on the two successor States now existing in Germany. The basis of that obligation was State responsibility: the treaties relating to Germany were binding because of the international responsibility of Germany for waging aggressive war. Those treaties had been imposed as a sanction against aggression.

54. There had, of course, been cases, in which the States participating in the conclusion of a treaty had not invited certain other States to the negotiations, but had imposed the treaty on them. On that aspect of the question he shared Mr. Bartoš's views; it was a point that should be mentioned in the commentary.

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[12] United Nations *Reports of International Arbitral Awards*, Vol. II, pp. 866-871.

[13] *P.C.I.J.*, 1929, Series A, No. 23, Judgment No. 16, pp. 18 *et seq.*

55. With regard to Article 2, paragraph 6, of the Charter, it was clear that it did not impose any obligations on third States. It was based on the assumption that the principles of the Charter had already been binding on all States before the Charter had been concluded, as principles of general international law, and that all States were required to act in accordance with those principles "so far as may be necessary for the maintenance of international peace and security". What the Charter did was to impose on States Members of the United Nations the obligation to take action when a non-Member State acted in a manner contrary to the principles of the Charter.

56. Mr. BRIGGS said he found paragraph 1 acceptable, except for the term "impliedly"; he supported Mr. Tunkin's suggestion that the words "expressly or impliedly" be deleted.

57. It had been pointed out by Mr. Jiménez de Aréchaga that article 62 was not in a real sense an exception, because it made provision for the element of consent. The draft articles dealt with consent to be bound by a treaty and article 62 envisaged a situation in which a State accepted the obligations arising from certain provisions of a treaty without actually becoming a party to the treaty. In order to allay some of the misgivings expressed and to stress appropriately the need for the consent of the third State, he suggested that the order of the contents of sub-paragraphs (*a*) and (*b*) be reversed. The present order was logical, but perhaps a departure from logic would make it possible to lay greater emphasis on the element of consent. Paragraph 1 could then be redrafted to read, approximately:

> "A State which is not itself a contracting party to a treaty is bound by a provision of that treaty if it has consented to any such provision, when the parties to the treaty intended that the provision in question should be the means of creating a legal obligation binding upon that particular State or a class of States to which it belongs."

58. Mr. REUTER said that in paragraph 1 of article 62, as in several other articles in the draft, a genuine attempt had been made to base the obligations of States solely on their own will. In the course of the discussion, members had inevitably found it necessary to draw attention to exceptions to that principle. Reference had been made, for instance, to the obligations imposed on a State which had been brought into existence by treaty; that was a special problem which would have to be considered later. Mr. Tunkin had referred to the major peace treaties concluded by a group of Powers representing the whole international community; whether such treaties were regarded as being based on the concept of responsibility or on that of a sanction, the essential point was that they entailed recognition of the existence of some kind of *de facto* international government.

59. Article 2, paragraph 6, of the Charter, might well refer to previously existing rules, but it nevertheless conferred rights on an Organization which had not existed previously and thus contituted an exception to the principle on which article 62 was based. Other speakers had mentioned the general principles of international law as a further exception, because they were claimed to have greater force than treaties. Although he shared that view, he must remind the Commission that, in paragraph (4) of the commentary on article 37, adopted at the previous session,[14] it had recognized that it was possible to establish new rules of *jus cogens*.

60. In the definitions included in Part I of the draft, adopted at its fourteenth session, the Commission had specified that it was concerned only with treaties and agreements in written form.[15] The question therefore arose whether, in article 62, the Commission intended to include manifestations of will which did not constitute agreements because they were not in written form. The word "agreement" was used in paragraph 3 (*a*); should it be deduced from that that the rule in paragraph 1 would apply when there was no "agreement"? Like Mr. Tunkin, he thought it would be better to use some such expression as "formal or informal consent", for consent could be informal and still be perfectly explicit.

61. The CHAIRMAN said that, although the Commission had indeed decided to confine its study to agreements in written form, it had not thereby denied the existence of other forms of agreement. In the articles adopted at its last two sessions, it had several times provided that consent could be given in other than written form; for instance, in article 19, paragraph 1, it had stipulated that acceptance of a reservation might be "expressed or implied".[16] The Commission recognized that consent could take several forms and considered that the essential point was that it should be genuine.

62. Speaking as a member of the Commission, he said that he could agree to the deletion of the words "expressly or impliedly" in paragraph 1; the question whether a State had given its consent would then be a matter of interpretation, as Mr. Tunkin had observed. But if the Commission retained only the word "expressly", it would be denying forms of consent which were perfectly genuine and acceptable. For example, if the neutralization of a third State was proposed in a treaty and that State established its neutrality by a national law, it clearly gave its consent, even if that consent was not expressed in an official reply to the parties to the treaty.

63. His view was that paragraph 1 referred to cases in which two States concluded a treaty in which they proposed to an already existing third State that it accept an obligation; if the third State consented, the effect would be that a separate agreement came into being. But it was possible to envisage a case in which the obligations provided for were connected with the establishment of a new State. That State could not

[14] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 12.

[15] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 161.

[16] *Ibid.*, p. 176.

give its consent because it did not yet exist. Did the Special Rapporteur consider that case to be within the scope of article 62?

64. Sir Humphrey WALDOCK, Special Rapporteur, replied that such cases would probably fall under article 63, but he must reserve his position on that point, since he did not know in what form article 63 would emerge from the Commission's discussion, if indeed it survived as an article distinct from article 62.

65. Mr. ELIAS said that paragraph 1 would be acceptable to him with a few amendments.

66. Some confusion appeared to have arisen both with regard to the requirement of consent in sub-paragraph (*b*) and, possibly, to the formulation of sub-paragraph (*a*), partly because paragraph 1 had failed to draw a distinction between general multilateral treaties and other traties. The commentary should contain some reference to such general multilateral treaties as the United Nations Charter itself, which constituted exceptions to the rule that the third State's consent was necessary.

67. Article 2, paragraph 6, of the Charter specified two obligations; the first was the obligation of Member States to ensure that non-Member States abided by the principles of the Charter, and the second was the obligation of non-Member States not to endanger peace.

68. Bilateral treaties, and multilateral treaties that were not general in character, could not impose upon a third State obligations which that State did not wish to accept. The problem could be reduced to determining whether consent had been genuinely given by the third State. That was a delicate matter, and the Commission should consider the suggestion that all interested States should be invited to participate in the negotiations leading up to the treaty, so that the third State's consent could be given in the treaty itself.

69. In paragraph 1 (*a*), the expression "a class of States to which it belongs" could give rise to difficulty; the commentary did not contain any explanation or give any authority for that expression.

70. He suggested that paragraph 1 be redrafted to read:

> "A State is bound by a provision of a treaty to which it is not a party if the treaty expresses the parties' intention to create a legal obligation binding upon that State and if the latter has consented to the provision in question."

The meeting rose at 12.55 p.m.

735th MEETING

Monday, 1 June 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Welcome to Mr. Ruda

1. The CHAIRMAN welcomed Mr. Ruda, who was attending the Commission's deliberations for the first time, after being elected to replace Mr. Padilla Nervo.

2. Mr. RUDA thanked the Commission for the honour it had done Argentina and the South American continent by electing him a member.

Law of Treaties

(A/CN.4/167)

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 62 (Treaties providing for obligations or rights of third States) *(continued)*

3. The CHAIRMAN invited the Commission to continue consideration of article 62 in the Special Rapporteur's third report (A/CN.4/167).

4. Mr. PAL said he would confine himself to the obligation contemplated in paragraph 1, which spoke of a third State being bound, under certain circumstances, by a provision of a treaty to which it was not a party. His remarks would not apply to third party obligations arising out of the situation contemplated in paragraph 4. If paragraph 1 was to be retained, he agreed with Mr. Verdross that the words "or impliedly" should be dropped. He could not agree with Mr. Tunkin that the consent of the third State should not be qualified at all, because the requirement that it must be expressly given went some way towards minimizing the mischievous propensity of the proposed provision. Since one of the law's most vigorous impulses was to be definite, he urged that the requirement of express consent should be retained.

5. In spite of what had been said by other members, he still doubted whether it was at all advisable to introduce a principle of such dubious value in international life. Specific legal norms were the instruments of the conscience of the community seeking to subdue potentially anarchical forces and interests to a tolerable harmony. He could not find anything in international community life that gave occasion for apprehending any tension or disturbance of equilibria on that count which would justify introducing such a new principle. It could not be claimed to be progressive. Neither usage nor practice warranted its being treated as a customary rule. Moreover, a norm of that kind would